

Lee, Mimi

**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; pwwapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net  
**Subject:** Final RRC Agenda Submission - 6.4 - III.H. - December 11-12, 2009 Agenda Materials  
**Attachments:** RRC - [6-4] - E-mails, etc. - REV (12-08-09)-EXC.pdf; RRC - [6-4] - Dash, Intro, Rule, Comment, Clean, PubCom, Variations - DFT1.2(11-22-09).pdf

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**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 - 6.4 - III.H. - 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 6.4, 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 6.4 [N/A]

## “Law Reform Activities Affecting Client Interests”

(Draft #3, 6/8/09)

**Summary:** Proposed Rule 6.4 is essentially unchanged from Model Rule 6.4. The Commission recommends adding the phrase “or adversely affected” to the rule to require disclosure to the organization both the benefits and the adverse effects on a client of a decision of the organization in which the lawyer participates. A similar change is proposed in the Comment. A reference to a lawyer’s duty of confidentiality was also added.

### Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" 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)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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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

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Commission on Access to Justice

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. The Commission rejected the suggestions in the belief that rejection of the Rule would send a negative message relating to the encouragement of lawyers to participate in law reform activities.

Not Controversial

## COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

### Proposed Rule 6.4\* Law Reform Activities Affecting Client Interests

November 2009

(Draft rule following consideration of public comment.)

#### *INTRODUCTION:*

Proposed Rule 6.4 is essentially unchanged from Model Rule 6.4. The Commission recommends adding the phrase “or adversely affected” to the rule to require disclosure to the organization of both the benefits and the adverse effects on a client of a decision by the organization in which the lawyer participates. A similar change is proposed in the Comment. A reference to the lawyer’s duty of confidentiality (Rule 1.6 and Business and Professions Code § 6068(e)(1)) was also added. The Commission does not recommend any further changes following public comment. See Public Comment Chart, below.

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\* Proposed Rule 6.4, Draft 3 (6/8/09).

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 6.4 Law Reform Activities Affecting Client Interests</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 6.4 Law Reform Activities Affecting Client Interests</b></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 <u>or adversely affected</u> by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.</p>	<p>The Rule has been amended by adding the phrase “or adversely affected,” requiring disclosure of both benefits and adverse effects on the affected lawyer’s client.</p>

\* Strikeouts and underlines reflect changes to the Model Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 6.4 Law Reform Activities Affecting Client Interests</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 6.4 Law Reform Activities Affecting Client Interests</b></p> <p align="center"><b>Comment</b></p>	<p 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 <del>should be mindful of</del> <u>must comply with the lawyer's</u> obligations to clients under other Rules <u>and statutes</u>, particularly Rules 1.6 and 1.7, <u>and Business and Professions Code § 6068(e)(1)</u>. 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 <u>or adversely affected</u>.</p>	<p>The Model Rule's phrase, "a lawyer should be mindful," was viewed as not sufficiently forceful. Instead, the mandatory "a lawyer must comply with the lawyer's obligations" has been substituted to emphasize the lawyer's important obligations, particularly those involving loyalty (Rule 1.7) and confidentiality (Rule 1.6), which has been added.</p> <p>The same change as was made to the Rule concerning disclosure has been made to the Comment.</p>



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

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	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 disagrees. The policy of encouraging lawyers to participate in law reform activities outweighs the purported burdens the Commenter speculates the Rule will create; The "material" limitation on the benefit or adverse effect that might result should avoid that result.
2	California Commission on Access to Justice	A			We strongly support the addition of proposed Rule 6.4.	No response necessary.
7	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

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

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

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<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"> <li>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.</li> <li>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."</li> <li>3. Amend the Comment so it reads as follows:  "[1] Lawyers involved in organizations</li> </ol>	<p>"material" limitation on the benefit or adverse effect that might result should avoid that result.</p> <ol style="list-style-type: none"> <li>1. As to the Commenter's suggestion that the rule provide, "There is no disciplinary penalty for a violation of this Rule," there are two responses: First, there is no discipline intended by the first sentence's language, which uses the word "may." Second, in the second sentence, not only must there be a material effect on a client of the lawyer, the lawyer must "know." If, however, the lawyer does "<u>know</u>" of such a <u>material</u> effect but chooses not to disclose it, then the lawyer should be subject to discipline. Law reform activities can involve work that can have a substantial effect on the law. The second sentence is intended to protect the integrity of that process, but it is not an onerous requirement.</li> <li>2. The Commission disagrees. The proposed revision does not add to what is already in the Rule.</li> <li>3. The Commission disagrees. The proposed Comment would not add to what is already state in the Comment. Instead, it would diverge unnecessarily from the Model Rule.</li> </ol>

