RRC2 – Rule 1-650 [6.1, 6.2, 6.3, 6.4, 6.5]
Post-Agenda E-mails, etc. – Revised (January 19, 2016)
Martinez (Lead), Harris, Rothschild

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January 16, 2015 Kehr Email re 6.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

1) Proposed paragraph (d) begins: "All law firms and governmental and corporate employers should ...." I understand that this tracks the Board Resolutions of 1989 and 2002, but I think it presumptuous for us to tell governmental agencies and departments what they should do. There is a separation of powers aspect to this if the judicial branch were to set a standard of this kind for the operation of the legislative and executive branches, and I understand that it is not uncommon for government lawyers to be prohibited from providing legal services outside of their government employment. I don't think this is softened by proposed Comment [5] b/c, if issued in this form by the Court, it could be seen by other branches of government as the Court scolding them. If that reference is retained, it could be done more subtly by replacing "law firms and governmental and corporate employers" with "law firm" b/c the definition of "law firm" presumably will include governmental and corporate law departments.

2) Was the definite article intentionally omitted from proposed paragraph (g): "through [the] disciplinary process."

3) The proposed Comments largely are taken from the MRs and suffer from their verbosity. Considering our directions to include only Comments that explain the Rule, I think we could remove ---

a. The last two sentence of Comment [1];

b. All of Comment [2]; and

c. All of Comment [3].

January 16, 2016 Tuft Email re 6.1 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

Thank you for your excellent report on proposed rule 6.1. I offer the following comments for your consideration:

1. I urge that the rule begin with the first sentence in Model Rule 6.1 in place of the first sentence in the proposed rule. The more direct and less aspirational statement (“Every lawyer has a professional responsibility to provide legal services to those unable to pay”) was added by the ABA in 2002 at the recommendation of Ethics 2000 to make it clear that this obligation is expected of lawyers and is not something that lawyers “should” do.

2. What is a reasonable amount the time, and whether it is at least 50 hours, should be addressed in the second sentence. Here, I suggest we combine the two concepts in the following single sentence, which is derived from the paragraph (1) of the State Bar Resolution:

   “ A lawyer should devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of pro bono publico legal services to persons unable to pay, without expectation of compensation other than reimbursement of expenses.”

3. In paragraph (a), rather than limit the time to 50 hours, and limit providing legal services “to” nonprofit organizations, the paragraph should state:

   (a) A substantial majority of a lawyer’s legal services under this rule should:

(1) be provided to indigent individuals ("persons"?), or

(2) be provided to, or on behalf of, nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantage ("indigent persons"?).

To be consistent, shouldn't we use "indigent individuals" or "indigent persons" in place of the "poor" or "disadvantage"?

4. I would delete the word "any" in the first sentence in paragraph (b)

   Reason: providing assistence to low income clients (the "Civil Gideon" issue), in addition to indigent persons has become an important access to justice issue.

5. In paragraph (c), I would change the word "may" to "should".

6. I question whether we should include paragraphs (d), (e) and (f) in the rule. The rules govern the conduct of lawyers and not law firms, corporate and government employers and law schools. We may also be attempting to micromanage how law firms, government and corporate employers and law schools should go about promoting pro bono services.

7. I recommend we include Model Rule Comment [11] in place of paragraphs (d) and (f).

January 19, 2016 Rothschild Email re 6.1 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

Here is my response to [Mr. Kehr's] comments [in blue]:

1) Proposed paragraph (d) begins: "All law firms and governmental and corporate employers should ...." I understand that this tracks the Board Resolutions of 1989 and 2002, but I think it presumptuous for us to tell governmental agencies and departments what they should do. There is a separation of powers aspect to this if the judicial branch were to set a standard of this kind for the operation of the legislative and executive branches, and I understand that it is not uncommon for government lawyers to be prohibited from providing legal services outside of their government employment. I don't think this is softened by proposed Comment [5] b/c, if issued in this form by the Court, it could be seen by other branches of government as the Court scolding them. If that reference is retained, it could be done more subtly by replacing "law firms and governmental and corporate employers" with "law firm" b/c the definition of "law firm" presumably will include governmental and corporate law departments. I agree that we can just use "law firm", since government legal departments are law firms.

