

Proposed Rule 6.5 [1-650] “Limited Legal Services Programs”

(Final Draft (Draft #5) 10/27/09)

Summary: Proposed Rule 6.5 is based upon recently adopted Rule 1-650 which in turn was based substantially on Model Rule 6.5. Most of the changes from Rule 1-650 are non-substantive, and made to conform the language of the proposed rule to that of the other proposed rules, e.g., changing “member” to “lawyer” and substituting proposed new rule numbers for existing rule numbers. Most of the rest of the changes are for purposes of clarifying the language of the proposed Rule.

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

Primary Factors Considered

Existing California Law

Rules

Statute

Case law

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

Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

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

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.5 Limited Legal Services Programs

October 2009

(Rule being considered for public comment.)

INTRODUCTION: Proposed Rule 6.5 is based upon recently adopted Rule 1-650 which in turn was based substantially on Model Rule 6.5. Most of the changes from Rule 1-650 are non-substantive, and have been made to conform the language of the proposed rule to that of the other proposed rules, e.g., changing “member” to “lawyer” and substituting proposed new rule numbers for existing rule numbers. Most of the rest of the changes are for purposes of clarifying the language of the proposed Rule.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 6.5 Limited Legal Services Programs</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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:</p>	<p>(a) A lawyer who, under the auspices of a program sponsored by a <u>court, government agency, bar association, law school, or</u> nonprofit organization—of 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:</p>	<p>Note that the title of the Rule has been shortened because the rule is no longer limited to nonprofit organizations.</p> <p>The changes to paragraph (a) were first made in Rule 1-650 to expand the list of organizations covered by the Rule.</p>
<p>(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</p>	<p>(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</p>	
<p>(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.</p>	<p>(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<u>prohibited from representation</u> by Rule 1.7 or 1.9(a) with respect to the matter.</p>	<p>The language change from Rule 1-650 was made because proposed Rule 1.10 (imputed conflicts) specifies when imputation is appropriate (current rules do not) and “prohibited from representation” is a more accurate statement than “is disqualified.”</p>
<p>(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.</p>	<p>(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.</p>	<p>Paragraph (b) is identical to Model Rule 6.5(b).</p>

* Proposed Rule 6.5, Draft 3 (10/28/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 6.5 Limited Legal Services Programs</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.</p>	<p>This language is identical to Rule 1-650(c).</p>

<p align="center"><u>ABA Model Rule</u> Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment</p>	<p align="center"><u>Commission's Proposed Rule</u>* Rule 6.5 Limited Legal Services Programs Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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 interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.</p>	<p>[1] Legal services organizations<u>Courts, courts, government agencies, bar associations, law schools</u> 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<u>in addressing</u> 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, <u>whenever</u> a client-lawyer-client relationship is established, but there <u>usually</u> is no expectation that the lawyer's representation of the client will continue beyond the<u>that</u> limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen<u>check</u> for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.</p>	<p>This language is taken from paragraph (a) of the Rule.</p> <p>This is the language adopted by the Supreme Court in Rule 1-650. There was some controversy concerning the issue of the formation of an attorney client relationship when lawyers assist others who have legal problems; the Court adopted “whenever” probably to avoid specifying that such a relationship is always formed.</p>
<p>[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</p>	<p>[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</p>	<p>Except for the change from “member” to “lawyer,” and references to the proposed new rule numbers, this language is almost identical to the Discussion paragraph 2 of Rule 1-650.</p>

