The section of the report that discusses rules 6.2-6.4 appear on the following pages of the Report & Recommendation document:

Proposed Rule 6.1 (Voluntary Pro Bono Publico Service) is scheduled for the Commission's January 22 & 23, 2016 meeting.

Proposed Rule 6.5 (Limited Legal Services Programs) was approved at the Commission's October 23rd Meeting.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]

Lead Drafter: **Martinez**
Co-Drafters: **Harris, Rothschild**
Meeting Date: **November 13-14, 2015**

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. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule 1-650 (6.5) as set forth below in Section III. In addition, the team is recommending adoption of related proposed new rules 6.1, 6.3, and 6.4. (See Section VIII.) The team considered a proposed rule 6.2 and agreed not to take a position on the adoption of that rule but to present it as an open issue for the Commission's consideration. (See Section IX.)

III. PROPOSED RULE 6.5 (CLEAN)

Rule 6.5 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 reasonable 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(c).] 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), Rule 1.6 and Rule 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. PROPOSED RULE 6.5 (REDLINE TO CURRENT CALIFORNIA RULE 1-650)

Rule ~~1-650~~6.5 Limited Legal Services Programs

(a) 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 reasonable 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.

(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~~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 this Rule ~~1-650~~ must secure the client's informed consent to the limited scope of the representation. See [Rule 1.2(c).] 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~~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), Rule 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 this Rule ~~1-650~~ ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(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 (a)(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 (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~~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 (b), 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 this Rule ~~1-650, a member~~, a lawyer undertakes to represent the client in the matter on an ongoing basis, ~~rule 3-310 and all other~~ Rules 1.7, 1.9(a) and 1.10 become applicable.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]

Lead Drafter: **Martinez**
Co-Drafters: **Harris, Rothschild**
Meeting Date: **November 13-14, 2015**

V. PUBLIC COMMENTS SUMMARY

- **Hon. Mark A. Juhas, CCAJ, 6/8/15:**

  Recommend rule 1-650 be retained and modified to clarify that an attorney-client relationship (1) is never established at court-based clinics and (2) does not exist at other clinics after completion of clinic session.

VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, 9/29/15:**

  1. Model Rule 6.1, regarding voluntary pro bono services, is, by its own language, purely aspirational. OCTC cannot enforce such a rule.

  2. Model Rule 6.2, regarding the acceptance of appointments by a tribunal, is consistent with Business and Professions Code section 6068(h).

  3. Model Rule 6.3 addresses a lawyer's service as a director, officer, or member of a legal services organization, while continuing to practice law in another capacity. 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.

  4. OCTC supports the disclosure requirement articulated in Model Rule 6.4 regarding a lawyer's participation in law reform activities where the reform may benefit a client.

  5. Model Rule 6.5, regarding short-term pro bono services, should be more rigorous in protecting against conflicts of interest. For example, the rules on conflicts of interest should apply where the lawyer knows of a conflict and where he or she should have known of the conflict.

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

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Pennsylvania Rule 6.5** is identical to Model Rule 6.5:

  Pennsylvania Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

  (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, 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 disqualified 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.

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

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_5.authcheckdam.pdf

- Forty-nine jurisdictions have adopted a rule counterpart to Model Rule 6.5. Thirty-four jurisdictions have adopted Model Rule 6.5 verbatim.[1] Fifteen jurisdictions have adopted a modified version of Model Rule 6.5.[2] Only two jurisdictions have not adopted any version of Model Rule 6.5."[3]

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

A. Introduction

As part of its assignment to consider current rule 1-650 [Model Rule 6.5], the drafting team was asked to consider whether Model Rules 6.1 (Voluntary Pro Bono Publico Service), 6.2 (Accepting Appointments), 6.3 (Membership in Legal Services Organizations) and 6.4 (Law Reform Activities Affecting Client Interests) should be recommended for adoption.

The drafting team's recommendations concerning proposed Rule 6.5 [1-650] are presented in sections B (Concepts Accepted) and C (Concepts Rejected), below.

The drafting team's recommendations concerning proposed Rules 6.1, 6.3 and 6.4 are presented in section D (Concepts Recommended (Pros and Cons): Recommend adoption of

[1] 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.

[2] 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.

[3] The two jurisdictions are: Florida and Texas.

versions of Model Rules 6.1, 6.3, and 6.4), below.

