Memorandum

To: Rules Revision Commission

From: Paul W. Vapnek

Date: August 12, 2009

Re: Proposed Rule 6.5

: -

The attached Chart compares ABA Model Rule 6.5 with the language of Rule 1-650 approved by the Supreme Court on July 29, 2009. A copy of the Court's Order is also attached for your information and to permit you to observe the changes the Court made in proposed Rule 1-650 that had been submitted to the Court after approval of the Commission's work by the Board of Governors. The description of the changes in the right hand column is self-explanatory. At some point the Commission will have to address imputation issues in this rule but after consideration of Model Rule 1.10.

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COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.5 Nonprofit And Court–Annexed Limited Legal Services Programs

August 2009
(Rule being considered for public comment)

INTRODUCTION: Proposed Rule 6.5 is based on recently approved Rule 1-650. The reference to personal disqualification (provided for in Model Rule 1.10 (the imputation rule)) is paragraph (c) of the proposed rule. It is subject to change pending the Commission's action on Rule 1.10.

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs	Commission's Proposed Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs	Explanation of Changes to the ABA Model Rule
(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:	(a) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:	No changes to the new Rule 1-650 have been made. Rule 1-650 refers to "member" in subparagraphs (a) and (b). This will likely require changing to "lawyer" as the Court did in (c).
(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and	(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and	
(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.	(2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.	

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs	Commission's Proposed Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs	Explanation of Changes to the ABA Model Rule
(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.	(b) Except as provided in paragraph (a)(2), a conflict of interest that arises from a member's participation in a program under paragraph (a) will not be imputed to the member's law firm.	
	(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.	Note that the Court reverted to use of "lawyer" rather than member.

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Commission's Proposed Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Explanation of Changes to the ABA Model Rule
[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of	[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms — that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of	

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Commission's Proposed Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Explanation of Changes to the ABA Model Rule
interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.	interest as is generally required before undertaking a representation.	
[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.	[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code	

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Commission's Proposed Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Explanation of Changes to the ABA Model Rule
	§ 6068(e)(1), are applicable to the limited representation.	
[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.	[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (a)(2) imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm would be disqualified under rule 3-310.	

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Commission's Proposed Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Explanation of Changes to the ABA Model Rule
[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal	[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's firm, paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) imputes conflicts of interest to the participating member when the member knows that any lawyer in the member's firm would be disqualified under rule 3-310. By virtue of paragraph (b), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a	

ABA Model Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Commission's Proposed Rule Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment	Explanation of Changes to the ABA Model Rule
disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.	client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program	
[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.	[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.	

NEW RULE OF PROFESSIONAL CONDUCT 1-650
(Clean Version**)**
(Adopted by the Supreme Court of California on July 29, 2009)

Rule 1-650. Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and

(2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.

(B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

(C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

Discussion:

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm would be disqualified under rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) imputes conflicts of interest to the participating member when the member knows that any lawyer in the member's firm would be disqualified under rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.

SUPREME COURT
FILED

JUL 29 2009

Frederick K. Ohlrich Clerk

Deputy

No. S173373

IN THE SUPREME COURT OF CALIFORNIA

IN THE MATTER OF THE REQUEST OF THE STATE BAR OF CALIFORNIA FOR APPROVAL OF NEW RULE 1-650, RULES OF PROFESSIONAL CONDUCT.

New Rule of Professional Conduct 1-650, recommended for approval by the Board of Governors of the State Bar of California, is adopted as modified in attachment 1 hereto.

GEORGE
Chief Justice

Attachment

Rule 1-650. Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and

(2) ~~is subject to~~ has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm ~~would be subject to~~ would have a conflict of interest under rule 3-310 with respect to the matter.

