

Proposed Rule 6.4 [N/A] “Law Reform Activities Affecting Client Interests”

(Draft #4, 12/13/09)

Summary: Proposed Rule 6.4, which concerns lawyers’ participation in law reform activities, is based on Model Rule 6.4. However, that part of the Rule that requires disclosures by lawyers participating in law reform activities has been deleted in response to public comment. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

Statute

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 7

Opposed Rule as Recommended for Adoption 4

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Commission on Access to Justice. See also Public Comment Chart.

Very Controversial – Explanation:

Moderately Controversial – Explanation:

There were several negative comments urging that this Rule not be adopted, or if it were adopted, that it be amended by deleting the second sentence that imposes disclosure requirements. See Public Comment Chart for details. The Commission rejected the suggestions that the Rule not be adopted in the belief that its rejection would send a negative message relating to the encouragement of lawyers to participate in law reform activities. It should be noted, however, that the California Access to Justice Commission strongly supported the public comment version of the Rule.

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.4* Law Reform Activities Affecting Client Interests

December 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 6.4 is based on Model Rule 6.4. The Commission recommends the adoption of the first sentence of the Model Rule but not the second sentence. After consideration of several comments received during the public comment period, the Commission determined that including the second sentence would impose on lawyers who participate in law reform activities burdensome disclosure requirements to non-clients, thereby countering the positive effect of the first sentence, which is intended to encourage participation in such activities. See Public Comment Chart, below. In addition, the Commission also concluded that the requirements of disclosure are better left to internal disclosure rules and procedures of the organization that the lawyer serves as a director, officer or member. See Explanation of Changes to the Rule.

Minority. A minority of the Commission agrees with the California Commission on Access to Justice and the Legal Aid Association of California that Model Rule 6.4 is as an important addition to the California Rules as is Model Rule 6.3, which the majority has recommended be adopted without material modification. Deleting the requirement to disclose the fact that the lawyer knows that the interests of the lawyer's client may be materially affected by a decision in which the lawyer participates sends the wrong message to the public and to the profession. As Model Rule 6.4, Comment [1] correctly states, a lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure. The minority also notes that there are no reported decisions of a lawyer being disciplined under the second sentence of Rule 6.4. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, RULE 6.4, at page 508 (6th Ed. 2008).

* Proposed Rule 6.4, Draft 4 (12/13/09).

A separate minority takes the position that, while the proposed Rule has laudable, aspirational goals, it has no place in a set of disciplinary rules. See full Dissent, below.

Variations in Other Jurisdictions. Nearly every state, including New York (effective 4/1/2009), has adopted Model Rule 6.4 verbatim or nearly verbatim. See Selected State Variations, below.

<p align="center"><u>ABA Model Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 6.4 Law Reform Activities Affecting Client Interests</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>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.</p>	<p>The Commission recommends the adoption of the first sentence of Model Rule 6.4.</p> <p>The Commission recommends that the second sentence of Model Rule 6.4 not be adopted. The Commission concluded that the requirements of disclosure are better left to internal disclosure rules and procedures of the organization that the lawyer serves as a director, officer or member. A minority of the Commission disagrees with this position. See Introduction.</p>

* Proposed Rule 6.4, Draft 4 (12/13/09). Strikeouts and underlines reflect changes to the Model Rule.

<p style="text-align: center;"><u>ABA Model Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests Comment</p>	<p style="text-align: center;"><u>Commission’s Proposed Rule</u> Rule 6.4 Law Reform Activities Affecting Client Interests Comment</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[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.</p>	<p>The Commission recommends adoption of only the first two sentences of the Model Rule comment. The Commission determined that the third and fourth sentences are unnecessary exposition. The Commission also recommends that the last sentence not be adopted in light of its recommendation that the second sentence of the black letter not be adopted. See Explanation of Changes for Rule.</p>

Rule 6.4 Law Reform Activities Affecting Client Interests

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

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 or adversely affected 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 must comply with the lawyer's obligations to clients under other Rules and statutes, particularly Rules 1.6 and 1.7, and Business and Professions Code § 6068(e)(1). 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 or adversely affected.~~

Proposed Rule 6.4 Law Reform Activities Affecting Client Interests

Minority Dissent

Proposed Rule 6.4 has lofty aspirational goals. All lawyers should be encouraged to serve their communities by serving on boards and commissions. Their legal education and training could be helpful in the deliberations of boards and commissions. They should, in all candor, disclose to such boards and commissions whenever they have a conflict, i.e., having a client who may be affected by any decision they make on such boards and commissions. However, the requirements should be part of law school education where students should learn what it means to be a lawyer and how lawyers should conduct themselves so as to promote the integrity of the profession. In no way should such service be the subject of discipline.

The Commission was not asked by the State Bar to write a practice guide, but to review and rewrite rules of discipline and conform, wherever possible, the California rules to the ABA rules. In these situations where the lawyer is not in a lawyer-client relationship and, therefore, owes no particular duty to a board or commission except ones created by, and agreed to by the board or commission.

