

Lee, Mimi

RE: Rule 6.3
12/11&12/09 Commission Meeting
Open Session Agenda Item III.G.

From: Marlaud, Angela
Sent: Monday, November 23, 2009 10:25 AM
To: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwvapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: Final RRC Agenda Submission - 6.3 - III.G. - December 11-12, 2009 Agenda Materials
Attachments: RRC - [6-3] - E-mails, etc. - REV (12-08-09)-EXC.pdf; RRC - [6-3] - Dash, Intro, Rule, Comment, Clean, PubCom, Variations - DFT1.2(11-22-09).pdf

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Sunday, November 22, 2009 10:43 PM
To: Marlaud, Angela
Cc: Paul Vapnek; Raul L. Martinez; Ignazio J. Ruvolo; Jerome Sapiro; Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G
Subject: RRC - 6.3 - III.G. - December 11-12, 2009 Agenda Materials

Greetings Angela:

I've attached a single, scaled PDF file that includes the following documents for this Rule (please use this e-mail as the cover memo for the Agenda item):

1. Dashboard, Draft 1.2 (11/22/09)PV-KEM;
2. Intro, Rule & Comment Chart, Draft 4 (11/22/09)RD-KEM;
3. Public Comment Chart, Draft 2 (11/22/09)RD-KEM;
4. Rule 6.3, Draft 3 (6/8/09), clean.
5. State Variations (2009).

I have also attached an e-mail compilation excerpt of the drafters' recent exchange concerning this Rule. Please include this excerpt in the agenda package after the scaled PDF document.

Please let me know if you have any questions. Thanks,

Kevin

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Proposed Rule 6.3 [N/A] “Membership in Legal Services Organization”

(Draft #3, 6/8/09)

Summary: Proposed Rule 6.3 is essentially unchanged from Model Rule 6.3. The Commission has added a reference to a lawyer’s duty of confidentiality in order to emphasize that a lawyer’s membership in a legal services organization is subject to both the lawyer’s duty to avoid conflicts of interest and the duty to protect confidential client information.

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

(14 Members Total – votes recorded may be less than 14 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 _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

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

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.3* Membership in Legal Services Organization

November 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 6.3 is essentially unchanged from Model Rule 6.3. However, the Commission recommends adding to the Rule a reference to California's statutory duty of confidentiality in order to emphasize that a lawyer's membership in a legal services organization is subject both to the lawyer's duty to avoid conflicts of interest and the duty to protect confidential client information. The Commission does not recommend any further changes following public comment. See Public Comment Chart, below.

* Proposed Rule 6.3, Draft 3 (6/8/09).

<p align="center"><u>ABA Model Rule</u></p> <p>Rule 6.3 Membership in Legal Services Organization</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p>Rule 6.3 Membership in Legal Services Organization</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 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:</p>	<p>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:</p>	<p>The introductory clause to proposed Rule 6.3 is identical to that of the Model Rule.</p>
<p>(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or</p>	<p>(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</p>	<p>The reference to B & P Code § 6068(e)(1) has been added to emphasize the importance of maintaining client confidences and secrets.</p>
<p>(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.</p>	<p>(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.</p>	<p>Paragraph (b) is identical to Model Rule 6.3(b).</p>

<p style="text-align: center;"><u>ABA Model Rule</u></p> <p style="text-align: center;">Rule 6.3 Membership in Legal Services Organization Comment</p>	<p style="text-align: center;"><u>Commissions Proposed Rule</u></p> <p style="text-align: center;">Rule 6.3 Membership in Legal Services Organization Comment</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[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.</p>	<p>Comment [1] is identical to Model Rule 6.3, cmt. [1].</p>
<p>[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.</p>	<p>[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 confidential client information will be protected.</p>	<p>Comment [2] is based on Model Rule 6.3, cmt. [2]. The added clause at the end of this Comment is intended to emphasize the importance of maintaining client confidences and secrets.</p>