(B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

(C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

Discussion:

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms — that will assist persons ~~to address~~ in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, ~~wherever~~ whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) ~~subjects the member to imputed conflicts of interest~~ imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm ~~is~~ would be disqualified ~~by~~ under rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) imputes conflicts of interest to the participating member ~~makes the participating member subject to imputed conflicts of interest~~ when the ~~lawyer~~ member knows that any lawyer in the member's firm ~~is~~ would be disqualified ~~by~~ under rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.

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June 21, 2008 KEM E-mail to Snyder:

In response to your e-mail of yesterday, I'm forwarding the e-mail I sent you last month on the Rule. I've attached the following:

1. A proposed draft 1, compared to MR 6.5. The only changes I've made are to place rule numbers in brackets pending the RRC's approval thereof. In Word.

2. The E2K Reporter's Explanation of Changes for Rule 6.5, in Word. The first paragraph of that can be adopted as part of the drafters report. ("Rule 6.5 is a new Rule in response to the Commission's concern that a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program. The paradigm is the legal-advice hotline or pro se clinic, the purpose of which is to provide short-term limited legal assistance to persons of limited means who otherwise would go unrepresented.")

3. A PDF copy of AB 3050, as amended, 5/23/08. I'm not sure how relevant this is but I've highlighted in yellow the sections that I think are. I'm no longer we should provide a copy of this; perhaps just mentioned the highlighted sections and discuss that the legislature has proposed legislation that urges the provision of pro bono and donations to legal aid organizations, at least in the context of clients not proficient in English. Am I misreading the bill?

4. A PDF of the summary edition of the Access to Justice Commission's 2002 Report. Again, I've highlighted parts of it that are relevant to our charge re access to justice. I think we should include a copy of this Report for the drafters, and probably for the Commission as a whole.

5. A PDF of the complete edition of the Access to Justice Commission's 2002 Report. I don't think we need to include this entire report -- the Commission has a budget after all -- but you might find some good language that goes into detail on the policy reasons supporting adoption of the Rule. Again, I've highlighted some parts in yellow.

<u>Some Comments</u>:

1. For now, I'd just send out to the drafters (w/ a copy to Randy & Lauren) the Rule, Reporter's Explanation, AB 3050, and the summary edition of the Access to Justice Report.

2. One question you might raise for the drafters is whether we should expressly require screening for the lawyer who is unknowingly exposed to a client's confidential information in providing limited legal services. I don't know why, but I had thought 6.5 requires it but it doesn't. It simply states that Rule 1.10 (imputation) does not apply in those circumstances. Paragraph (b) and Comment [4] both state that the lawyer's FIRM is not precluded from the representation, and notes that the lawyer himself or herself is personally DQ'd, but says nothing about whether the personally DQ'd lawyer must be screened. My guess is that they don't want to discourage participation in hotlines, etc., and, if you had to set up a screen whenever one of your lawyers inadvertently was exposed to an adversary's confidential information, many firms would decline the invite or ask their lawyers to decline. My reco is that we don't depart from the MR on this.

3. Perhaps we can add a comment that a lawyer who participates in a hotline, etc., and subsequently learns that he or she has been exposed to confidential information of an adversary of a client of the firm is himself or herself subject to Rule 1.9, but that his or her personal DQ is not imputed to the firm. I think we can probably make comment [4] clearer. Something to consider.

4. Of course, I may have simply misread the Rule and comment [4] and it is blindingly clear. I'm tired, however, and need to break.

5. At any rate, I wouldn't recommend spending a lot of time actually revising the MR until we get the RRC's approval of the Rule in concept.

I thinks that's it.

June 26, 2008 KEM E-mail to Snyder:

I'm following up the e-mail I sent you on 6/21 with some more issues/ideas re Rule 6.5. After I sent you the e-mail I came upon a chart I had compiled many moons ago about 6.5 (I can't remember why I did it) and updated it to reflect recent adoptions. It reflects how states have reacted to Model Rule 6.5. In the attached, I have highlighted with yellow marker some of the more interesting variations of the rule as adopted by the states you might want to consider.