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

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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. “</p>	
3	Orange County Bar Association	D			<p>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.</p> <p>If the Bar decides to adopt proposed Rule 6.4, the OCBA respectfully suggests adopting</p>	<p>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 “material” limitation on the benefit or adverse effect that might result should avoid that result.</p>

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

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<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>As to the Commenter’s suggestion that the rule provide, “There is no disciplinary penalty for a violation of this Rule,” there are two responses: First, there is no discipline intended by the first sentence’s language, which uses the word “may.” Second, in the second sentence, not only must there be a material effect on a client of the lawyer, the lawyer must “know.” If, however, the lawyer “knows” of such an effect but chooses not to disclose it, then the lawyer should be subject to discipline. Law reform activities might involve work that can have a substantial effect on the law. The second sentence is intended to protect the integrity of that process, but it is not an onerous requirement.</p>
1	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>The Commission disagrees. The commenter’s concern with the lawyer’s duty of confidentiality is already adequately addressed by the Commission’s revision of the Model Rule comment to provide that a lawyer “<i>must comply</i> with the lawyer’s obligations under ... Business &amp; Professions Code section 6068(e)(1),” instead of the Model Rule’s statement that the lawyer “should be mindful of ...”</p>

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

TOTAL = \_\_ Agree = \_\_  
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<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 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</p>	

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

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Disagree = \_\_  
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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 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. 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</p>	<p>The Commission disagrees. The commenter’s concern with the lawyer’s duty of confidentiality is already adequately addressed by the Commission’s revision of the Model Rule comment to provide that a lawyer “<i>must comply</i> with the lawyer’s obligations under ... Business &amp; Professions Code section 6068(e)(1),” instead of the Model Rule’s statement that the lawyer “should be mindful of ...”</p>

**Rule 6.4 Law Reform Activities Affecting Client Interests.  
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TOTAL = \_\_ Agree = \_\_  
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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, 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.	
4	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 Committee did not make the change. The sentence is not impractical. For the second sentence to apply, not only must there be a <u>material</u> effect on a client of the lawyer, the lawyer must " <u>know</u> " of that effect. Law reform activities might involve work that can have a substantial effect on the law. The second sentence is intended to protect the integrity of that process, but it is not an onerous requirement.



## Rule 6.4 Law Reform Activities Affecting Client Interests

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.



## 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. The text relevant to proposed Rule 1.8 is highlighted)

**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."



## **File List - Public Comments – Batch 4 – Proposed Rule 6.4**

D-2009-275e State Bar OCTC [6.4]

D-2009-276h Erin Penning SDCBA Legal Ethics Comm [6.4]

D-2009-278d California Commission on Access to Justice [6.4]

D-2009-280d Legal Aid Assoc CA [6.4]

D-2009-283g Orange County Bar [6.4]

D-2009-284 Jeffrey Jaech [6.4]

D-2009-285b Ted Cassman CACJ [6.4]

D-2009-287h Santa Clara County Bar [6.4]

D-2009-288 Business Law Section [6.4]





**THE STATE BAR OF  
CALIFORNIA**

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October 20, 2009

Randall Difuntorum, Director  
Office of Professional Competence & Planning  
State Bar of California  
180 Howard Street  
San Francisco, California 94105

Re: Comments of the Office of the Chief Trial Counsel to Proposed  
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in July 2009. Here are our comments:

**~~Rule 1.8.6 Payments Not from Client.~~**

- ~~1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.~~

**~~Rule 1.8.7 Aggregate Settlements.~~**

- ~~1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.~~

**~~Rule 1.15 Handling Funds and Property of Clients and Other Persons.~~**

- ~~1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.~~
- ~~2. OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 – 14.~~
- ~~3. OCTC suggests that the term "inviolable" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.~~
- ~~4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.~~
- ~~5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4<sup>th</sup> 430, 439; *Obrien v. Jones* (2000) 23 Cal.4<sup>th</sup> 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.~~
- ~~6. OCTC is concerned that the language of rule 1.15(l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able~~

~~to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)~~

### ~~Rule 3.3 Candor Toward the Tribunal.~~

- ~~1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an "attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth." Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California's current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.~~
- ~~2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for "knew or reasonably should have known." (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation~~
- ~~3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney's belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model~~

~~Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5 200.~~

4. ~~OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." (Butler v. State Bar (1986) 42 Cal.3d 323, 329.)~~

**Rule 6.4 Law Reform Activities Affecting Client Interests.**

1. OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.

Again, thank you for the opportunity to comment on these rules.

