

**RRC2 – Rule 1-650 [6.5 and MR 6.1, 6.2, 6.3 & 6.4]  
Post-Agenda E-mails, etc. – Revised (November 9, 2015)  
Martinez (Lead), Harris, Rothschild**

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**October 7, 2015 Kehr Email to Drafting Team, cc Difuntorum, Mohr & Lee:**

\* \* \*

3) I agree with **Rule 6.3** in principle; however:

- a. The ABA language is based on a misconception of what constitutes a conflict of interest. A lawyer does not have a conflict by reason of representing clients with adverse interests. A lawyer properly may represent McDonalds and Burger King. And in fact this is quite common. Think, for example, of a patent lawyer who is a polymer chemist and handles patent applications for competitors or an entertainment lawyer who represents (competing) actors. To be more accurate: "... notwithstanding that the organization serves persons in matters that would constitute a conflict of interest for the lawyer under Rule 1.7 or 1.9 if undertaken by the lawyer or the lawyer's law firm having interests adverse to a client of the lawyer.
- b. I don't know why paragraph (a) refers to Rule 1.7 but not Rule 1.9.
- c. I hope the Commission will discuss paragraph (b) as its meaning is unclear to me. It appears to say that a lawyer serving on a non-profit's Board could not join in a decision to drop a client of the non-profit if that client is an adversary of the lawyer's firm, even if in a matter unrelated to the firm's representation of its client. Why?
- d. Regarding Comment [1]:
  - i. Its first and final sentences do not explain the meaning of the Rule and could be cut.
  - ii. Its third sentence uses the phrase "potential conflict", which is a term used in our current Rules but not MR 1.7. This could cause confusion. The same sentence again speaks of conflicting interests, which is irrelevant for in determining whether a lawyer has a conflict. If the Commission were to adopt my change as stated in my first paragraph on this Rule, the third sentence could be removed b/c the Rule would be self-explanatory.

5) I support **Rule 6.4**; however:

- a. B/c there is only one Comment, it need not be numbered.
- b. It uses "client-lawyer" rather than "lawyer-client".
- c. Neither its second sentence nor the Rule 1.2(b) reference explains the Rule. These could be removed.
- d. The third sentence does not explain the Rule and actually seems inconsistent with it. If the Commission feels that a lawyer's law reform efforts should not target the lawyer's clients, this should be added to the Rule. This is a viable idea. See *Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811 (2011).

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**October 29, 2015 McCurdy Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

The State Bar Office of Chief Trial Counsel (OCTC) submitted their comments for rules on the November agenda, with a brief additional comment on Rule 1-650 (attached).

For the November meeting, the consideration of Rule 1-650 will only include the related consideration of ABA Model Rules 6.2, 6.3 & 6.4. The discussion of ABA Model Rule 6.1 will be taken up at the Commission's January meeting.

Attached:

RRC2 - [1-310][1-320][1-600][5.4] - 10-27-15 OCTC Memo to RRC2.pdf

**October 27, 2015 OCTC Memo to Commission:<sup>1</sup>**

\* \* \*

**D. Rule 1-650: Limited Legal Services Program**

1. Rule 1-650 should be retained as currently written. The rule addresses conflicts of interest in a manner consistent with our other rules of ethics. Adoption of new rules fashioned after Model Rules 6.3 or 6.4 should maintain that consistency. (See OCTC's comment of September 29, 2015.)

**November 3, 2015 Kehr Email re 6.2 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I have only two comment on this draft, both in the nature of questions ---

1) Comment [1] refers to section 6068(h) instead of § 6068(h). I seem to recall a decision to use the section symbol in the interests of brevity. Am I wrong on that? (and I notice that the symbol was used in Comment [2] to proposed Rule 6.2)

2) The highlighted portion of Comment [2] is unclear to me: "Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation

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<sup>1</sup> On September 29, 2015, OCTC sent the following comment to the Commission [comments concerning rule 6.1 (not on the November 13-14, 2015 agenda] and rule 6.5 [approved during October 23, 2015 meeting] are not included):

\* \* \*

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.

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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." There is no current California conflict provision that would make the repugnance of the client's goal a conflict of interest. This either would be a competence issue or a cause for termination under rule 3-700. Current rule 3-700(C)(1) includes: "(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or". The first Commission's Rule 1.16(b)(4) included the same wording. I don't like the idea of muddling the conflict Rules with an off-hand suggestion of this sort. I can think of two solutions. One would be to omit the example from the sentence. The other would be to add a reference to Rule 1.16(b)(4) [assuming the same numbering], worded in terms of the potential client's conduct being such as would permit the lawyer to terminate the relationship under that Rule. I prefer the first solution b/c I think the real issue is whether, for example, a death penalty advocate would be competent to argue its unconstitutionality. If the answer were "yes", the lawyer should accept the appointment.

**November 3, 2015 Kehr Email re 6.3 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

- 1) I wonder why paragraph (a) doesn't also refer to Rule 1.9 and 1.18.
- 2) In the interests of brevity, all of Comment [1] could be removed. It is a policy discussion rather than an explanation of the Rule. If it is retained, "client-lawyer" should be corrected to the California style of "lawyer-client".
- 3) Isn't Comment [2] only best practices advice and not an explanation of the Rule. It could be removed.

**November 3, 2015 Kehr Email re 6.4 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Here are my suggestions on this proposed Rule ---

- 1) Our style manual directs us to use "may" in the sense of having discretion to, being permitted to, or having the right to do something. See Guidelines for Drafting, etc. at p. 29. The two uses of "may" in the Rule therefore should be "might".
- 2) Our agreed style is not to number a single Comment.
- 3) The first sentence of the Comment should be corrected to the California usage of "lawyer-client".

**November 3, 2015 Martinez Email re 6.2 to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

- 2) We could remove the "example" reference so that Comment [2] would read:

~~or~~ if undertaking the representation would result in an improper conflict of interest, ~~for example~~, or 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."

**November 3, 2015 Martinez Email re 6.3 to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

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- 1) RRC-1 added the reference to section 6068(e)(1). It's unclear why Rules 1.9 and 1.18 were not listed and why Rule 6.3 only deals with obligations to current clients. Perhaps this is because the scenarios under those other rules were viewed by the ABA as less likely to arise.
- 2) The comment can be shortened.
- 3) Agreed.

**November 3, 2015 Martinez Email re 6.4 to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

I don't see that the use of "may" is improper. The Guideline describe the use of "may" but not "might," leaving open the possibility that "might" is an equivalent to "may." Also, the ABA Rule 6.4 uses "may," so we would be suggesting something different by altering the ABA verbiage.