

McCurdy, Lauren

From: Dominique Snyder [snyderlaw@charter.net]
Sent: Tuesday, October 27, 2009 11:56 AM
To: linda.foy@jud.ca.gov; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov
Cc: Difuntorum, Randall; McCurdy, Lauren; 'Kevin Mohr'
Subject: FW: RRC - 6.2 - III.F. - 11/6-7/09 Meeting
Attachments: RRC - 6-2 - Rule - DFT1 (10-26-09) - Cf. to MR.doc

Fellow drafters,

See attached for your consideration. Please let me know your input by tomorrow morning - then we can get this to Lauren by the deadline at noon.

Thanks.

Dom

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Tuesday, October 27, 2009 9:38 AM
To: Dominique Snyder
Subject: RRC - 6.2 - III.F. - 11/6-7/09 Meeting

Dom:

I've attached a proposed revision of MR 6.2. Please circulate it to the drafters for their input.

Thanks,

Kevin

Proposed Rule 6.2 [N/A] “Accepting Appointments”

(Draft #1, 10/26/09)

Summary:

Comparison with ABA Counterpart

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

Stakeholders and Level of Controversy

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

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

<p align="center"><u>ABA Model Rule</u> Rule 6.2 Accepting Appointments</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 6.2 Accepting Appointments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:</p> <p>(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;</p>	<p>A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:</p> <p>(a) representing the client is likely to result in violation of the these Rules of Professional Conduct, <u>the State Bar Act</u>, or other law;</p>	
<p>(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or</p>	<p>(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or</p>	
<p>(c) 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.</p>	<p>(c) the client or the cause is so <u>[repugnant]</u> to the lawyer as to be likely to impair the client-lawyer<u>lawyer-client</u> relationship or the lawyer's ability to represent the client.</p>	

* Proposed Rule 6.2, Draft 1 (10/26/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 6.2 Accepting Appointments Comments</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 6.2 Accepting Appointments Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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 responsibility to 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. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.</p>	<p>[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as <u>[repugnant]</u>. The lawyer's freedom to select clients is, however, qualified. <u>See Business & Professions Code section 6068(h)</u>. All lawyers have a responsibility to 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. A lawyer may also be subject to appointment by a court-tribunal to serve unpopular clients or persons unable to afford legal services.</p>	
<p><i>Appointed Counsel</i></p> <p>[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</p>	<p><i>Appointed Counsel</i></p> <p>[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<u>includes situations where</u> the lawyer could-would not <u>be able to</u> 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 <u>[repugnant]</u> to the lawyer as to be likely to impair the client-lawyer<u>lawyer-client</u> relationship or the</p>	

* Proposed Rule 6.2, Draft 1 (10/26/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 6.2 Accepting Appointments Comments</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 6.2 Accepting Appointments Comments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>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.</p>	
<p>[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.</p>	<p>[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty, and confidentiality, <u>and competence</u>, and is subject to the same limitations on the client-lawyer <u>lawyer-client</u> relationship, such as the obligation to refrain from assisting the client in violation of these <u>se</u> Rules <u>or the State Bar Act</u>. See <u>Rule 1.2(d)</u>.</p>	

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;¹
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer;² or
- (c) the client or the cause is so [repugnant]³ to the lawyer as to be likely to impair the ~~client-lawyer~~ lawyer-client relationship or the lawyer's ability to represent the client.

¹ Drafters' Note/Recommendation: The Commission previously voted not to include a reference to "or other law" in Rule 1.16, notwithstanding that Model Rule 1.16 does so provide. The Commission gave no reason for its departure from the Model Rule:

- (1) the lawyer knows or reasonably should know that the representation will result in violation of ~~the rules of professional conduct~~ these Rules or ~~other law~~ of the State Bar Act;

The Explanation of Changes for MR 1.16(a)(1) provides:

Paragraph (a) is substantially the same as the Model Rule but makes two changes. First, the Model Rule requires a lawyer to withdraw from a representation if the representation "will" result in a violation by the lawyer. That standard appears to require withdrawal only when the lawyer can predict with certainty that a violation will occur. The Commission proposes to change broaden this duty by requiring the lawyer to withdraw if the lawyer "knows or reasonably should know". Second, the Model Rule phrase "of the rules of professional conduct" is changed to "of these Rules or the State Bar Act" in order to include the related statutory provisions and conform to our style.

Recommendation: The drafters recommend keeping "or other law" in Rule 6.2.

² Drafters' Note/Question: The Commission recommended rejection of MR 1.16(b)(6), which provides a lawyer may withdraw from a representation if:

- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

The Commission explained its rejection of MR 1.16(b)(6):

The Commission rejected Model Rule paragraph (b)(6). As written, it appears to be broad enough to permit a lawyer to terminate a representation simply because of more profitable representation is available. See the explanation above for the Commission's rejection of Model Rule paragraph (b)(1). The lawyer's financial situation would come into play only when so grave that it would affect the lawyer's ability to fulfill the duty of competence.