* Proposed Rule 6.5, Draft 3 (10/28/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 6.5 Limited Legal Services Programs Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>the need for further assistance of counsel. Except as provided in this Rule, the<u>these</u> Rules of Professional—Conduct<u>and the State Bar Act</u>, including Rules<u>the lawyer's duty of confidentiality under Business and Professions Code section 6068(e)(1), Rule</u> 1.6 and Rule <u>1.9(e)</u>, are applicable to the limited representation.</p>	
<p>[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.</p>	<p>[3] Because a<u>A</u> lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. <u>Therefore</u>, paragraph (a)(1) requires compliance with Rules 1.7 or<u>and</u> 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. <u>In addition</u>, and<u>paragraph (a)(2) requires compliance</u> with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's <u>law</u> firm is<u>would be</u> disqualified by Rules 1.7 or 1.9(a) in the matter.</p>	<p>Except for the change from “member” to “lawyer,” and references to the proposed new rule numbers, this language is almost identical to the Discussion paragraph 3 of Rule 1-650.</p>
<p>[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</p>	<p>[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 <u>law</u> firm, paragraph (b) provides that Rule 1.10 is<u>imputed conflicts of interest are</u> inapplicable to a representation governed by this Rule<u>rule</u> 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 <u>any lawyer in</u> the lawyer's firm is disqualified<u>prohibited from</u></p>	<p>Except for the change from “member” to “lawyer,” and references to the proposed new rule numbers, this language is almost identical to the Discussion paragraph 4 of Rule 1-650.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 6.5 Limited Legal Services Programs Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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 disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.</p>	<p><u>representation</u> by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however<u>moreover</u>, a lawyer's participation in a short-term limited legal services program will not <u>be imputed to the lawyer's law firm</u> or preclude the lawyer's <u>law</u> 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. <u>However, once the conflict is identified, the member should be screened from the member's firm's representation of a client with interests adverse to a client that the member previously represented under the program's auspices.</u></p>	<p>This last sentence was added at the suggestion of COPRAC to clarify the actions to be taken once a conflict has been identified.</p>
<p>[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.</p>	<p>[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.</p>	<p>Except for the change from "member" to "lawyer," and references to the proposed new rule numbers, this language is almost identical to the Discussion paragraph 5 of Rule 1-650.</p>

Rule 6.5 Limited Legal Services Programs

- (a) A lawyer 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 lawyer or the client that the lawyer will provide continuing representation in the matter:
- (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
 - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), a conflict of interest that arises from a lawyer's participation in a program under paragraph (a) will not be imputed to the lawyer'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.

Comment

[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 usually 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 check for conflicts of 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, these Rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code section 6068(e)(1), Rule 1.6 and Rule 1.9, are applicable to the limited representation.

[3] 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. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 and 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer. In addition, paragraph (a)(2) requires compliance with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's law firm would be disqualified by Rules 1.7 or 1.9(a) in the matter.

[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 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) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that any lawyer in the lawyer's firm is prohibited from representation by Rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm or preclude the lawyer'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. However, once the conflict is identified, the member should be screened from the member's firm's representation of a client with interests adverse to a client that the member previously represented under the program's auspices.

[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.

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.

**RRC – Rule 6.5 [1-650]
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**RRC – Rule 6.5 [1-650]
E-mails, etc. – Revised (11/3/2009)**

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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 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) ~~makes the participating member subject to imputed conflicts of interest~~ imputes conflicts of interest to the participating member when the ~~lawyer-member~~ lawyer knows that any lawyer in the member's ~~law-firm~~ 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.

August 28, 2009 KEM E-mail to RRC:

Greetings:

During the Chair's Report yesterday, Harry mentioned that Bob had raised an issue in an earlier e-mail concerning Comment [1] that he would like to address. Unfortunately, I did not include that e-mail in the compilation I circulated on 8/25. Therefore, I've pasted Bob's 5/1/09 e-mail below for your consideration.

Kevin

May 1, 2009 Kehr E-mail to RRC:

1. I join in Jerry's objection to the proposed change to Comment [1]. A lawyer-client relationship is formed when legal services are requested and provided. See, e.g., Cal. State Bar Formal Opn. 2003-161; ABA Formal Opn. 91-361; Catherine J. Lanctot, Attorney-Client Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147, 160-61 (1999) ["Courts have treated the giving of legal advice as the essence of the practice of law, and under certain circumstances, advice that is specific to the unique set of facts advanced by the questioner is likely to provide a basis for imposing all the duties inherent in a more traditional attorney-client relationship."]; and Carol A. Needham, Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law, 45 U. Kan. L. Rev. 453, 461 (1997) ["Giving a client legal advice tailored to the specific facts presented by that client is at the heart of the definition of the practice of law."]
2. However, the proposed change highlights a second issue in the Comment, and this arises under either wording.
3. Paragraph (A) of the Rule treats the lack of "expectation by either the member or the client that the member will provide continuing representation in the matter" as a condition to what follows. The Rule does not establish that there is no expectation (in variable and

unknown circumstances) that their relationship will not continue, but says that certain things follow if the lawyer and client do not expect a continued relationship. I would think this means that those involved should do something to communicate to the client what limitations there are on the services to be provided as this would be necessary to have the protection of the Rule. In fact, the lawyer is directed to do just that by the first sentence of Comment [2].