Very truly yours,



Russell G. Weiner  
Interim Chief Trial Counsel

**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): Erin Penning

Old Rule No./Title: None

Proposed New Rule No./ Title: Rule 6.4. Law Reform Activities Affecting Client Interests

**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 [XX] 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 [XX]

In some instances, it would be impossible for a lawyer to comply with Proposed Rule 6.4 without revealing client confidences in violation of Rule 1.6 and Cal. Bus & Prof. Code § 6068(e).

California Proposed Rule 6.4 recites in relevant part: “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.**” (Emphasis added.)

However, 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 mere 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. In addition, 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.

In such instances when a lawyer could not make the disclosure required by Proposed Rule 6.4 without disclosing client confidences, an option must be permitted. Proposed Rule 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.

(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 [ XX ]

In accordance with the comments under section (2), above, Proposed Rule 6.4 could be worded as follows (addition in **bold, underline text**):

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, **if not prohibited by the lawyer’s obligations to clients under other Rules and statutes**, but need not identify the client. **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.**

In the alternative, Proposed Rule 6.4 could remain worded as currently proposed but be accompanied by a second Comment worded as follows:

Comment [2]

If disclosure is prohibited by the lawyer’s obligations to any client under other Rules and statutes, then a lawyer cannot provide the disclosure required. If disclosure is prohibited, or if the lawyer 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.

The addition of “Comment [2]” may be sufficient to rectify the problem here, given that Rule 6.4 begins, “A lawyer **may** serve as a director, officer or member of an organization involved in reform of the law... .” The Rule is not unequivocally permissive. “May” implies that there could be limits, and those limits could be spelled out in the comments.

Another concern is the impact this 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 rule, rather than limiting it to officers and directors of the Conference leads to a questionable outcome.

(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 [  ]

N/A

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

See comments in Section (2), above.

**CONCLUSIONS (pick one):**

[  ] We approve the new rule in its entirety.

[XX] 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.

# 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  
Chair  
Superior Court of Contra Costa County  
Pittsburg

KENNETH W. BABCOCK  
Vice Chair  
Public Law Center  
Santa Ana

RAMON ALVAREZ  
Alvarez Lincoln/Mercury  
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Law Office of Robin Crawford  
Pacifica

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California State Automobile Association  
San Francisco

ERIKA FRANK  
California Chamber of Commerce  
Sacramento

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U.S. District Court, Central District of California  
Santa Ana

HON. JAMES E. HERMAN  
Superior Court of Santa Barbara County  
Santa Maria

MICHELLE MANZO  
McDermott, Will & Emery LLP  
Los Angeles

SYLVIA MARTIN-JAMES  
Retired, Riverside Unified School District  
Riverside

HON. DOUGLAS P. MILLER  
Court of Appeal, Fourth Appellate District  
Riverside

HON. NHO TRONG NGUYEN  
Superior Court of Orange County  
Westminster

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Clarence & Dyer LLP  
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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 6.4 – Membership in Law Reform Activities Affecting Client Interests**

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 6.4, which is essentially Model Rule 6.4, with one proposed minor exception. The OCBA has concerns that a disciplinary rule like this could chill attorneys from volunteering for organizations addressing law reform.

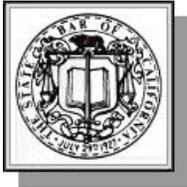
If the Bar decides to adopt proposed Rule 6.4, the OCBA notes the following with respect to the proposed language.

As it currently stands, this Rule would be the same as the Model Rule, except in two places it would add the language “or adversely affected” to the duty of disclosure. The OCBA respectfully suggests adopting language like that used by Florida, namely – “materially affected” instead of “materially benefitted or adversely affected.”

There are two reasons for this. First, proposed Rule 6.3(b) uses the phrasing “material adverse effect,” so, for consistency, the Florida wording for Rule 6.4 seems more appropriate. Second, the Florida wording may prove more workable because it requires disclosure if there is either a material benefit or a material adverse effect, as opposed to California, which would require disclosure of any possible adverse effect – a standard that may lead to excessive disclosures, diluting the effect of significant disclosures and ultimately discouraging participation in these organizations.

Thus, for consistency with Rule 6.3 and to avoid potentially excessive disclosures, the OCBA proposes to adopt Rule 6.4, but replace “materially benefitted or adversely affected” with “materially affected” in each of the two instances where it is used.

The OCBA also 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.” As was noted with proposed Rule 6.3, 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.



# 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 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[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.

## Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We **do not** accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the  next to **Attachment**.