Question: Do the same concerns over 1.16(b)(6) in seeking to *withdraw* apply also to a decision whether to *accept* an appointment?

³ Drafters' Note/Question: The Commission has rejected MR 1.16(4), which permits withdrawal from representation if "(4) the client insists upon *taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;*" (Emphasis added). The Commission explained its rejection of a "repugnant" standard:

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as [repugnant].⁴ The lawyer's freedom to select clients is, however, qualified. See Business & Professions Code section 6068(h).⁵ All lawyers have a responsibility to 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. A lawyer may also be subject to appointment by a ~~court~~ tribunal⁶ 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~~ includes situations where⁷ the lawyer ~~could~~ would not be able to⁸ 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]⁹ to the lawyer as to be likely to impair the ~~client-lawyer~~ lawyer-client relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an

The Commission has rejected Model Rule paragraph (b)(4). The concept that a client's conduct is "repugnant" to a lawyer is divorced from the proper concern, which is the ability of the lawyer to competently and loyally represent the client and would give the lawyer a broad subjective basis for terminating representations. In its place, proposed paragraph (b)(4) identifies as a basis for permissive withdrawal conduct of the client that materials interferes with the lawyer's ability to act competently. The Commission's rejection was informed by the requirement of Bus. & Prof. C. § 6068(h).

Question: Do the same concerns over 1.16(b)(4) and the vague standard of "repugnant" in seeking to withdraw apply also to a decision whether to accept an appointment? Should section 6068(h), which speaks directly to the issue of rejecting a client's cause, also inform the Commission's decision with respect to this Rule? Note that the Commission revised Rule 1.16(b)(4) as follows:

the client ~~insists upon taking action that~~ by other conduct renders it unreasonably difficult for the lawyer ~~considers repugnant or with which~~ to carry out the ~~lawyer has a fundamental disagreement~~ employment effectively;

⁴ See footnote 3.

⁵ Drafters' Recommendation: Add a reference to B&P Code § 6068(h), which is also cited in the BOG's Pro Bono Resolution ("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';")

⁶ Drafters' Recommendation: Substitute "tribunal" for "court" as in the blackletter.

⁷ Drafters' Note: Change made to clarify that "good cause" is not necessarily limited to the situations identified in the Comment.

⁸ Drafters' Note: Change made to "would" to parallel the construction of the next clause in the sentence.

⁹ See footnote 3.

RRC – Rule 6.2
Rule – Draft 1 (10/26/09) – COMPARED TO MR 6.2 (2002)
November 6-7, 2009 Meeting; Agenda Item III.F.

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,¹⁰ 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 these Rules or the State Bar Act. See Rule 1.2(d).

¹⁰ **Drafters' Note:** We have added competence to the examples of duties that an appointed lawyer owes the client. Courts regularly refer to this duty in their opinions.

Rule 6.2 Accepting Appointments (Commission's Proposed Rule – Clean Version)

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.

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 & Professions Code section 6068(h). All lawyers have a responsibility to 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. 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 includes situations where the lawyer would not be able to 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 lawyer-client 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).

Table of Contents

August 27, 2009 McCurdy E-mail to Snyder, cc Chair, Vapnek, Tuft & Staff:	2
October 21, 2009 Snyder E-mail to McCurdy, cc KEM:.....	4
October 21, 2009 KEM E-mail to Snyder, cc McCurdy:.....	4
October 22, 2009 Snyder E-mail to KEM:.....	4
October 22, 2009 McCurdy E-mail to Snyder, cc KEM:.....	4
October 27, 2009 KEM E-mail to Snyder:.....	5
October 27, 2009 Snyder E-mail to Drafters (Foy & Ruvolo), cc Chair & Staff:	5
October 31, 2009 Kehr E-mail to RRC:.....	5
November 1, 2009 Sapiro E-mail to RRC List:	6

August 27, 2009 McCurdy E-mail to Snyder, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead assignments for this meeting.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. III.Z. Rule 1.2(a), (b) & (c) Advising Violation of Law (Draft #1 7/6/09 to be revised following July 2009 meeting) Codrafters: Peck, Tuft

Assignment: (1) a chart comparing proposed Rule 1.2 to MR 1.2; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

2. III.OO. Rule 3.5 Impartiality of the Tribunal [5-300, 5-320] (Post Public Comment Draft #4 dated 9/28/08) Codrafters: Peck, Ruvolo, Vapnek

Assignment: (1) a chart comparing proposed Rule 3.5 to MR 3.5; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. IV.E. Rule 6.1 Voluntary Pro Bono Service [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Foy, Julien, Ruvolo, Voogd

Assignment: (1) a chart comparing proposed Rule 6.1 to MR 6.1; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

2. IV.F. Rule 6.2 Accepting Appointments [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Foy, Ruvolo

Assignment: (1) a chart comparing proposed Rule 6.2 to MR 6.2; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

October 21, 2009 Snyder E-mail to McCurdy, cc KEM:

My computer is down. I'm getting concerned, however, about what I need to do for the November meeting which is swift approaching. Can you and/or Kevin send me whatever I need so that I can talk to Kevin about what I should do? I can't access prior RRC information and emails very well – searching is a nightmare.