4. So far so good, but Comment [1] appears to turn this on its head by saying there never is an expectation of a continued relationship (in variable and unknown circumstances in which the lawyer might have done nothing to prevent the client from misunderstanding the lawyer's role). The second sentence of Comment [1] says: "In these programs ... a lawyer-client relationship is established, but there is no expectation that ... the representation ... will continue" The suggested revision to that sentence would have the same effect. This sentence is inconsistent with the Rule and with the first sentence of Comment [2]. I think the solution is to remove the second sentence entirely. The paragraph tracks without it.

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

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

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

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

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

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

1. **III.C. Rule 1.1 Competence [3-110]** (Dec. 2008 Comparison Chart - Post Public Comment Rule Draft #7 dated 6/18/07)

Codrafters: Peck, Ruvolo

Assignment: (1) a chart comparing proposed Rule 1.1 to MR 1.1; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

2. **III.F. Rule 1.8.8 Limiting Liability to Client [3-400]** (Post Public Comment Rule Draft #5 dated 6/23/07)

Codrafters: Kehr, Martinez

Assignment: (1) a chart comparing proposed Rule 1.8.8 to MR 1.8(h); (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. **III.BB. Rule 8.4 Misconduct [1-120]** (Dec. 2008 Comparison Chart)
Codrafters: PECK (co-lead), Tuft
Assignment: (1) a chart comparing proposed Rule 8.4 to MR 8.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.
2. **III.HH. Rule 1.5 Fees for Legal Services [4-200]** (Post Public Comment Draft #6.1 dated 1/1/09 to be revised following the July 2009 meeting)
Codrafters: Ruvolo, Voogd
Assignment: (1) a chart comparing proposed Rule 1.5 to MR 1.5; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

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

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **IV.Q. Rule 6.5 Limited Legal Services Programs** [only if adopted by Sup. Ct.] (NOTE: If the California Supreme Court declines to approve the proposed new rule that is presently pending with the Court, then this assignment becomes moot.)
Codrafters: Martinez, Ruvolo, Sapiro
Assignment: (1) a comparison chart with any recommended changes to the anticipated new RPC 1-650; and (2) a “dashboard” cover sheet.

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

October 27, 2009 Difuntorum E-mail to KEM, cc McCurdy, Lee:

At the August 28 & 29, 2009 meeting, my notes indicate that the train whistle blew on Rule 6.5. Is there a post meeting draft that you/Paul might have prepared after that meeting? If there is not a post meeting draft, then let me know and I will try to take a shot at it now to give Paul a nudge.

For the November agenda materials, I think all that is needed is a revised 6.5 Introduction and Model Rule Comparison Chart that has the August meeting revisions and a Dashboard. Like Rule 5.7, the goal for this rule at the November meeting is getting the rule materials approved for submission without any substantive re-openers.

October 27, 2009 KEM E-mail to Difuntorum, cc McCurdy, Lee:

I've attached the following (all in Word except my notes):

1. Rule 6.5, draft 5 (10/27/09), redline, compared to the S.Ct. approved rule 1-650 (7/29/09).
2. Rule 6.5, draft 5 (10/27/09), in Annotated and Clean versions.
3. My meeting notes from the August 2009 meeting.
4. A clean copy of the S.Ct. approved rule 1-650 (7/29/09).
5. Model Rule 6.5, for comparison file purposes (sorry, but I'm running a bit short on time).

KEM Comments:

1. I think I tracked the changes approved at the August meeting pretty well. However, I had to assume certain things in the Comment, i.e., because (a)(1) and (a)(2) essentially ended up identical to MR 6.5(a)(1) and (2), I assumed we should make the same changes to the Comment (i.e., substituting the numbers of our proposed Rules, e.g., 1.7, 1.9 and 1.10, where appropriate).

2. A note on the draft number. By my count, the S.Ct.'s approved final version was draft 4. Although Paul had submitted a "post-adoption" draft for the August meeting, I'm not sure any changes were made, so I numbered the attached draft #5. Nevertheless, I also numbered it "post-adopt DFT2" because it is the second draft to go before the Commission since the S.Ct. approved 1-650. I remain unapologetic for my byzantine nomenclature.

Please let me know if you have any questions.

October 27, 2009 Difuntorum E-mail to Vapnek & Drafters (Martinez, Ruvolo & Sapiro), cc Staff:

With much thanks to Kevin and Mimi, attached are materials to help you complete the subject assignment.