Rule 6.4 Law Reform Activities Affecting Client Interests
(Commission's Proposed Rule – Clean Version)

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.

COMMENT

- [1] Lawyers involved in organizations seeking law reform generally do not have a lawyer-client 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).

Rule 6.4: Law Reform Activities Affecting Client Interests

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2008 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California. has no comparable provision.

District of Columbia: Rule 6.4 adds the following paragraph (a): "A lawyer should assist in improving the administration of justice. A lawyer may discharge this requirement by rendering services in activities for improving the law, the legal system, or the legal profession."

Florida: replaces "materially benefited" with "materially affected" in the second sentence of Rule 6.4.

Georgia: adds that "[t]here is no disciplinary penalty for a violation of this Rule."

Illinois: Rule 6.4 applies when the "actions" of the organization may affect a client's interests, rather than when the "reform" may affect the client's interests.

New Hampshire: New Hampshire substitutes the word "affected" for the word "benefitted" in the second sentence of Rule 6.4. A special New Hampshire Comment explains the reasoning: "Since situations may arise in which law reform activities may materially impinge on a client's interest in an adverse, as well as beneficial manner, the change was made to reflect that possibility."

New York: has no direct equivalent to ABA Model Rule 6.4.

Ohio: omits ABA Model Rule 6.4 because the Supreme Court of Ohio believes that the "substance of Model Rule 6.4 is addressed by other provisions of the Ohio I Rules of Professional Conduct that address conflicts of interest."

**Rule 6.4 Law Reform Activities Affecting Client Interests.
[Sorted by Commenter]**

TOTAL = __ **Agree =** 1
Disagree = 4
Modify = 2
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Attorneys for Criminal Justice	D			CACJ objects to this proposal as unnecessary and unworkable. For example, the proposed rule would require that every officer of CACJ disclose to CACJ every time a decision in which he or she participates might benefit (or, less likely, adversely affect) one of his or her clients. Under the proposed rule, every other officer of CACJ would have to make such disclosures to CACJ every time he or she participates in a discussion concerning the position that CACJ should take on proposed legislation for a new penal statute or amendment to a penal statute. We think that is unduly burdensome and unreasonable. Currently in California there is no provision addressing this issue. That is the way it should remain.	The Commission has deleted the second sentence of the proposed Rule, which imposed the disclosure obligations.
2	California Commission on Access to Justice	A			We strongly support the addition of proposed Rule 6.4.	No response necessary.
3	Executive Committee of the State Bar of California Business Law Center	D			The Executive Committee recommends that, like New York State, California not adopt proposed Rule 6.4. Proposed rule 6.4 is unclear in its scope and implementation, while subjecting a lawyer engaged in the worthwhile activity of law	New York has adopted Model Rule 6.4. The Commission disagrees. The policy of encouraging lawyers to participate in law reform activities outweighs the purported burdens the Commenter speculates the Rule will create; The

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					<p>reform, for which a lawyer has particular training, to the risk of disciplinary action if proper disclosure is not made. Alternatively, the disclosure will become so common as to render it rote and meaningless.</p> <p>In the alternative, the Executive Committee recommends the following amendments if the Commission chooses to adopt proposed Rule 6.4.</p> <ol style="list-style-type: none"> 1. Amend the rule, as the State of Georgia has done, to provide that a lawyer is not subject to discipline for violation of the rule. 2. To permit a lawyer to participate in organizations, in addition to law reform and administration organizations, the first sentence of the proposed rule should read as follows: "A lawyer may serve as a director, officer or member of any organization, including any organization that may be involved in reform of the law or its administration, notwithstanding that the involvement may affect the interests of a client of the lawyer." 3. Amend the Comment so it reads as follows: "[1] Lawyers involved in organizations 	<p>"material" limitation on the benefit or adverse effect that might result should avoid that result. In light of the concerns raised concerning the disclosures required by the second sentence of Model Rule 6.4, that sentence has been deleted.</p> <ol style="list-style-type: none"> 1. In light of the deletion of the second sentence to the Model Rule, no such legend is required. 2. The Commission disagrees. The proposed draft and the Model Rule are limited to law reform activities, which is consistent with the title to the Rule. The proposed revision would cause the rule to apply to all organizations of any kind, of which law reform organizations are only one example. 3. No change required. The first two sentences of the Commenter's proposal are identical to the Model Rule. Those are the only two sentences the