Some general observations:

1. Nearly every state that has considered MR 6.5 has adopted it. The reason for most states not having yet adopted it is that they have not yet adopted post-E2K Rules.

   a. Only two states that have completed their E2K review have declined to adopt it: Florida and Kansas.

   b. Kansas is the only state that has no other rule similar to MR 6.5.

   c. In the case of Florida, Florida already has a lengthy Rule 6.5 entitled "Voluntary Pro Bono Plans," which provides for the creation of pro bono committees within each judicial circuit that would appear to more systematically address the issues in MR 6.5. See http://www.floridabar.org/divexe/rrtfb.nsf/FV/F0DF871E8337A74F85257164004C597A

   d. Other states have rules similar to Florida's. See, e.g., Indiana Rule 6.6.

2. Most states that have adopted MR 6.5 have adopted it verbatim.

3. All of the states that have published proposed rules for consideration by their highest court or their state bars have recommended adoption of MR 6.5, either verbatim or with relatively minor changes.

4. The attached chart documents the foregoing points. I f I refer to a state rule in the following section, I have included the relevant part of that rule in the chart.

Some possible issues. These are issues that can be raised with the drafters. I include my recommendations. In the end, I think the Model Rule as it stands is fine. The only change I would urge is #2, below. Nevertheless, I think it might be good to have a record that some of the following changes were considered and rejected (or not).

1. Should we use "know" as the standard (MR and nearly every other state) or "is aware" (Maine) or "actually knows" (Wyoming)? Maine gives a good explanation for wh it uses "is aware." See chart.

    a. KEM recommendation: Keep "know".

2. Should we add "government agencies, bar associations and law schools" in paragraph (a)? See N.H., N.Y., Wisconsin & Wyoming.

    a. KEM recommendation: I think this is a good idea. I'm not sure how bar associations are incorporated (non-profit or for-profit), I'm not sure a person would necessarily think of a government agency as non-profit and there are several law schools (including mine) that are proprietary.

    b. If this change is made, then we need to change the title to something more general, like "Participation in Limited Legal Service Programs.

3. Should we prohibit "appearances before a tribunal"? See D.C. Rule, cmt. [1], last sentence ("For the purposes of this rule, short-term limited legal services normally do not include appearing before a tribunal on behalf of a client.")

    a. KEM recommendation: I don't think it is necessary but if we agree that this is primarily to permit a person to participate in hotlines and the like (see cmt. [1]), then perhaps we should include this limitation.

4. Should we limit the provision of assistance to "one-time" for each client? See N.H. (paragraph (a)), S.C. (cmt. [1]), though I think S.C.'s comment might simply be a typo.

    a. KEM recommendation: Not necessary. I think this is a bad idea. For example, my school every year provides free tax advice and assistance to folks under the VITA ("Voluntary Income Tax Assistance") program. My understanding is that there are a number of repeat players every year. Although the assistance is provided primarily by law students, I believe we've had lawyers involved.

5. Should we include a requirement of informed written consent? See Wyoming, which adds paragraph (b) ("(b) Unless the representation of the client consists solely of telephone consultation(s), the disclosure and consent required by subsection (a) shall be in writing.") Wyoming also has revised the introduction to paragraph (a) as follows:

> (a) A lawyer ~~who~~ may, under the auspices of a program sponsored by a nonprofit organization, the state or county bar association, or a court, provide~~s~~ short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter if the lawyer informs the client of the scope of the representation at the time legal services are provided and the client

makes an informed decision to the limited scope. In such circumstances, the lawyer:

a. KEM recommendation: Not necessary. I think this might discourage participation. The whole point of the rule is to encourage participation by lightening the conflicts prohibitions and regulations. Wyoming is the only state that has adopted such a rule.