**Rule 6.3 Membership in Legal Services Organization.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	California Commission on Access to Justice	A			We wholeheartedly support the adoption of this Rule.	No response necessary.
1	COPRAC	A			COPRAC supports the adoption of proposed Rule 6.3 and the Comments to the Rule.	No response necessary.
4	Orange County Bar Association	D			<p>The OCBA does not believe it is necessary to adopt Rule 6.3. The OCBA has concerns that a disciplinary rule like this could chill attorneys from volunteering for certain legal services organizations.</p> <p>The OCBA suggests the proposed Rule be amended 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 would act to offset any disincentive for attorneys to participate in legal services organizations if the proposed rule is adopted, but still provide helpful guidance to volunteering attorneys.</p>	The Commission disagrees. The policy of encouraging lawyers to devote their time to legal services organizations outweighs the purported burdens the Commenter speculates the Rule will create.
2	San Diego County Bar Association Legal Ethics Committee	M			The proposed rule does not define "legal service organization(s)". Could not find a definition of that exact term anywhere in the proposed rules, the State Bar rules, the California Codes, the Federal Statutes, the Code of Federal Regulations, the ABA Rules, or the Model Rules. Also, the term is	The Commission disagrees. As the commenter noted, there is no readily available definition of "legal services organization." No other jurisdiction has seen the need to create such a definition. An attempt to define the term would run the risk of excluding from the Rule's <i>permissive</i> coverage

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 6.3 Membership in Legal Services Organization.
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>confusingly similar to other terms of art such as “legal service corporations” governed by federal law to provide legal services to the poor, qualified employer sponsored tax-exempt prepaid group legal plans under Internal Revenue Code sections 120 and 501(c) 20, and lawyer referral services, which are not intended to be included in the proposed rule.</p> <p>The proposed rule should be modified to include the intended definition of “legal service organization” by citing to the intended definition if one exists or defining the term in a new subsection (c) as follows:</p> <p>“(c) The term “legal service organization” means those defined in section(s) _____ of _____ [and/or the case of _____].”</p> <p>OR</p> <p>“(c) The term “legal service organization” means . . . “</p>	activities that should be encouraged.
5	Santa Clara County Bar Association	A			No comments added.	No response necessary.

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 confidential client information will be protected.

Rule 6.3: Membership in Legal Services Organizations

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. The text relevant to proposed Rule 1.8 is highlighted)

California. has no equivalent provision in its Rules of Professional Conduct.

Georgia: adds that there is "no disciplinary penalty for a violation of this Rule."

Illinois: Rule 6.3 applies to a "not-for-profit" legal services organization.

Michigan: Rule 6.3 adds extensive rules governing lawyer participation in "not-for-profit referral, service[s] that recommend legal services to the public."

New Jersey: Rule 6.3 requires that the organization comply with Rule 5.4 and states the limitation in (b) to include adverse effect on the interest of "a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client."

New York: DR 5-110 tracks the language of Rule 6.3.

Ohio: omits ABA Model Rule 6.3 because the Supreme Court of Ohio believes the substance of Rule 6.3 is addressed by other rules governing conflicts of interest, including Rule 1.7(a).

Texas: Rule 1.13 (entitled "Conflicts: Public Interest Activities") is similar to ABA Model Rule 6.3, but the Texas rule

also governs a lawyer's activities in a "civic, charitable or law reform organization." Texas Rule 1.13 omits the clause "notwithstanding that the organization serves persons having interests adverse to a client of the lawyer"

File List - Public Comments – Batch 4 – Proposed Rule 6.3

D-2009-269 COPRAC [6.3]

D-2009-276g Gina Dronet SDCBA Legal Ethics Comm [6.3]

D-2009-278c California Commission on Access to Justice [6.3]

D-2009-280c Legal Aid Assoc CA [6.3]

D-2009-283f Orange County Bar [6.3]

D-2009-287g Santa Clara County Bar [6.3]



**THE STATE BAR
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 6.3 – Membership in Legal Services Organization

Dear Mr. Sondheim:

The State Bar of California's Standing Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 6.3 – Membership in Legal Services Organization. COPRAC supports the adoption of proposed Rule 6.3 and the Comments to the Rule.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in cursive script that reads "Suzanne M. Mellard".

Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC)
BATCH #4, Comment Deadline October 23, 2009
SDCBA Legal Ethics Committee Deadline September 22, 2009
Subcommittee Deadline August 31, 2009

LEC Rule Volunteer Name(s): _____ Gina Dronet _____

Old Rule No./Title: _____ None _____

Proposed New Rule No./ Title: _____ 6.3 Membership in Legal Service Organizations _____

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [] No []

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Proposed Rule 6.3 deals with a subject not specifically addressed by the existing California Rules of Professional Conduct: a lawyer’s participation in a “legal service organization”.

Unfortunately, the proposed rule does not define “legal service organization(s)”. I could not find a definition of that exact term anywhere in the proposed rules, the State Bar rules, the California Codes, the Federal Statutes, the Code of Federal Regulations, the ABA Rules, or the Model Rules. (In addition, the term is confusingly similar to other terms of art such as “legal service corporations” governed by federal law to provide legal services to the poor, qualified employer

sponsored tax-exempt prepaid group legal plans under Internal Revenue Code sections 120 and 501 (c) 20, and lawyer referral services, which are not intended to be included in the proposed rule.)

Therefore, the proposed rule should be modified to include the intended definition of “legal service organization” by citing to the intended definition if one exists or defining the term in a new subsection (c) as follows:

(c) The term “legal service organization” means those defined in section(s) _____ of _____ [and/or the case of _____].

OR

(c) The term “legal service organization” means . . .

NOTE: Absent the intended definition, I cannot provide the proposed language for the modification. I believe a starting point is California Business & Professions Code section 6213 – 6215, which describe the organizations entitled to receive IOLTA funds under B&P sections 6210 – 6228, (legal service for the poor paid by interest earned on client trust accounts). For convenience, the relevant sections are set forth in the attachment. However, it is unclear whether the drafters intended to include those organizations that currently fall outside these sections because they are not subject to State Bar regulation but may be in the future. See, e.g., Frye v. Tenderloin Housing Clinic, Inc., (2006) 38 Cal.4th 23,40, which held that nonprofit public benefit corporations providing legal services to the public are not subject to existing regulations governing the practice of law by professional law corporations. The Supreme Court directed the State Bar to investigate such organizations and propose appropriate rules in 2006, which are being considered in the rules revision process.

CONCLUSIONS (pick one):

- We approve the new rule in its entirety.
- We approve the new rule with modifications.*
- We disapprove the new rule and support keeping the old rule.
- We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*
- We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

Continuation Pages; Dronet Comments
Proposed Rule 6.3 Membership in Legal Service Organization
Batch #4, Proposed Amendments to CRPC

Business & Professions Code sections describing intended legal service organizations:

6213. As used in this article:

(a) "Qualified legal services project" means either of the following:

(1) A nonprofit project incorporated and operated exclusively in California which provides as its primary purpose and function legal services without charge to indigent persons and which has quality control procedures approved by the State Bar of California.

(2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California which meets the requirements of subparagraphs (A) and (B).

(A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars (\$20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.

(B) The program shall have quality control procedures approved by the State Bar of California.

(b) "Qualified support center" means an incorporated nonprofit legal services center that has as its primary purpose and function the provision of legal training, legal technical assistance, or advocacy support without charge and which actually provides through an office in California a significant level of legal training, legal technical assistance, or advocacy support without charge to qualified legal services projects on a statewide basis in California.

(c) "Recipient" means a qualified legal services project or support center receiving financial assistance under this article.

(d) "Indigent person" means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.

(e) "Fee generating case" means a case or matter that, if undertaken on behalf of an indigent person by an attorney in private practice, reasonably may be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party. A case shall not be considered fee generating if adequate representation is unavailable and any of the following circumstances exist:

(1) The recipient has determined that free referral is not possible because of any of the following reasons:

(A) The case has been rejected by the local lawyer referral service, or if there is no such service, by two attorneys in private practice who have experience in the subject matter of the case.

(B) Neither the referral service nor any attorney will consider the case without payment of a consultation fee.

(C) The case is of the type that attorneys in private practice in the area ordinarily do not accept, or do not accept without prepayment of a fee.

(D) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with professional responsibility, referral will be attempted at a later time.