Discussion of any substantive or non-substantive changes in duties, or alternatives considered can be found in sections E, F and G, respectively.

The drafting team recommends that the entire Commission treat as an open issue whether proposed Rule 6.2 (derived from Model Rule 6.2) should be recommended for adoption. Materials related to proposed Rule 6.2 can be found in section IX.1, below.

B. Concepts Accepted (Pros and Cons): Recommend adoption of proposed amended rule 1-650 (6.5)

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 drafting team 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.
2. 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.
3. 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.

C. Concepts Rejected (Pros and Cons): Proposed amended Rule 6.5

1. In rule 6.5, the team 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.

D. Concepts Recommended (Pros and Cons): Recommend adoption of versions of Model Rules 6.1, 6.3, and 6.4

1. **Proposed Rule 6.1**.

   Introduction: Proposed Rule 6.1, which encourages lawyers to provide or enable the direct delivery of pro bono publico services to persons of limited means, tracks Model Rule 6.1, except that it incorporates language from the Board of Governors Pro Bono Resolution (2002) ("Board Resolution," attached) and includes specific references to California statutory law.

   - Pros: This rule is critical for addressing California's access to justice crisis and, in the first Commission, had the strong support of the legal services community. This rule is consistent with existing California law (Bus. & Prof. Code §§ 6068(h) and 6072 - 6073) and the Board of Trustee's Pro Bono Resolution. Although it is admittedly aspirational, it is not a rule that purports to be a disciplinary standard. One could narrowly construe the Commission's charter as rejecting only those aspirational rules that create a misleading impression that they are disciplinary. This proposed rule does not mislead. It appeals to a lawyer's sense of professional obligation without the façade of a disciplinary intent.
   - Cons: By its terms, this rule is not a lawyer disciplinary standard. Aspirational provisions are not appropriate for the California rules given the Commission's charter. In addition, depending on one's perspective, the concept of "pro bono" described in the rule might be criticized as both under-inclusive (e.g., community and civic activities unrelated to the legal profession are not recognized) or over-inclusive (e.g., true pro bono should be limited to direct delivery of legal services to persons of limited means and should not include participation in activities to improve the law).

2. **Proposed Rule 6.1** – Move Comment [12] of Model Rule 6.1 into the rule text as a new paragraph (c).

   - Pros: This change to the Model Rule version of 6.1 helps assure that lawyers, judges, and the public will know that the Rule is not intended to be a disciplinary standard. This change also is consistent with the objective of avoiding commentary that might contradict the terms of a rule.

- Cons: Making the non-disciplinary nature of this rule more prominent might dilute the intended effect of the rule in encouraging pro bono activity.

The following is a clean version of proposed Rule 6.1

Rule 6.1 Voluntary Pro Bono Publico Service

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should aspire to provide or enable the direct delivery of at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without expectation of compensation other than reimbursement of expenses to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of increasing access to justice.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

(c) The responsibility set forth in this Rule is not enforceable through disciplinary process.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in

the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means. In addition, see Rule 5.4(a)(5) regarding a lawyer’s agreement to pay court awarded fees to a legal services organization.

[5] While it is preferable that a lawyer fulfill his or her annual responsibility to perform pro bono services through activities described in paragraphs (a)(1) and (2), the lawyer’s commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers from performing the pro bono services outlined in paragraphs (a)(1) and (2).

Accordingly, where those restrictions apply, government and public sector lawyers may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate is encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10]Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11]Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]

Lead Drafter: **Martinez**
Co-Drafters: **Harris, Rothschild**
Meeting Date: **November 13-14, 2015**

The following is a redline version of proposed Rule 6.1 to ABA Model Rule 6.1

Rule 6.1 Voluntary Pro Bono Publico Service

Every lawyer ~~has a~~, as a matter of professional responsibility ~~to~~, should provide legal services to those unable to pay. A lawyer should aspire to ~~render~~provide or enable the direct delivery of at least ~~(~~50~~)~~ hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the ~~(~~50~~)~~ hours of legal services without ~~fee or~~ expectation of ~~fee~~compensation other than reimbursement of expenses to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of increasing access to justice.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

(c) The responsibility set forth in this Rule is not enforceable through disciplinary process.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. ~~The American Bar Association urges all lawyers to provide a minimum of~~

~~50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that~~ In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in ~~programs funded by the~~a qualified legal services ~~Corporation~~program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without ~~fee or expectation of fee~~compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means. In addition, see Rule 5.4(a)(5) regarding a lawyer's agreement to pay court awarded fees to a legal services organization.