6. Should we include something like NY paragraph (a)(3) and cmt. [3A] that give guidance on what a lawyer may do re referring the client to another lawyer or assistance program when the lawyer KNOWS there is a conflict? See Chart.

a. KEM recommendation: I think this is a good idea but we should be careful not to give guidance that might conflict with our proposed Rule 4.3 ("Dealing with unrepresented persons").

7. In paragraphs (a)(1) and (2), should we substitute "must comply with" for "is subject to" as NY has done? See chart.

a. KEM recommendation: Not necessary. Although "must comply with" is probably more accurate and better English, that is not a sufficient reason to change the MR language.

8. Screening. Washington para. (a)(3) and N.H. comment [5] expressly require screening for the lawyer who participated in the limited legal service program. See Chart. Washington also requires screening of the firm lawyer who is representing the firm client that is adverse to the limited representation client.

a. KEM recommendation: I don't think it is necessary but if we do mention screening, I think it would be fine in a comment and not blackletter. This all might be obviated if we recommend adoption of a general screening rule.

9. Free Services Limitation? Some states expressly require that the program provide "free" advice. See, e.g.:

a. NY, cmt. [1] ("[1] Legal services organizations, courts, government agencies, bar associations and various nonprofit organizations have established programs through which lawyers provide free short-term limited legal services . . . .")

b. Washington, para (a) introduction: "(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided:"

c. KEM recommendation: Not necessary. I'm not aware of any programs under the auspices of courts, bar associations, non-profits or law schools that charge for the advice.

That's it. Please let me know if you have any questions. We should try to get this out to the drafters by the end of this weekend at the latest.

July 23, 2009 Vapnek E-mail to McCurdy (forwarded to Sondheim & KEM on 7/24/09):

Attached is a chart for Rule 6.5, with our proposed Rule 1-650 as the Commission's proposal. Please have copies made for the meeting tomorrow.

July 30, 2009 McCurdy E-mail to RRC:

We have received a copy of the Sup. Court's order on RPC 1-650. Please see attached.

Draft [#4], as approved by the California Supreme Court (7/29/09), compared to Rule adopted by State Bar of California Board of Governors:

Rule 1-650. Limited Legal Services Programs

(A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:

(1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and

(2) ~~is subject to~~ has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm ~~would be subject to~~ would have a conflict of interest under rule 3-310 with respect to the matter.

(B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.

(C) The personal disqualification of a lawyer participitating in the program will not be imputed to other lawyers participating in the program.

Discussion:

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons ~~to address~~in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, ~~wherever~~ whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) ~~subjects the member to imputed conflicts of interest~~imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm ~~is~~ would be disqualified ~~by~~ under rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) ~~makes the participating member subject to imputed conflicts of interest~~imputes conflicts of interest to the participating member when the ~~lawyer~~ member knows that any lawyer in the member's ~~law~~ firm ~~is~~ would be disqualified ~~by~~ under rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.

July 30, 2009 Difuntorum E-mail to RRC:

The Sup. Ct. modified the rule submitted by the Bar. Here are my personal observations about the changes made by the Sup. Ct. (a.k.a., my attempt to read the smoke signals).

1) The Sup. Ct. added a new paragraph (C) stating that "[t]he personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program." Two things on this change: (i) this concept appears in the last sentence of MR 6.5 Comment [4] and in the last sentence of RPC 1-650 Disc. Para. [4], so it seems to me that the Sup. Ct. might believe that exceptions to a rule belong in the black letter text and not simply in a comment; and (ii) by making this change, the Sup. Ct. added the term "disqualification" to the black letter text even though the Bar's submitted version of RPC 1-650 did not use any form of that word in the black letter text. Might this suggest that the Sup. Ct. intends the rule to be a standard governing civil disqualification? To me, there's insufficient information to draw this conclusion.

2) In Disc. para. [1], the first sentence, the Sup. Ct. substituted “in addressing” for “to address” even though MR 6.5 uses “to address” in MR 6.5 Comment [1]. This suggests that the Sup. Ct. has no problem tinkering with Model Rule language when necessary to improve grammar and style.