2) Was the definite article intentionally omitted from proposed paragraph (g): "through [the] disciplinary process." I agree with Bob

3) The proposed Comments largely are taken from the MRs and suffer from their verbosity. Considering our directions to include only Comments that explain the Rule, I think we could remove ---

   a. The last two sentence of Comment [1];

   b. All of Comment [2]; and

c. All of Comment [3].

I think comments 2 and 3 should remain. I have no problem with deleting the penultimate sentence of comment 1, but would leave the last sentence. Since this is an aspirational rule, I think the additional comments are helpful in stressing the importance of the rule and the methods for complying with it.

Here are my response to [Mr. Tuft's] comments:

1) I urge that the rule begin with the first sentence in Model Rule 6.1 in place of the first sentence in the proposed rule. The more direct and less aspirational statement ("Every lawyer has a professional responsibility to provide legal services to those unable to pay") was added by the ABA in 2002 at the recommendation of Ethics 2000 to make it clear that this obligation is expected of lawyers and is not something that lawyers "should" do. I agree with Mark that his proposed opening is better, but that is exactly what we had in the previous meeting draft and it was rejected.

2) What is a reasonable amount the time, and whether it is at least 50 hours, should be addressed in the second sentence. Here, I suggest we combine the two concepts in the following single sentence, which is derived from the paragraph (1) of the State Bar Resolution:

> "A lawyer should devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of pro bono publico legal services to persons unable to pay, without expectation of compensation other than reimbursement of expenses."

I think we can meet Mark's second concern by rewriting the intro provision to read: "Every lawyer, as a matter of professional responsibility, should devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of legal services to persons unable to pay, without expectation of compensation other than reimbursement of expenses."

3) In paragraph (a), rather than limit the time to 50 hours, and limit providing legal services "to" nonprofit organizations, the paragraph should state:

(a) A substantial majority of a lawyer's legal services under this rule should:

(1) be provided to indigent individuals ("persons"?), or

(2) be provided to, or on behalf of, nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantage ("indigent persons"?).

To be consistent, shouldn't we use "indigent individuals" or "indigent persons" in place of the "poor" or "disadvantage"?

Mark combines two issues here. I agree that we ought to be consistent in our wording. The current wording in the draft comes directly from the resolution, but I think we can adapt that to pick either "indigent individuals" or "the poor and disadvantaged". The advantage of the latter is that it is a bit broader and is closer to the IOLTA eligibility guidelines that include not only income but also age and disability. I also like Mark's other comment in this section, to drop the "50 hours" from subsection (a).

4) I would delete the word "any" in the first sentence in paragraph (b).

Reason: providing assistance to low income clients (the "Civil Gideon" issue), in addition to indigent persons has become an important access to justice issue.

Mark would drop the word "any" from the first sentence of (b). I disagree. I think the reference here is to the additional portion of the 50 hours that are not provided to the poor or disadvantaged without fee. The word comes from the Model Rule.

5) In paragraph (c), I would change the word "may" to "should". I agree with Mark

6) I question whether we should include paragraphs (d), (e) and (f) in the rule. The rules govern the conduct of lawyers and not law firms, corporate and government employers and law schools. We may also be attempting to micromanage how law firms, government and corporate employers and law schools should go about promoting pro bono services. (d), and (e) do go beyond addressing lawyers. They come from the resolution. The motion at the previous meeting said that we should base our work on the resolution, but it was not specific on how closely we should stick to the resolution and what parts of the resolution we should include. I like having these provisions in the rule, but would not object strongly if the drafting team wants to delete them. I disagree with Mark on (f), as I think it does directly address the conduct of lawyers, rather than firms, agencies, or law schools.

7) I recommend we include Model Rule Comment [11] in place of paragraphs (d) and (f). I prefer having (d) in the rule, but if not, then ABA comment 11 is better than nothing. I disagree with Mark that comment 11 has anything to do with (f).

These are my comments. Raul and Lee – What do you think? Do we need a call tomorrow or Thursday to talk about this before the meeting?