[5] While it is ~~possible for~~preferable that a lawyer ~~to~~ fulfill ~~the~~his or her annual responsibility to perform pro bono services ~~exclusively~~ through activities described in

paragraphs (a)(1) and (2), ~~to~~ the ~~extent that any hours of service remained unfulfilled, the remaining~~lawyer's commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers ~~and judges~~ from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers ~~and judges~~ may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. ~~Participation in judicare programs and~~ Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate ~~are~~is encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10]Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono

services or making financial contributions when pro bono service is not feasible.

[11]Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

~~[12]~~ ~~The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.~~

- Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.1. There is a wide range of variation in their adoption of Model Rule 6.1, with some retaining the 1983 version, some adopting the 2002 version, and others implementing unique provisions, ranging from D.C.'s relatively short rule to Florida's rule, which establishes an elaborate pro bono framework. As of 2013, 7 states have mandatory pro bono reporting (Florida, Hawaii, Illinois, Maryland, Mississippi, Nevada, and New Mexico); 8 states have formally rejected mandatory pro bono reporting (Colorado, Indiana, Massachusetts, Minnesota, New York, Pennsylvania, Tennessee, and Utah); 11 states encourage voluntary pro bono reporting (Arizona, Georgia, Kentucky, Louisiana, Missouri, Montana, New Mexico, Oregon, Texas, Utah, and Washington); and 2 states were actively considering voluntary pro bono reporting (Michigan and Vermont). Moreover, as of January 1, 2015, New York will require all applicants to the New York State Bar (except those applying for admission by motion) to show that they have completed at least 50 hours of law-related pro bono service as a condition of bar admission. California has no comparable rule. See: http://apps.americanbar.org/legalservices/probono/reporting.html.

3. **Proposed Rule 6.3**.

Introduction: Proposed Rule 6.3 provides that 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.

- Pros: This rule promotes activity by lawyers that supports the delivery of legal services in California. It balances protection of client interests (loyalty and confidentiality) and encouraging lawyer participation as officers or board members of legal services organizations. OCTC has commented in support of this rule by stating that service by lawyers in this capacity is important. (See OCTC comment in section VI., above.
- Cons: This rule is more of a guidance rule than a necessary disciplinary standard. The lawyer conduct that the rule purports to regulate is generally addressed by the lawyer's duties of loyalty and confidentiality.

4. Proposed Rule 6.3 – inclusion of reference to Business and Professions Code section 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 and including a reference in section 6068(e)(1) is an appropriate companion to the reference to the conflicts rule (rule 1.7) that codifies loyalty.
   - Cons: None identified.

The following is a clean version of proposed 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 1.7 or Business and Professions Code § 6068(e)(1); 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, including assurances that information protected by Business and Professions Code § 6068(e) will be protected.

The following is a redline version of proposed Rule 6.3 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 1.7 or Business and Professions Code § 6068(e)(1); 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, including assurances that information protected by Business and Professions Code § 6068(e) will be protected.

- Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.3. Kentucky, Ohio, and Texas have declined to adopt the Rule. California has no comparable rule.

4. **Proposed Rule 6.4**.

Introduction: Proposed Rule 6.4 concerns lawyers' participation in law reform activities, and is based on Model Rule 6.4.

- Pros: This rule is consistent with the paradigm of self-regulation by the legal profession in recognizing the role that lawyers play in law reform generally, and in

particular in the reform of laws governing lawyers and the practice of law. The disclosure requirement balances client protection and is the aspect of the rule that OCTC expressly supports in its comment.

- Cons: California does not have a counterpart to this rule and among the questions about this rule and its policy are the following: (i) Whether the concept of a "law reform organization" should be defined (e.g., Does it include legislative bodies like Congress? Does it apply to rules or is it limited to legislation? Does the organization need to have the power to promulgate, as opposed to recommend rules?); (ii) What does "materially benefitted" mean and how concrete must the benefit be? Or does it matter since the rule is designed to encourage lawyer participation in such activities; (iii) How enforceable is this rule given that the organization would not know of the existence of the lawyer's client or interest? Or does it matter since the rule is designed to permit disclosure to the law reform organization, not necessarily for client protection; and (iv) If the client would be materially harmed (as opposed to benefitted), the second sentence of the rule arguably would not apply, and, if so, what rule would protect the client's interest, if any. (Cf, Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 822 [duty to disclose any personal relationship or interest that the lawyer knew or reasonably should have known could substantially affect the exercise of his professional judgment].).