July 30, 2009 Melchior E-mail to RRC:

I think that staff must have made those edits. They are improvements.

I find it reassuring that the court takes its own look and is not afraid to use more direct language. You all know what I have in mind to reason from that; so I won't say it.

July 31, 2009 Sondheim E-mail to Difuntorum, cc RRC & Bob Hawley:

With regard to changes in "grammar and style," I suggest that when we make our submission to RAC and the Board, as well as the Supreme Court we have an overall statement at the beginning of our submission indicating that various language changes to the ABA language have been made throughout the rules as set forth in the explanation column in order to improve grammar and style as was done by the Court with regard to 1-650. This would make it easier for us to justify such changes.

Kurt—You’re on the right track.

August 12, 2009 Vapnek E-mail to McCurdy, cc Drafters:

Here is the Comparison chart for Rule 6.5 and a brief memo about the chart and the changes. Please include these and a copy of the

Supreme Court's Order of July 29, 2009 for the Agenda item for this rule.

Nance, Jerry and Raul: My apologies for doing this in your name, but there was no time for me to get this to you before the submission deadline.

I trust that you will approve the concept of using the Court's version of the new rule as the basis for our submission of rule 6.5.

August 24, 2009 Sapiro E-mail to RRC List:

I offer two substantive issues for discussion and a few minor drafting nits.

1. I would like a statement added to the Comment to the effect that lawyers who participate in group or prepaid legal services programs that have hotlines for the rendition of advice are not covered by this rule. For example, a prepaid legal service program may have lawyers who handle “hotlines” and receive client inquiries, giving advice, but not making court appearances or preparing legal documents without further arrangements between the

lawyer and the caller. They are not – and should not be – covered by this rule. I think we should say so.

2. On a different subject, suppose a lawyer works at a legal clinic or covers a hotline and discusses a problem with a pro bono client. Later, he or she discovers that the lawyer's firm is representing a bank in suing that pro bono client. I think the firm should be able to avoid imputed conflicts by screening the lawyer who rendered the pro bono services. We did not take that issue up in the press to get the rule out quickly, but I think we should discuss it now that we have time to do so. To me, this is one place we should advocate screening to avoid imputed conflicts.

3. Several places in the Comment are references to "rule 1-650" or other rules. I suggest that we take this opportunity to conform the Comment to the current style that we are pursuing by putting the word rule in initial caps and using the new rule numbers. For example, wherever references are made to "Rule 1-650," I would substitute the phrase "this Rule." Similarly, in references to other rules, I would refer to "Rule 1.7" and use the new rule number.

McCurdy, Lauren

From: McCurdy, Lauren
Sent: Tuesday, August 25, 2009 9:51 AM
To: Audrey Hollins (E-mail); avoogd@stanfordalumni.org; CommissionerJ2@gmail.com; Ellen Peck (E-mail); hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; Jerome Sapiro Jr. (E-mail); kemohr@charter.net; Kevin Mohr (Home#1) (E-mail); Kevin Mohr (Work) (E-mail); Kurt Melchior (E-mail); Lauren McCurdy; Lee, Mimi; linda.foy@jud.ca.gov; Mark L. Tuft (E-mail); martinez@lbbslaw.com; Paul W. Vapnek (E-mail); Randall Difuntorum (E-mail); rlkehr@kscllp.com; snyderlaw@charter.net; Stan Lamport (E-mail); Yen, Mary
Subject: Message from the Chair Concerning Agenda Item III.L. -- 6.5

Commission Members,

Although the Supreme Court has approved 1-650, there is a problem in comment [1] in that rule and in 6.5 which was previously pointed out by Bob Kehr, I believe. The comment says "there is no expectation that the lawyer's representation of the client will continue...." If his is so, why does comment [2] require that the client "consent to the limited scope of the representation"? If there is no expectation, there is no need for consent.

Cheers,
Harry