(2) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims.

(3) A court has appointed a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

(4) The case involves the rights of a claimant under a publicly supported benefit program for which entitlement to benefit is based on need.

(f) "Legal Services Corporation" means the Legal Services Corporation established under the Legal Services Corporation Act of 1974 (P.L. 93-355; 42 U.S.C. Sec. 2996 et seq.).

(g) "Older Americans Act" means the Older Americans Act of 1965, as amended (P.L. 89-73; 42 U.S.C. Sec. 3001 et seq.).

(h) "Developmentally Disabled Assistance Act" means the Developmentally Disabled Assistance and Bill of Rights Act, as amended (P.L. 94-103; 42 U.S.C. Sec. 6001 et seq.).

(i) "Supplemental security income recipient" means an individual receiving or eligible to receive payments under Title XVI of the federal Social Security Act, or payments under Chapter 3 (commencing with Section 12000) of Part 3 of Division 9 of the Welfare and Institutions Code.

(j) "IOLTA account" means an account or investment product established and maintained pursuant to subdivision (a) of Section 6211 that is any of the following:

(1) An interest-bearing checking account.

(2) An investment sweep product that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(3) An investment product authorized by California Supreme Court rule or order.

A daily financial institution repurchase agreement shall be fully collateralized by United States Government Securities or other comparably conservative debt securities, and may be established only with any eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities or other comparably conservative debt securities, shall hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.), and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars (\$250,000,000).

(k) "Eligible institution" means a bank or any other type of financial institution authorized by the Supreme Court.

6214. (a) Projects meeting the requirements of subdivision (a) of Section 6213 which are funded either in whole or part by the Legal Services Corporation or with Older American Act funds shall be presumed qualified legal services projects for the purpose of this article.

(b) Projects meeting the requirements of subdivision (a) of Section 6213 but not qualifying under the presumption specified in subdivision (a) shall qualify for funds under this article if they meet all of the following additional criteria:

(1) They receive cash funds from other sources in the amount of at least twenty thousand dollars (\$20,000) per year to support free legal representation to indigent persons.

(2) They have demonstrated community support for the operation of a viable ongoing program.

(3) They provide one or both of the following special services:

(A) The coordination of the recruitment of substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects in California.

(B) The provision of legal representation, training, or technical assistance on matters concerning special client groups, including the elderly, the disabled, juveniles, and non-English-speaking groups, or on matters of specialized substantive law important to the special client groups.

6214.5. A law school program that meets the definition of a "qualified legal services project" as defined in paragraph (2) of subdivision (a) of Section 6213, and that applied to the State Bar for funding under this article not later than February 17, 1984, shall be deemed eligible for all distributions of funds made under Section 6216.

6215. (a) Support centers satisfying the qualifications specified in subdivision (b) of Section 6213 which were operating an office and providing services in California on December 31, 1980, shall be presumed to be qualified support centers for the purposes of this article.

(b) Support centers not qualifying under the presumption specified in subdivision (a) may qualify as a support center by meeting both of the following additional criteria:

(1) Meeting quality control standards established by the State Bar.

(2) Being deemed to be of special need by a majority of the qualified legal services projects.

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

c/o State Bar of California - 180 Howard Street - San Francisco, CA 94105 - (415) 538-2251- (415) 538-2524/fax

October 23, 2009

Audrey Hollins
The State Bar of California
Office of Professional Competence,
Planning and Development
180 Howard Street
San Francisco, CA 94105

Re: Comment on proposed Rules 6.3, 6.4, 1.8.6, and 1.8.7

Dear Ms. Hollins:

On behalf of the California Commission on Access to Justice, I am writing to provide input to the rules identified above.