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					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 or other organization 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 Rules 1.7, 1.8, 1.9, 1.11 and 1.18. When a lawyer participates in a decision that materially benefits or adversely affects a client, the lawyer should protect the integrity of the organization by making an appropriate disclosure within the organization. "	Commission has recommended be adopted given its recommendation that the second sentence of the Rule be deleted.
4	Orange County Bar Association	D			The OCBA does not believe it is necessary to adopt Rule 6.4. The OCBA has concerns that a disciplinary rule like this could chill attorneys from volunteering for organizations addressing law reform. If the Bar decides to adopt proposed Rule 6.4, the OCBA respectfully suggests adopting	The Commission disagrees. The policy of encouraging lawyers to participate in law reform activities militates in favor of the Rule. The concern that the rule might chill lawyer's participation has been obviated by deletion of the second sentence of the Model Rule. The proposed revision is unnecessary in light of the

RRC - 6-4 - Public Comment Chart - By Commenter - DFT3 (12-13-09)KEM-ML

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					<p>language like that used by Florida, namely – “materially affected” instead of “materially benefitted or adversely affected.”</p> <p>The OCBA also suggests amending the proposed Rule to include, at the end, the language that has been adopted in Georgia: “There is no disciplinary penalty for a violation of this Rule.” This language would act to offset any disincentive for attorneys to participate in organizations addressing law reform while still providing helpful guidance to participating attorneys.</p>	<p>second sentence’s deletion.</p> <p>In light of the deletion of the second sentence to the Model Rule, no such legend is required.</p>
5	San Diego County Bar Association Legal Ethics Committee	M			<p>It is foreseeable that a lawyer involved in law reform will not always be able to disclose that a client’s interests may be materially benefitted or adversely affected without disclosing client confidences. The fact that a client need not be identified does not solve the problem. Hiding the client’s identity does not permit the lawyer to reveal the client’s confidences. For instance, a lawyer’s record of representing certain clients may be enough in some instances for others to correctly infer the client whose interests would be materially benefitted or adversely affected.</p> <p>In such instances when the lawyer could not make the disclosure required by Proposed Rule 6.4 without disclosing client confidences, an option must be permitted. Proposed Rule</p>	<p>The Commenter’s concerns are all addressed by the deletion of the second sentence to the Rule the deletion of most of the Comment.</p>

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					<p>6.4 should explicitly provide that option, either in the text of the rule or in a comment, by stating that, if disclosure is not permitted by the lawyer's obligations to clients under other Rules and statutes, the lawyer should instead recuse himself or herself from participating in the decision that may materially benefit or adversely affect the client.</p> <p>Have the last two sentences of Rule 6.4 read: "When the lawyer knows that the interests of a client may be materially benefitted or adversely affected by a decision in which the lawyer participates, the lawyer shall disclose that fact, <u>if not prohibited by the lawyer's obligations to clients under other Rules and statutes</u>, but need not identify the client. <u>If disclosure is prohibited, the lawyer shall not participate in any decision that may materially benefit or adversely affect the interests of his or her client.</u>"</p> <p>In the alternative, Proposed Rule 6.4 could remain worded as currently proposed but be accompanied by a second Comment worded as follows:</p> <p>"If disclosure is prohibited by the lawyer's obligations to any client under other Rules or statutes, then a lawyer cannot provide the disclosure the disclosure required. If disclosure is prohibited, or if the lawyer</p>	

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					<p>chooses not to disclose in accordance with Rule 6.4 for any other reason, the lawyer shall not participate in any decision that the lawyer knows may materially benefit or adversely affect the interests of a client.”</p> <p>Concerned about the impact the rule will have on members who participate in organizations such as the California Conference of delegates. The addition of another Comment to address this issue is encouraged. It is hard to imagine that the drafters intended all the delegates to make such disclosures to the Conference but including “members” within the ambit or the proposed, rather than limiting it to officers and directors of the Conference leads to a questionable outcome.</p>	
6	Santa Clara County Bar Association	D			<p>This rule as proposed should not be adopted.</p> <p>The SCCBA supports the rationale for having this rule: to encourage attorneys to participate in law reform organizations. However, the rule elevates fiduciary duties that the attorney owes the organization as a Board member to an attorney rule of conduct subjecting the attorney to discipline.</p> <p>The attorney’s duty as an attorney runs to the client; the attorney’s duty as a member of the Board or a committee runs to the organization and is governed by the conflict of interest rules that govern that organization. As such,</p>	<p>The Commission disagrees. The policy of encouraging lawyers to participate in law reform activities militates in favor of the Rule. The concerns the Commenter has expressed have been obviated by deletion of the second sentence of the Model Rule.</p>

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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the last sentence should be deleted or be modified to read: "While a lawyer may be required to disclose a conflict of interest related to a client pursuant to fiduciary duties as an officer or member of such an organization, the lawyer shall protect the confidentiality of the client as required by Business & Professions Code Sec. 6068(e)(1)." The Comment to this rule should be revised accordingly.	
7	State Bar Trusts & Estates Section Executive Committee	M			The Executive Committee of the Trusts and Estates Section of the State Bar urges that the last sentence of proposed Rule 6.4 be deleted as unnecessary and impractical, or at least clarified such that it does not apply to organizations that are merely advisory.	The second sentence of the proposed Rule has been deleted.