Attachment 

file: [Rule 6.4 102309\\_1.PDF \(53k\)](#)

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**Proposed comment re Rule 6.4:**

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 Executive Committee appears to be an organization described by proposed Rule 6.4, one "involved in the reform of the law or its administration." Most Executive Committee members are attorneys with private practices, and many of the reforms and other issues addressed by the Executive Committee naturally "may" materially affect clients of many of the members. If the last sentence of the proposed rule is enacted, Executive Committee members, under threat of disciplinary action, would need to make regular boilerplate disclosures to the Executive Committee, even though all members already are aware of the obvious fact that the matters before the Executive Committee may affect members' clients. These disclosures would be meaningless acts, and may effectively relieve a member from disclosing a particular client interest directly and significantly relevant to the matter being considered by the Executive Committee. Furthermore, such disclosures would not in any way protect or benefit the attorneys' clients, which is the presumed purpose of the Rules. If an organization were to decide that such disclosures are necessary to preserve the integrity of its process, then the organization could adopt and enforce its own disclosure requirement.

Alternatively, the last sentence of the proposed rule could be limited to apply only to organizations that have the authority to change the law or its administration. If so limited, then the participants in the many bar committees, which have merely advisory or advocacy powers, need not be concerned about being disciplined for failing to make obvious and meaningless disclosures to the committees.

# OFFICE USE ONLY.

\* Date

10/23/2009



Period

PC



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D-2009-284 Jeffrey Jaech [6.4].pdf

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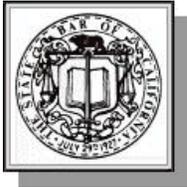
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\* Required



# 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 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[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.

## Attachments

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Attachment 

file: [6.4.pdf \(57k\)](#)

Attachment 

Attachment 



### Receive Mass Email?

To receive e-mail notifications regarding the rules revision project, check the box indicating that you would like to be added to the Commission's e-mail list and enter your email address below. Email addresses will be used only to deliver the requested information. We will not use it for any other purpose or share it with others.

#### **6.4 – Law Reform Activities Affecting Client’s Interests.**

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.

# OFFICE USE ONLY.

\* Date

10/23/2009 

Period

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File :

D-2009-285b Ted Cassman CACJ [6.4].pdf

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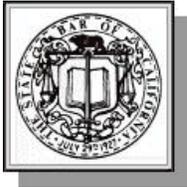
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# THE STATE BAR OF CALIFORNIA

## 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.

Rule 6.4 Law Reform Activities Affecting Client Interests [n/a]

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.**

This rule as proposed should not be adopted. The Santa Clara County Bar Association 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. 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, 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.

# OFFICE USE ONLY.

\* Date

10/30/2009 

Period

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File :

D-2009-287h Santa Clara County Bar [6.4].pdf

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## BUSINESS LAW SECTION

THE STATE BAR OF CALIFORNIA

November 4, 2009

State Bar Special Commission for the Revision of the Rules of Professional Conduct  
c/o Ms. Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Dear Commissioners:

This letter commenting on Proposed Rule 6.4 is provided by the Executive Committee (“Executive Committee”) of the State Bar of California Business Law Section (the “Section”). Sections of the State Bar are established under the Rules of the State Bar to serve the profession, the public, and the legal system. (See Rules of the State Bar, Title 3, Division 2, Chapter 1) Each year, the Section proposes legislation, upon the approval of the State Bar Board of Governors, to the California Legislature to reform and improve the law. It also provides comments and recommendations on legislation proposed by others at the state and federal level as well as on corresponding administrative proposals, all in accordance with review and approval procedures approved by the State Bar Board of Governors. The Section also comments on uniform codes and regulations at the state and national level, all in accordance with review and approval procedures approved by the State Bar Board of Governors. Other Sections of the State Bar engage in similar activities.

The Section is administered by an Executive Committee of 16 members, which reviews and approves all proposed legislation and legislative and regulatory comments. The Section also has 13 standing committees and other ad hoc committees from time to time, many of which initiate such participation in the legislative process under the umbrella of the Section. The approximately 200 members of these committees all volunteer their time and energy to the activities of the Sections and are expert in and interested in the area of law covered by the committee. Often, members are leaders in their field. The members come from solo or small firms, large firms, in house corporate counsel, law school faculties and legal departments of government agencies. Committee members must have five years of legal experience before they are eligible to serve on those committees. The members of the Executive Committee have all served on at least one standing committee, in most cases as Chair or co-Chair of it.