- ~~• **Proposed Rule 1.8.6** The Access Commission recommends a minor revision to Rule 1.8.6 to add to the exception those non-profit charitable organizations which represent clients without a fee.~~

~~This rule, titled "Payments Not From Client", addresses the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company. The rule requires "informed written consent" from the client. The proposed Rule includes an exception that is in the current California rule (3-310[F]), but is not in the ABA rule. The exception says that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." The rationale for this exception is "...because the concerns addressed by the Rule do not come into play in those situations." While the exception will cover attorneys working with County Counsel who represent local school districts, and will also cover the Public Defender, it fails to cover legal services programs.~~

~~The Commission's stated rationale for the exception -- enhancing access to justice -- also applies to legal services programs. If this rule goes into effect, legal aid programs would have to fully inform each client that any fees are paid by someone else, and then get the client's written consent, before rendering any service. Not only would this shut down hotlines and other phone-based services, but it would unnecessarily slow down in-person services and result in fewer low-income people receiving services. And nothing would be gained by making this Rule applicable to legal services programs. Therefore, the Access Commission urges that this rule be amended by including in the exception those non-profit charitable organizations which represent clients without a fee.~~

HON. STEVEN K. AUSTIN
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Pittsburg

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U.S. District Court, Central District of California
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HON. DOUGLAS P. MILLER
Court of Appeal, Fourth Appellate District
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HON. RONALD ROBIE
Court of Appeal, Third Appellate District
Sacramento

JOHN SNETSINGER
California Polytechnic State University
San Luis Obispo

ERIC WAYNE WRIGHT
Santa Clara University School of Law
Santa Clara

MARY LAVERY FLYNN
Director, Legal Services Outreach
State Bar of California
San Francisco

- ~~**Proposed Rule 1.8.7** – The Access Commission urges that this Rule on Aggregate Settlements be modified to permit attorneys to obtain prior approval from clients. While the proposed rule is only slightly more difficult than existing rule 3-310 (D), even the existing rule does not comport with the reality of aggregate litigation. When a suit is filed on behalf of multiple plaintiffs, such as employees, tenants, etc., the rule would require full, extensive disclosure to each client of considerable information, and the informed written consent of each client. When such a case is settled, for example on the courthouse steps, it is very common that not all of the clients are present. Therefore, the settlement would be delayed while all of the clients are located, the agreement is perhaps translated, and written consent is obtained from all. We believe that such a process would unduly restrict and even discourage potential settlements. Therefore, we believe that the Rule should permit attorneys to obtain prior consent to such settlements, and that a follow-up notification be required within a reasonable amount of time after the settlement is finalized.~~
- **Proposed Rule 6.3** – This proposed rule has not existed in California in the past, and the Access Commission strongly supports its inclusion in our Rules of Professional Conduct. The rule as drafted is excellent, and it will help provide valuable guidance and protection for those wishing to serve on the boards of legal services programs. The mission of legal aid programs to serve the legal needs of low-income communities will often be in conflict with the interests of large corporations. But that should not be a barrier for an attorney who makes his or her living as a corporate attorney who wishes to provide public service by joining a legal aid board. We wholeheartedly support the adoption of this Rule.
- ~~**Proposed Rule 6.4** – Likewise, the Access Commission strongly supports the addition of proposed Rule 6.4. This Rule will encourage attorneys to participate in law reform organizations, and provides a reasonable procedure for them to follow whenever their clients might be benefited by the work of that organization. Working to improve the law is an important role for lawyers, and it is critical that lawyers feel that they can be involved in these activities without fearing ethical problems because of the potential impact on clients.~~

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Respectfully submitted,



Hon. Steven K. Austin
Co-Chair

"The Unified Voice of Legal Services"



VIA FACSIMILE (415) 538-2171

October 22, 2009

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Public Comment on proposed Rules 6.3, 6.4, 1.8.6 and 1.8.7

Dear Ms. Hollins:

I am writing on behalf of the Legal Aid Association of California (LAAC), and our member legal services nonprofit organizations, with comments on four of the proposed Rules of Professional Conduct.

Founded in 1984, the Legal Aid Association of California (LAAC) is a non-profit organization created for the purpose of ensuring the effective delivery of legal services to low-income and underserved people and families throughout California. LAAC is the statewide membership organization for more than 70 non-profit legal services organizations in the state.

Our members provide high-quality legal services to our state's most vulnerable populations. These services to low-income and other underrepresented individuals form an essential safety net in California and often ensure that the programs' clients have access to life's basic necessities, such as food, safe and affordable housing, freedom from violence, health care, employment, economic self-sufficiency, and access to the legal system.