The following is a clean version of proposed Rule 6.4

Rule 6.4 Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. [See also Rule 1.2(b).] In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7.

The following is a redline version of proposed Rule 6.4 to ABA Model Rule 6.4

Rule 6.4 Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. [See also Rule 1.2(b). ~~For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject.~~] In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. ~~A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.~~

- Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.4. Ohio, Virginia, and Texas have declined to adopt the Rule. California has no comparable rule.

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

1. If related rules 6.2 through 6.4 are adopted, they would be new rules establishing new charging vehicles for misconduct. While certain concepts overlap with other existing law, such as the duty of loyalty, the statement of these duties in new rules constitute substantive changes to the current rules.

F. Non-Substantive Changes to the Current Rule:

1. Using “lawyer” rather than “member” in each proposed new rule. (See VIII.A.2, above.)
2. Adopting the Model Rule numbering for each proposed rule.

G. Alternatives Considered:

1. There were no alternatives considered in regards to rule 6.5. For rules 6.1 through 6.4, the primary alternative policy was to reject the addition of these Model Rules for which there are no current California counterparts.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]

Lead Drafter: **Martinez**
Co-Drafters: **Harris, Rothschild**
Meeting Date: **November 13-14, 2015**

IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

1. Proposed Rule 6.2

   Introduction: Proposed Rule 6.2 is based on Model Rule 6.2, which sets forth a lawyer's duties when a tribunal seeks to appoint the lawyer to represent a person. The drafting team considered a rule 6.2 and agreed to not take a position on the adoption of the rule, but to present it as an open issue for the Commission's consideration.

   - Pros: Adopting this rule would be consistent with a lawyer's duty to respect judges and courts (Bus. & Prof. Code section 6068(b)) and with a lawyer's duty never to reject "the cause of the defenseless or the oppressed" (Bus. & Prof. Code section 6068(h)). Having this rule would help promote public confidence in the legal profession.
   - Cons: This rule is ambiguous in regards to its scope. Whether it applies exclusively to pro bono appointments by a tribunal or also to the conduct of lawyers who serve on panels and accept appointments with compensation is unclear.[4] In addition, while the rule is consistent with a lawyer's duty under Business and Profession Code section 6068(h), the precise terms of the rule are more detailed than existing law and might have the effect of constraining both lawyers and judges in taking a position on a lawyer's refusal to accept an appointment. For example, the rule includes the concept of a "repugnant client" and it is uncertain that existing California law or policy would recognize such a subjective assertion by a lawyer, standing alone, as a valid basis for claiming good cause to refuse an appointment.

   The following is a clean version of proposed Rule 6.2

   Rule 6.2 Accepting Appointments

   A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

   (a) representing the client is likely to result in violation of these Rules, the State Bar Act, or other law;

   (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

   (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client

[4] Following inquiry, ABA Center on Professional Responsibility staff provided background materials indicating that rule 6.2 was intended to address the situation where a judge appoints a lawyer to represent a client pro bono and not intended to regulate public defenders and/or members of a paid appointment panel. The materials received are attached to this report.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. See Business and Professions Code section 6068(h). Every lawyer, as a matter of professional responsibility, should assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients without expectation of compensation other than reimbursement of expenses. A lawyer may also be subject to appointment by a tribunal to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty, confidentiality, and competence, and is subject to the same limitations on the lawyer-client relationship, such as the obligation to refrain from assisting the client in violation of these Rules or the State Bar Act. See Rule 1.2(d).

[4] Paragraph (c) does not apply to public defenders or federal public defenders or a subordinate lawyer in their offices where appointment is governed by statute. See Cal. Government Code section 27706; Penal Code section 987.2(e); 18 U.S.C. section 3006A(g); Fed. R. Crim. Proc. 44. See also Rule 5.1, Comment [6].