It is not unusual for legislative staffers or State employees from departments regulating an area to be a member of a standing committee or regularly attend standing committee meetings. Several committees have “Legislative Days” in Sacramento, visiting with legislators and government officials and their staffers. Some committees are regularly requested by state agencies to assist in review of regulatory proposals and some have been requested by members of the legislature or their staff to provide input on pending or potential legislative proposals.

## **DISCUSSION OF MODEL RULE 6.4**

The Executive Committee applauds the Commission for the work it is doing to examine the California Rules of Professional Conduct and bring them up to date, specifically in comparison with the American Bar Association's Model Rules of Professional Conduct and the rules of professional conduct in all other states. The Executive Committee appreciates the opportunity to comment on the proposed rules. There is only one rule on which the Executive Committee wishes to comment in the two sets of rules on which the Commission is currently requesting comment.

The Executive Committee opposes, or in the alternative supports with amendments, proposed MRCP 6.4 for the following reasons.

## **LEGAL REASONS**

While attractive on the surface, the proposed rule is a duplicative remedy in search of a harm.

The Comment to the proposed Rule 6.4 conflates the conflict of interest duties of a lawyer to not represent a person or use a client's information with the fact a that lawyer (and the lawyer's firm) has a client base with an interest in a decision of a "law reform organization." The only explanation for the purpose of Model Rule 6.4 comes in the Model Rule Comments in the reference to Rule 1.2(b) and in the sentences preceding that reference. Rule 1.2(b) permits a lawyer to represent a client where the lawyer has a concurrent conflict of interest with another client, provided several tests are met, including informed written consent from each affected client.

However, the Comment to the proposed Rule 6.4 states that there is no conflict of interest, as a lawyer has no attorney-client relationship with the law reform organization. Even if there were a conflict, the proposed rule does not require compliance with the conflict of interest rules; rather it requires disclosure to "law reform organizations" in certain circumstances. Since there is no conflict of interest, the reference to Rule 1.2(b) is at best puzzling, if not confusing, to the practitioner. In sum, as the Comment to proposed Rule 6.4 states, there is no harm, *i.e.*, conflict of interest, to be remedied.

It seems the purpose of Model Rule 6.4 is to permit a quasi-conflict of interest, yet other Model Rules address the issue of conflicts of interest, including this quasi-conflict of interest or interests of third parties. Model Rule 1.7(a)(2) prohibits a lawyer from representing a current client if there is a "significant risk" that the representation will be "materially limited" by the lawyer's responsibilities to "a third person or by a personal interest of the lawyer".

The ABA comments on Rule 1.7(a) provide in pertinent part:

///

### **Identifying Conflicts of Interest: Material Limitation**

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.

.....

The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

### **Lawyer's Responsibilities to Former Clients and Other Third Persons**

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

### **Personal Interest Conflicts**

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.

Consequently, a lawyer's duties to a current client effectively prevent a lawyer from acting adversely to that client, as the penalty for such adverse action is that the lawyer cannot represent the client. Even where there is a true conflict of interest with a current client, the lawyer is not penalized if acting for the benefit of the client, nor is any disclosure to the client, much less to any one else, required.

Model Rule 1.8 expands on the provisions of Model Rule 1.7. Model Rule 1.8 addresses not representation of a client but when a lawyer may use information acquired from a client for purposes other than representation of the client. Model Rule 1.8(b) provides that a lawyer shall not use information relating to a client to the disadvantage of the client, except as permitted or required by the Model Rules. The comment to Model Rule 1.8, in Paragraph [5], informs the lawyer that disadvantageous use of information violates the lawyer's duty of loyalty to the client. The lawyer may not use client information to benefit the lawyer or a third person. The Comment continues on to list the Rules that permit the use of client information. Rule 6.4 is not among those rules. Thus, Rule 6.4 is not a permissive provision overriding a lawyer's duty to not use client information to the disadvantage of a current client or to benefit the lawyer or a third person. The lawyer cannot use client information to the detriment of a client or for the benefit of a third person.

Model Rule 1.9 covers duties to former clients. Model Rule 1.9 prohibits representation of others in certain circumstances. Model Rule 1.9(c), like Model Rule 1.8(b) just discussed, prohibits the use of information to the disadvantage of the former client, except as otherwise permitted or when the information has become generally known. In addition, a lawyer may not reveal information relating to the representation of the former client, except as otherwise permitted. The Comments to this Model Rule shed no additional light on this provision. Just like Model Rule 1.8(b), no limitation or disclosure is required if information is used for the benefit of a former client.