Comments on Proposed Rule 6.3 - SUPPORT

LAAC supports the proposed Rule 6.3 on lawyers serving as a member or director of a legal services organization.

Comments on Proposed Rule 6.4 - SUPPORT

LAAC supports proposed Rule 6.3 regarding attorneys serving as directors, officers or members of an organization involved in the reform of the law or its administration.

Comments on Proposed Rule 1.8.6 – SUPPORT IF AMENDED

This rule address the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company and requires “informed written consent” from the client. The proposed rule includes an exception that is in the current California rule (3-310[F]), such that “no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public.” This exception would cover situations such as a County Counsel who represents local school districts and Public Defender programs, but does not cover legal services nonprofit corporations.

The Commission’s stated rationale for the exception, which it identifies as enhancing access to justice, is “because the concerns addressed by the Rule do not come into play in those situations.” The same is true for legal services nonprofit organizations that represent clients without a fee. Legal services nonprofit corporations be included in this exception; without this, there is a significant risk that legal services nonprofits would be forced to eliminate critical hotlines and other phone-based services, that currently serve many low-income clients and could also slow down the provision of in-person assistance, such that many fewer low-income Californians would be able to receive the vital legal help they need. LAAC strongly recommends that the exception be modified to include non-profit charitable organizations that represent clients without a fee, as well as the public agencies already included in the proposed rule. LAAC supports proposed Rule 1.8.6 with this amendment.

Comments on Proposed Rule 1.8.7 - OPPOSE

While LAAC understands the ethical considerations that form the basis for this rule, the construct of the proposed rule simply does not comport with the reality of aggregate litigation. The requirements in the proposed rule would likely result many fewer such cases being resolved through settlement or settlements being significantly delayed. This important topic requires additional discussion and a rule that actually permits the efficient settlement of aggregate cases. The Commission should revisit and modify this proposed rule accordingly, including returning to the language of the ABA Model Rule, which requires informed consent, in a writing signed by the client.

Thank you for your kind consideration of these comments.

Sincerely,


Julia R. Wilson
Executive Director

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, October 23, 2009 2:46 PM
To: Hollins, Audrey
Cc: 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'
Subject: Orange County Bar Comments Re Rule Revisions
Attachments: OCBA Comments on Rules Due Oct 23 2009.pdf

Dear Ms. Collins:

Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.

Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.

Rule 1.8.7

Aggregate Settlements [3-310(D)]

Rule 1.15

Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

Rule 3.3

Candor Toward the Tribunal [5-200]

Rule 3.6

Trial Publicity [5-120]

Rule 3.7

Lawyer as Witness [5-210]

Rule 6.3

Membership in Legal Services Organization [n/a]

Rule 6.4

Law Reform Activities Affecting Client Interests [n/a]

Trudy C. Levindofske, CAE

Executive Director

Orange County Bar Association

Orange County Bar Association Charitable Fund

(949)440-6700, ext. 213

MEMORANDUM

Date: October 13, 2009

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association (“OCBA”)

Re: **Proposed Rule 6.3 – Membership in Legal Services Organization**

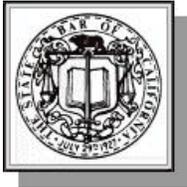
Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following concerning the subject proposed Rule:

The OCBA does not believe it is necessary to adopt Rule 6.3, which is essentially Model Rule 6.3, plus the addition, in two places, of language that serves as a reminder that emphasizes the importance of maintaining client confidences and secrets. The OCBA has concerns that a disciplinary rule like this could chill attorneys from volunteering for certain legal services organizations.