The following is a redline version of proposed Rule 6.2 to ABA Model Rule 6.2

Rule 6.2 Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of ~~the~~these Rules~~ of Professional Conduct~~, the State Bar Act, or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the ~~client-lawyer~~lawyer-client relationship or the lawyer's ability to represent the client.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. ~~All lawyers have a~~See Business and Professions Code section 6068(h). Every lawyer, as a matter of professional responsibility ~~to~~, should assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients without expectation of compensation other than reimbursement of expenses. A lawyer may also be subject to appointment by a ~~court~~tribunal to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty ~~and~~, confidentiality, and competence, and is subject to the same limitations on the ~~client-lawyer~~lawyer-client relationship, such as the obligation to refrain from assisting the client in violation of ~~the~~these Rules or the State Bar Act. See Rule 1.2(d).

[4] Paragraph (c) does not apply to public defenders or federal public defenders or a subordinate lawyer in their offices where appointment is governed by statute. See Cal. Government Code section 27706; Penal Code section 987.2(e); 18 U.S.C. section 3006A(g); Fed. R. Crim. Proc. 44. See also Rule 5.1, Comment [6].

- Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.2, with little variation. Kentucky, North Carolina, New York and Oregon have declined to adopt the Rule, and Georgia has reduced the rule to a single sentence. California has no comparable rule.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]

Lead Drafter: **Martinez**
Co-Drafters: **Harris, Rothschild**
Meeting Date: **November 13-14, 2015**

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Martinez

- [Date]: Email Comment

Harris

[Date]: Email Comment

Rothschild

- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 1-650 [6.5] and proposed new rules 6.1, [6.2], 6.3, and 6.4, in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 1-650 [6.5] and proposed new rules 6.1, [6.2], 6.3, and 6.4, in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

XIII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 1-650
"Limited Legal Services Programs"

INTRODUCTION. Current rule 1-650 is based on Model Rule 6.5. As explained in section II (Background/Purposed), below, the rule 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. Neither rule 1-650 nor Model Rule 6.5 is intended as a disciplinary rule. Instead, the rules 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 addition to its review of current rule 1-650, the drafting team is requested to review the aforementioned Model Rules and recommend whether, in light of the Commission's Charter, any of the aforementioned rules should be recommended for adoption in California. If time becomes a limiting factor in the drafting team's review, then it is recommended that the team focus its efforts on Model Rule 6.1, which has a California counterpart in the State Bar's Pro Bono Resolution. (See section V.B, below.)

I. Text of Current Rule:

(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. Background/Purpose:

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.[1] 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

[1] See Dhyana Levy, "*As Foreclosures Rise, Pro Pers Clog the Courts*," San Francisco Daily Journal, May 20, 2009, p. 1, at Exhibit 4.

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 proposed rule 1-650[2] 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,[3] was adopted by the Board and approved by the Supreme Court, effective August 28, 2009.[4]

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,[5] or

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

[3] 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.

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.

[4] The Supreme Court approved proposed rules 1-650 and 3-410 (Disclosure of Professional Liability Insurance) at about the same time. Because of the exigency of the circumstances that rule 1-650 was designed to address, the Supreme Court ordered it effective immediately upon approval. Rule 3-410, however, did not become operative until January 1, 2010.

[5] 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.

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 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.

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. In a _____, 2015 memorandum to the Commission, OCTC provided the following comment regarding rule 1-650:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. In a 2010 Letter to the first Commission, OCTC provided the following comment on Rule 1-650:

> OCTC finds Comments 1-4 more appropriate for treatises, law review articles, and ethics opinions. It supports Comment 5.

IV. Potential Deficiencies in the Current Rule:

A. See the above 2010 input from OCTC regarding comments [1] to [4] of the first Commission's proposed Rule 6.5, which tracked current rule 1-650.

B. See above 2015 input from OCTC.

C. The current rule does not address ethical walls or screening, in particular with respect to a situation where a lawyer who has provided limited legal services to an individual in compliance with the rule subsequently discovers that the lawyer's firm has a client with interests adverse to the individual in the same or a substantially related matter. Should the rule or comments be revised to state that once a conflict is identified, the volunteer lawyer who is prohibited from representing the firm's client must be screened from the firm's lawyers representing the client.

V. California Context:

A. <u>Introduction</u>

California. 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). As explained in section II (Background/Purpose), 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. (See Section VI, below.) In none of the adopting jurisdictions is the rule disciplinary in nature.