Model Rule 1.11 addresses conflicts of interest for government officers. A current or former government lawyer may not use information in violation of Model Rule 1.9(c) (discussed above) and may not use “confidential government information” (as defined) about a person in the representation of a client whose interests are adverse to the person and the confidential government information could be used to the “material disadvantage” of the person. Again, the only limitation is on the use of information to the disadvantage of government or a person about whom the lawyer has confidential government information.

Finally, Model Rule 1.18 addresses how a lawyer may use information acquired from a prospective client. That information may be used in the same way a lawyer may use information acquired from a former client under Model Rule 1.9 (discussed above). Similar to the other conflict of interest rules, Comment [6] to Model Rule 1.18 permits a lawyer to use information in the “same or substantially related matter” unless it would be “sufficiently harmful” if used in the matter.

In sum, the various conflict of interest Model Rules address when a lawyer may represent, or not, a client and when a lawyer may use client information. As the Comment to Model Rule 6.4 states, there is no attorney-client relationship with the legal reform organization, so that prong of the conflict of interest rules is satisfied. The second prong of those rules addresses use of the information. In all cases, the lawyer may not use information adversely to the client (or prospective client); no limitation is set upon use of information for the benefit of a client. The key limitation is in Model Rule 1.8(b), where the lawyer may not use client information for the benefit of any third party. We believe the other Model Rules adequately address the issues that are the subject of proposed Model Rule 6.4 making adoption of Model Rule 6.4 unnecessary.

#### **CHILLING EFFECT OF PROPOSED RULE 6.4**

The adoption of proposed Model Rule 6.4 likely will have a chilling effect on lawyer participation in civic organizations. In the ABA Model Rules’ own language:

##### Scope

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,”

are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.

Proposed Rule 6.4 is a “may” rule with regard to being a member of a law reform organization but is a “shall” rule with regard to disclosure.

California takes a more disciplinary approach. Under Business and Professions Code §6077 the rules of professional conduct are “binding” on all State Bar members and the State Bar may discipline members for willful breach.

Since the disclosure rule is a trap for the unwary, and a nullity (as discussed below), the Commission should weigh carefully the need for a rule that will cause conscientious lawyers to over-disclose in the desire to avoid potential disciplinary proceedings and trap less conscientious (but usually not “willful”) lawyers who fail to disclose.

Further, the portion of the rule that “permits” a lawyer to be a member of a law reform organization is unnecessary and could “chill” lawyers’ participation in civic organizations. Lawyers have always participated in law reform and administration of the law. That portion of the rule raises a number of questions where none existed before. Should John Marshall, the first U.S. Supreme Court Justice, have been required to disclose potential impacts on clients as he served on the U.S. Supreme Court or in the Virginia House of Burgesses (see Jean Edward Smith, JOHN MARSHALL: DEFINER OF A NATION, (Henry Holt and Company 1996))?

Yes, standards have changed. However, the civic participation of lawyers should not be discouraged or denigrated. No persuasive reason is presented for subjecting lawyers to potential discipline under proposed Rule 6.4 in a role lawyers have historically played and for which lawyers are well suited by training, particularly when actual conflicts are covered under other provisions of the Model Rules.

#### **PRACTICAL REASONS**

1. The Rule, as Proposed, is Both a Nullity and a Trap for the Unwary.

Under the proposed rule any lawyer involved in “organizations seeking law reform” should simply announce to the organization that the lawyer (and, presumably, the lawyer’s firm) “knows” that “a private client might be materially benefited or adversely affected.” The trap for the unwary is that if a lawyer forgets to make the announcement, makes the announcement at the wrong time or wrongly decides that the organization is not involved in law reform, the lawyer is subject to discipline.

While the proposed rule tries to limit the scope of the responsibility to disclose knowledge of material benefit or adverse impact on a client by a decision in which the lawyer participates, the comment undercuts that narrow scope. As the Comment states, any lawyer practicing antitrust

law is deemed to represent a client when involved in any antitrust legislative proposal. By analogy, any lawyer involved with any legislative proposal related to the lawyer's expertise is deemed to represent an affected client and should provide the disclosure. As the description of the Business Law Section indicates, every committee member should make a disclosure at some (unknown) time, since every committee member is an expert in that area of law, even though that fact is obvious by reason of the lawyer's membership on the committee. The reality of practice is that a lawyer and a law firm will have such a broad range of clients that the lawyer should assume that some client will be benefitted or harmed, and avoid the risk of discipline by routinely disclosing.

We suggest that the Commission also consider that lawyers are leading citizens, serving on various governmental entities. Those lawyers are performing a traditional role, as recognized by the ABA Model Rules in its Preamble to the Model Rules. Yet proposed Rule 6.4 undercuts that service by branding such service as for the benefit of clients. The State Bar should not discourage attorneys from participating in law reform or public service or taint them with working for the interests of clients.