If the Bar decides to adopt proposed Rule 6.3, the OCBA notes the following with respect to the proposed language:

The Rule as worded seems to implement the desired incentive – encouraging lawyers to support and participate in legal services organizations – while providing a non-controversial proviso to protect client confidences. It also safeguards against conflicts by having the lawyer recuse himself or herself if the decision or action of the organization may have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer. The OCBA suggests the proposed Rule be amended 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 would act to offset any disincentive for attorneys to participate in legal services organizations if the proposed rule is adopted, but still provide helpful guidance to volunteering attorneys.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

- Yes
 No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- [Rule 1.8.6 \[3-310\(F\)\]](#)
- [Rule 1.8.7 \[3-310\(D\)\]](#)
- [Rule 1.15 \[4-100\]](#)

- [Rule 3.3 \[5-200\]](#)
- [Rule 3.6 \[5-120\]](#)
- [Rule 3.7 \[5-210\]](#)

- [Rule 6.3 \[n/a\]](#)
- [Rule 6.4 \[n/a\]](#)
- [Batch 4 Discussion Draft \(All rules\)](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

OFFICE USE ONLY.

* Date

10/30/2009 

Period

PC

File :

D-2009-287g Santa Clara County Bar [6.3].pdf

Commented On:

Specify:

Submitted via:

Online

* Required

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November 9, 2009 McCurdy E-mail to Drafters (Vapnek, Martinez, Ruvolo & Sapiro), cc Chair, Vice-Chairs & Staff:

Rule 6.3 Drafting Team:

This message provides the assignment background materials for Rule 6.3 on the December agenda. **The assignment deadline is Sunday, November 22, 2009.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (staff prepared template)
4. introduction (text of public comment version of the introduction – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (version of chart as issued for public comment)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attachments:

- RRC - [6-3] - Dashboard - ADOPT - DFT1 (11-05-09)ML.doc
- RRC - [6-3] - Intro, Rule & Comment Explanation - DFT3 (06-08-09)RD.doc
- RRC - [6-3] - Rule - DFT3 (06-08-09) - CLEAN-LAND.doc
- RRC - [6-3] - Public Comment Chart - By Commenter - DFT1 (11-09-09)RD.doc
- RRC - [6-3] - Public Comments (11-09-09).pdf
- RRC - [6-3] - State Variations (2009).doc

November 19, 2009 Vapnek E-mail to Drafters, cc KEM:

I have reviewed all the materials for this Rule. Most commenters approve. One suggests that we add a definition of "legal service organization." If we recommend that, I propose it be placed in the definitions rule 1.0.1. Another suggests we add language from the Georgia version of this rule to the effect "there is no disciplinary penalty for a violation of this Rule." I don't recall our doing anything like that for any other rule. Any comments or suggestions? Please respond as soon as you can.

November 19, 2009 Martinez E-mail to Drafters, cc KEM:

Our Rule 1.7 doesn't fit here because we don't have the "material limitations" concept of the ABA counterpart. I'm not so sure the ABA version of 1.7 fits either because that rule contemplates multiple clients and a lawyer serving on a board under Rule 6.3 doesn't have a client per se. We may want to say something different than referring to 1.7 such as "the decision or action would be incompatible with the lawyer's duty of loyalty to a client." This way we don't have to refer to Rule 1.7.

As for defining "legal services organization," the devil is in the details. The Annotated ABA rules say this seems to mean "a pro bono organization that provides legal services to the disadvantaged."

I don't agree with the Georgia approach. There is no reason to single this rule out for special treatment.

November 19, 2009 KEM E-mail to Drafters:

1. First, I think the citation to 1.7 is fine. The gist of 1.7 concerns current client conflicts and, even w/o the material limitation" language of MR 1.7, the kind of association contemplated in 6.3 would come within one of the categories of 1.7(d) [i.e., 3-310(B)].

2. I'm not sure we should add a definition of "legal services organization". The definition would necessarily have to be very broad and I would be afraid we would inadvertently leave out an organization that should be covered. The Commenter noted that she didn't find a definition and I would hate to create one out of whole cloth. This is a term that is better left undefined.

3. Georgia does not impose discipline for violations of any of the 6 series rules. If we were to follow Georgia's lead, we should identify the available discipline for every Rule, as Georgia does. For example, Georgia adds to Rule 1.1 (competence) the following: "The maximum penalty for a violation of this Rule is disbarment." See http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_11_competence/

I don't think that would fly well out here and recommend against it. I don't think it is necessary to include the statement as to any of the other 6 series rules either.