October 21, 2009 KEM E-mail to Snyder, cc McCurdy:

I'm not sure where the agenda for November stands as we've been scrambling to package the 40+ rules in Batches 1, 2 and 3 for BOG by this Friday. I know Lauren is chiefly responsible for proofing what Randy, Mary, Mimi and I have done, and packaging all the latest drafts, so she hasn't been able to address the next agenda.

Best thing to do is look at the rolling agenda for September through November, which I've attached. Start w/ Batch 6 on page 10. You're down as lead drafter for Rules 6.1 (pro bono) and 6.2 (appt. of counsel). I would guess that at least one and probably both will be on the November agenda. The due date is next Wednesday, 10/28, at noon.

I've also attached Word files of the MR 6.1 & 6.2 Annotated, and separate files of their legislative histories that will give you the historical context of the rules.

You are already familiar and know much more about the history of the State Bar's pro bono resolution than anyone else on the Commission. I hope this helps.

October 22, 2009 Snyder E-mail to KEM:

I was finally able to open these and review them. It occurs to me, however, that an important history for the RRC's consideration of these rules would be the Board of Governors Resolution taken some years ago. (See attached.) COPRAC also endorsed voluntary pro bono service.

Unless you see some reason we should not do so, I would recommend that we put forth the recommendation of adopting these two rules to the drafting team and get their views. However, I note that the term "**voluntary**" pro bono service is somewhat at odds with the view expressed in the rule that "every lawyer has a **professional responsibility** to provide legal services to those unable to pay." (Emphasis added.)

Let me know what you think. I wonder if this will be categorized as "controversial"?

October 22, 2009 McCurdy E-mail to Snyder, cc KEM:

Sorry for not getting back to you. As Kevin mentioned, we've all been up against the wall formatting and compiling the RRC mega agenda item for the RAC & BOG. I had intended to forward the documents that Kevin has so helpfully took care of. We may be coming out with something further, but the rolling assignments agenda was intended to set the stage for the coming meetings, knowing that the RRC meeting dates were tightly spaced, and the work to be done was well defined.

October 27, 2009 KEM E-mail to Snyder:

I've attached a proposed revision of MR 6.2. Please circulate it to the drafters for their input.

October 27, 2009 Snyder E-mail to Drafters (Foy & Ruvolo), cc Chair & Staff:

Fellow drafters,

See attached for your consideration. Please let me know your input by tomorrow morning - then we can get this to Lauren by the deadline at noon.

Attached:

RRC - 6-2 - Rule - DFT1 (10-26-09) - Cf. to MR.doc

October 31, 2009 Kehr E-mail to RRC:

Here are my comments on this draft:

1. I have a problem with the MR at the outset b/c of its use of "seek to avoid" joined with the undefined "except for good cause". This seems to me to be a terribly open-ended basis for professional discipline. My preference would be to eliminate this rule and leave the topic to Rule 6.1, the lawyer's obligation to obey court orders, and § 6068(h). If others share my concern, my suggestion in the next paragraph might be an acceptable alternative.
2. If the Commission decides to keep 6.2 in some form, I would eliminate paragraph (c) because we do not have repugnance as the basis for terminating a representation under Rule 1.16. My suggestion would be to change paragraph (a) to permit the lawyer to seek to avoid an appointment for any reason that would serve as the basis for a lawyer to decline or terminate a representation under Rule 1.16. Some of those reasons are inapplicable because they can arise only in the context of a current relationship. An example would be 1.16(a)(3): "the client discharges the lawyer". Still, this seems to me to be the most efficient way of giving the lawyer proper latitude. I also would keep paragraph (b) although it is not in Rule 1.16. Finally, the use of "client" in paragraph (b) is incorrect because the person is not yet a client, but I suppose that can be overlooked. This would make the rule look something like this ---

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except:

(a) for a reason that would permit the lawyer to decline or terminate a representation under Rule 1.16; or

(b) if representing the client would be likely to result in an unreasonable financial burden on the lawyer.

November 1, 2009 Sapiro E-mail to RRC List:

1. I support the basic concept of this rule. However, I would reject the “repugnant” standard. If a lawyer is appointed to represent someone, the lawyer does not espouse the client or the client’s cause.
2. I would also reject the wording of proposed Comment [2]. Whether a client is unpopular or not should not permit a lawyer to refuse appointment by a tribunal.