The nullity is that lawyers will disclose so routinely that the disclosure will have no effect. Routine disclosure also resolves such issues as how often the lawyer should make the disclosure, and to whom. The mechanics of fulfilling this new disclosure requirement are woefully missing, leaving the practitioner little choice but to disclose at every turn, lest the lawyer become subject to disciplinary action.

2. The Comment to Proposed Rule 6.4 States that a Lawyer is "professionally obligated to protect the integrity of the [law reform] program".

Where is the source and authority of this new obligation? What is its scope? This duty is not set out in Business and Professions Code section 6068, which otherwise sets forth the duties of California lawyers, or elsewhere in the Model Rules. The Comment seeks to short-circuit the scope of the obligation by saying it is discharged by "appropriate" disclosure. Is it that easy? This new obligation is a far leap from the previous discussion in the Comment, which indicates that a lawyer may not be able to participate in law reform because that "might indirectly affect a client" and the lawyer should comply with the lawyer's obligations to his/her clients, including avoiding conflicts of interest. As discussed above, there is no attorney-client relationship with the law reform organization, and any conflicts of interest are already addressed in the Model Rules. Again, all these decisions about how to best fulfill a lawyer's obligations are taken under the risk of State Bar disciplinary action.

3. The Proposed Rule Does Not Address the Responsibility of the Organization to which Such Notice is Given.

While outside the scope of these rules, the lawyer will be asked what the organization should "do" with the disclosed information. Since it is the lawyer's obligation "to protect the integrity" of the program, the Comment should address how the lawyer should guide the organization.

4. The Proposed Rule Covers Organizations “involved in reform of the law or its administration”.

There is no guidance on which organizations are included. The Comment refers to a bar association. However, environmental organizations often recommend legislation. Should a lawyer sitting on the organization’s board provide a disclosure when the board approves a legislative proposal? Many other types of organizations may engage in legislation or rulemaking activities.

5. The Proposed Rule Permits a Lawyer to Participate in an Organization “involved in reform of the law or its administration” even Though the Reform May Affect a Client.

Is this rule inclusive, that is, a lawyer may be a member of organizations with dissimilar purposes – or is the proposed rule exclusive, that is, may a lawyer participate only in law reform organizations? Further, many kinds of organizations can take actions other than law reform that may affect a client. For example, a human rights organization may sue a client or a company similar to a client. Since the proposed rule turns on the potential for harm or benefit to a client, perhaps, a lawyer should disclose when making decisions regarding other types of actions. The conflict of interest rules are not limited to law reform organizations.

In sum, proposed Rule 6.4 is unclear in its scope and implementation, while subjecting a lawyer engaged in the worthwhile activity of law 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.

**RECOMMENDATION: DO NOT ADOPT**

The Executive Committee recommends that, like New York State, California not adopt proposed Rule 6.4, for the reasons stated in this letter.

**RECOMMENDATION: AMENDMENTS**

In the alternative, the Executive Committee recommends the following amendments if the Commission chooses to adopt proposed Rule 6.4.

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 would 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

November 4, 2009

administration, notwithstanding that the involvement may affect the interests of a client of the lawyer.”

3. Amend the Comment so it reads as follows:

***Public Service***

**Rule 6.4 Organization Activities Affecting Client Interests -  
Comment**

[1] Lawyers involved in organizations 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.

The positions expressed herein have not been adopted by the Section or its overall membership or by the State Bar’s Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California. There are currently over 9,000 members of the Section. Membership in the Section is voluntary and funding for its activities, including all legislative activities, is obtained entirely from voluntary sources.

We hope the foregoing is useful in your deliberations. Please do not hesitate to contact the undersigned at (916) 329-7400 ext. 222 if you would like to be in touch with a representative of the Executive Committee versed in the matters covered by this letter and authorized to speak on its behalf. I will be happy to put you in touch with such person.

Respectfully,



Paul Pascuzzi

Chair, Executive Committee  
Business Law Section of the State  
Bar of California

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

Rule 6.4 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 - [6-4] - Dashboard - ADOPT - DFT1 (11-05-09)ML.doc
- RRC - [6-4] - Intro, Rule & Comment Explanation - DFT3 (06-08-09)RD.doc
- RRC - [6-4] - Rule - DFT3 (06-08-09) - CLEAN-LAND.doc
- RRC - [6-4] - Public Comment Chart - By Commenter - DFT1 (11-09-09)RD.doc
- RRC - [6-4] - Public Comments (11-09-09).pdf
- RRC - [6-4] - State Variations (2009).doc

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

This one has more, and more negative, comments. Please review all the material, including the very long letter from the Chair of the EXCom of the Business Law Section. Please let me have your comments and suggestions as soon as possible, as all our material has to be submitted by Sunday.