The link to the Georgia Rules is:

http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/

Interestingly, Georgia Rule 1.17 (sale of law practice) provides: "The maximum penalty for a violation of this Rule is a public reprimand."

For 1.8, it provides: "The maximum penalty for a violation of Rule 1.8(b) is disbarment. The maximum penalty for a violation of Rule 1.8(a) and 1.8(c)-(j) is a public reprimand."

For 1.7, 1.9, 1.10 and 1.11, the maximum penalty is disbarment. However, if a former judge violates Rule 1.12, the max is a public reprimand. Very curious.

November 19, 2009 Martinez E-mail to KEM, cc Drafters:

1. If we refer to Rule 1.7, we should refer more specifically to subparagraph (d) and take the mystery out of the rule (or else give MCLE credit for trying to decipher the rule).
2. Your second point is the very definition of an overly broad statute--one that reaches both intended and unintended targets, simply to make sure nothing is missed. Why use the term "legal services organization" if no one can agree on what it means? For example, does it include for-profit organizations or only nonprofits? Does it include legal referral service organizations?

November 20, 2009 KEM E-mail to Martinez, cc Drafters:

I continue to believe that the reference to 1.7 is fine. It doesn't have to be limited to 1.7(d). The main point of the reference to 1.7 is to remind lawyers of their ongoing duties owed current clients under all of 1.7, not just the specific provisions outlined in 1.7(d).

I think any attempt to define "legal services organization" is a fool's errand. I feel the same way about changing the term in our rule and then trying to explain why we changed the term (we would have to give a definition just to explain why we changed the term and then define whatever our new term is). Again, this is a "can do" rule.

Similar to my recommendation re 6.4, I think we should circulate our exchange to the Commission and just vote on the Rule w/o debate, unless the other drafters have concerns/observations that you and I have not raised. I would also provide the Commission members w/ a copy of Annotated Rule 6.3 that I circulated in my previous e-mail.

November 22, 2009 Vapnek E-mail to Drafters, cc KEM:

My vote is to leave the reference to rule 1.7 as is, without being more specific. Also, I agree that trying to define "legal services organization" would take much too long without any benefit to this rule or any other rule. I agree that our exchange should be circulated to the Commission with the other material (that I will work on this afternoon and evening) for a final decision by the Commission.

November 22, 2009 Ruvolo E-mail to Drafters, cc KEM:

I agree.

November 22, 2009 Vapnek E-mail to Drafters, cc KEM:

Here is the dashboard for Rule 6.3. If there are no comments or suggestions for change, I will send on the package later today.

November 22, 2009 KEM E-mail to Vapnek & Drafters:

To follow up on my earlier e-mail, I've attached the following:

1. Dashboard, Draft 2.1 (11/22/09)PV-KEM;
2. Intro, Rule & Comment Chart, Draft 4 (11/22/09)RD-KEM;
3. Public Comment Chart, Draft 2 (11/22/09)RD-KEM;
4. Rule 6.4, Draft 3 (6/8/09), clean.
5. State Variations (2009).

Some notes:

1. Dashboard: I've added the Commission on Access to Justice as a stakeholder, as we have been doing for all the Rules in the 6 series (public service).
2. Intro, Rule & Comment Chart:
 - a. Intro: I've changed the date and parenthetical, and added a sentence at the end of the Introduction.
 - b. Rule Chart: Added some explanations.
 - c. Comment Chart: Added an explanation for Comment [1] (stating the obvious).
3. Public Comment Chart. I've taken a stab at responses. Please review carefully.
4. Rule 6.4, draft 3: I've created this based on the changes to the Model Rule. We typically include a clean version.
5. State Variations. Again, we typically include these.

Please let me know if you are OK with the foregoing. If you are OK, I'll package the documents in a single PDF file and get them to Angela. As you know, she's pretty much on her own and I'd like us to do as much as we can to make the daunting task of an agenda mailing a little easier.

Please let me know if you have any questions.

November 22, 2009 Vapnek E-mail to KEM, cc Drafters:

The changes you have made are fine. Thanks. I would be grateful if you sent the package to Angela, along with our email exchange on this rule so the Commission can see what we have been discussing.