B. 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.

C. 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 section 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.

VI. Approach In Other Jurisdictions (National Backdrop):

An ABA article entitled *State Committees Review and Respond to Model Rules Amendments* compares the responses of states to the most significant revisions and additions to the Model Rules proposed by the ABA Ethics 2000 Commission. MR 6.5 is covered in the article.[6]

A. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 6.5: Nonprofit And Court-Annexed Limited Legal Services Programs," revised July 29, 2015, is available at:

[6] This article, which is available at http://www.abanet.org/cpr/jclr/review_art.pdf, was last updated as of November 30, 2007. A chart with links to recent actions by the states is available at http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf. Both sources were used to derive the general information on the action by other states on MR 6.5.

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_5.authcheckdam.pdf

- As of July 29, 2015, forty-nine jurisdictions have adopted a rule counterpart to Model Rule 6.5. Thirty-four jurisdictions have adopted Model Rule 6.5 verbatim.[7] Fifteen jurisdictions have adopted a modified version of Model Rule 6.5.[8] Only two jurisdictions have not adopted any version of Model Rule 6.5."[9]

- [KEM: I don't think we need to bring MR 1.10 into the mix, especially as Cal. does not have a rule counterpart.]

Finally, independent research indicated that as of March 23, 2009, there is no reported civil or disciplinary case law on MR 6.5 in any of the states that have adopted the rule or a variation of it.

A. The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 6.1: Voluntary Pro Bono Publico Service," revised May 4, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_1.authcheckdam.pdf

- As of May 4, 2015, 44 jurisdictions have adopted a rule of professional conduct that addresses the provision of pro bono legal services. Only seven jurisdictions have not.[10] Only six jurisdictions have adopted Model Rule 6.1 verbatim.[11] Every other jurisdiction that has adopted a pro bono rule has revised the Model Rule, many reducing the black letter to a single paragraph, and some reducing the hours expected (e.g., to 25 or 20 hour per year). jurisdictions have adopted a rule substantially similar to Model Rule 6.1. All rules, however, are aspirational. No jurisdiction requires that a lawyer provide pro bono legal services.

VII. Public Comment Received by the First Commission:

The clean text of proposed rule 6.5 drafted by the first Commission and adopted by the Board to replace rule 1-650 is enclosed with this assignment, together with the synopsis

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[7] 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.

[8] 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.

[9] The two jurisdictions are: Florida and Texas.

[10] The seven jurisdictions that have not adopted a pro bono rule of professional conduct are: California, Illinois, Kentucky, North Carolina, Ohio, Oregon and Texas.

[11] The six jurisdictions are: Alaska, Arkansas, Iowa, Minnesota, Rhode Island and Wisconsin.

of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs from current rule 1-650, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

In addition, the clean text of proposed rules 6.1, 6.2, 6.3 and 6.4 drafted by the first Commission and adopted by the Board, together with the synopsis of public comments received on that proposed rules and the full text of those comments. Although each of the proposed rules differs from its respective Model Rule counterpart, the drafting team might consider to what extent, if any, the public comments received on the proposed rules provide helpful information in analyzing their Model Rule counterparts.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the proposed rule showing changes to rule 1-650 is also enclosed with the public comments received. Similar redline comparison of the other four proposed rules to their Model Rule counterparts are provided. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives. In addition, at least with respect to Model Rules 6.1 to 6.4, the drafting team should also consider whether the rationale underlying the rules make them appropriate for inclusion in a set of disciplinary rules.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

(1) Whether the rule should be amended (black letter or comment) to state that when a conflict is identified arising from a lawyer's representation of a legal services client and a client represented by the lawyer's firm, the lawyer who participated in the legal service program should be screened from the firm's representation of the firm's client who has interests adverse to the legal services client.

(2) Whether the Commission should recommend a rule counterpart to Model Rule 6.1.

(3) Whether the Commission should recommend a rule counterpart to Model Rule 6.2.

(4) Whether the Commission should recommend a rule counterpart to Model Rule 6.3.

(5) Whether the Commission should recommend a rule counterpart to Model Rule 6.4.

IX. Research Resources:

- Business and Professions Code §§ 6072 – 6073
- State Bar Ethics Alert Article "A Primer on Limited Scope Representation."
- State Bar Formal Op. No. 1998-152 (generally addressing imputation of conflicts covered by Rule 3-310)