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

This is an awful rule. I think we should heed the recommendations of the commentators and dump this rule. I particularly like the comment from the San Diego Bar Assoc. pointing out the massive disclosures that would have to be made by members of the Conference of Delegates. And think how this would apply to the RRC. (After all, we are a "law reform organization.") Harry would have to take 4 votes: those for, those against, those who abstain, and those who have a client who might be affected by a proposed rule.

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

I don't think we should delete this Rule. It is merely a "can-do" rule. Like 6.3, it is intended to protect lawyers against DQ motions that are filed because a lawyer might be a member of one of the organizations.

The following is from the Annotated Model Rules, Rule 6.3:

To encourage lawyers to serve as members, officers, and directors of legal services organizations, Rule 6.3 specifies that such service is not to be used as ammunition to disqualify lawyers from representing clients in the normal course of their practices. Otherwise, membership in legal services organizations would expose lawyers to so many disqualifying conflicts that recruitment would become very difficult.

The following is from the Annotated Model Rules, Rule 6.4:

What Rule 6.3 does for lawyers serving on the boards of legal services organizations, Rule 6.4 does for lawyers serving on the boards of law reform organizations. Rule 6.4 permits lawyers to serve in organizations involved in reforming the law or the administration of law, even if the reform may affect-- for worse or for better--a client of the lawyer. See Model Rule 6.4, cmt. [1] (lawyer involved in law reform organization does not generally have lawyer-client relationship with it).

I've attached copies of Annotated Rules 6.3 and 6.4.

I would keep these rules. I would be very concerned with what their absence would signal. These rules are intended to encourage lawyer participation, not to impose onerous burdens on them.

***Attachments:***

RRC - 6-3 - Model Rule 6.3 - ANNOT (2007).doc

RRC - 6-4 - Model Rule 6.3 - ANNOT (2007).doc

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

I don't see a problem that needs to be fixed. Lawyers have never felt discouraged from serving on these kinds of organizations. The Rule presents an onerous and unnecessary obligation on lawyers, as shown by the negative comments. The term "law reform organization" is vague and I don't see that the absence of the rule would signal anything but California's common sense desire not to follow it.

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

I understand your position but, given that this Rule is out there, I am concerned with the message we send by deleting it. It's what Stan refers to as a "can do" rule. As Georgia recognizes, it's not intended to subject a lawyer to discipline. My recommendation is to 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 6.4 that I circulated in my previous e-mail.

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

I agree with you Kevin.

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

Without debate? Given the substantial negative public comment I don't think we can vote on this rule without debate.

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

On this one I am also with Kevin. My strong impression from rereading the negative comments is that they are like Chicken Little, but the sky isn't or won't be falling if this rule is eventually adopted. The gist of the rule as I read it is that if you have a specific axe to grind in the work of an organization, you should disclose that for whatever value the disclosure might have to the others in the organization. It is inconceivable to me that there would be situations in the Conference of Delegates that would warrant disclosures of any kind. It's a debating society most of the work of which consists of highly technical proposals for legislation that are then put on an agenda for lobbying of the legislature. Only a handful of people get to debate on any one resolution, so it is unlikely in the extreme that one could sway the Conference to the advantage of a client. But if that were the case, a simple disclosure of interest during the debate would suffice. And the same would likely obtain with other law reform organizations. The sky is not falling!!

One suggested change I do like is to "materially affected." Are there votes for that change?

**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 6.4; all the other materials remain the same. If there are no comments, I'll send off the package later today to meet our deadline.

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

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

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 6.4, 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). I've also marked "some material additions" to the Rule and Comment in light of our additions concerning adverse effect and confidentiality. The vote tally will be entered after the meeting. I'm not aware of any dissents but that may change.
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 our standard footnote re redlines.
  - c. Comment Chart: Added our redline changes, which for some reason disappeared. Also substituted "the Rule" for "paragraph (b)".
3. Public Comment Chart. I've taken a stab at responses. Please review very carefully.
4. Rule 6.3, 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.

In addition, I'll compile our e-mail exchanges and send those on to Angela as well.

Please let me know if you have any questions.

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

What you have done looks fine. I like the idea of the "materially affect" that Florida has adopted and will raise that issue at the Commission meeting next month. Please send the material on to Angela.