**RRC – Rule 6.5 [1-650]
E-mails, etc. – Revised (11/3/2009)**

Among the materials provided are: a post-August meeting redraft of revised Rule 1-650 implementing the latest changes (see Kevin's email below for more information on the post-August meeting materials provided); a redline of this draft to MR 6.5 (by Mimi); and a draft Model Rule Comparison Chart (my quick draft, excuse formatting) that includes Mimi's redline version in the middle column. All that's needed is your review, an updated introduction and new explanations for the chart. A Dashboard would also be great if you have the time. Hope this helps.

Attachments:

RRC - 6-5 [1-650] - Compare - Intro, Rule & Comment - COMBO - DFT3 (10-27-09) RD.doc
RRC - 1-650 [6-5] - Rule - S.Ct. [4] (07-29-09) - CLEAN.doc
RRC - 6-5 [1-650] - Rule - Post-Adopt DFT2 [5] (10-27-09) - CLEAN.doc
RRC - 6-5 [1-650] - Rule - Post-Adopt DFT2 [5] (10-27-09) - ANNOT.doc
RRC - 6-5 [1-650] - Rule - Post-Adopt DFT2 [5] (10-27-09) - Cf. to 1-650.doc
RRC - 6-5 [1-650] - Rule - Post-Adopt DFT2 [5] (10-27-09) - Cf. to MR.doc
RRC - 6-5 [1-650] - Model Rule 6.5 (2002)2.doc
RRC - 6-5 [1-650] - 08-28 & 08-29-09 KEM Meeting Notes - DFT2.3_71-74.pdf

October 28, 2009 Vapnek E-mail to Staff, cc Drafters & Chair:

Enclosed is the Dashboard draft I have prepared. I am working on the Chart, the explanations; I will send to all as soon as done.

Attachment:

RRC - 1-650 [6-5] - Dashboard - PUBCOM - DFT1 (10-28-09)PV.doc

October 28, 2009 Vapnek E-mail to Staff, cc Drafters & Chair:

Here is the revised Comparison chart with a new Introduction and explanations. If there are no objections, the rule package is ready to go.

Attachment:

RRC - 6-5 [1-650] - Compare - Intro, Rule & Comment - COMBO - DFT3.1 (10-28-09)RD-PV.doc

October 31, 2009 KEM E-mail to RRC:

1. I believe there is an error in the chart, which is my error because the chart is based on a post-August 2009 draft that I prepared.
2. Paragraph (b) should be identical to MR 6.5. I didn't make the change that was dictated by the Commission's decision to substitute the proposed rule numbers for the language we had used in rule 1-650 (we used the language because there are no current rules 1.7, 1.9 or 1.10).

3. Therefore, paragraph (b) should provide:

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

4. The Explanation of Changes should provide:

Paragraph (b) is identical to Model Rule 6.5(b).

My apologies for not having caught that earlier.

November 1, 2009 Kehr E-mail to RRC:

I have one comment on this proposal:

Paragraph (a), correctly in my view, treats the lack of expectation of a continued relationship as a condition for what follows. However, it is my view that the modifier should be “reasonable expectation” rather than “expectation”. The reason is that a lawyer-client relationship cannot be created by the unreasonable expectation of the “client”.

Under California law, see *Zenith Insurance v. Cozen O'Connor*, 148 Cal. App.4th 998, 1010 (2009) [“California law is settled that a client's subjective belief that an attorney-client relationship exists, standing alone, cannot create such a relationship, or a duty of care owed by the attorney to that plaintiff. (citation omitted) This is because a plaintiff cannot unilaterally establish an attorney-client relationship, and its hindsight “beliefs” that such a relationship existed are thus legally irrelevant. (*Ibid.*) Instead, it is the intent and conduct of the parties that control the question as to whether an attorney-client relationship has been created. (citation omitted)”]; *Fox v. Pollack*, 181 Cal. App.3d 955, 958-59 (1986) [Appellants did allege that they thought respondent was representing their interests because he was an attorney. However, they allege no evidentiary facts from which such a conclusion could reasonably be drawn. Their states of mind, unless reasonably induced by representations or conduct of respondent, are not sufficient to create the attorney-client relationship; they cannot establish it unilaterally.]; *Hetos Investments Ltd. v. Kurtin*, 110 Cal. App.4th 36, 44 (2003) [payor of attorneys fees on behalf of an adverse party to a negotiation in which the payor was involved filed a disqualification motion arguing, among other things, that he believed the lawyer represented him. The trial court rejected this argument, apparently because the belief is not enough to create a relationship and because the payment of fees under 3-310(F) does not supply enough support to create a reasonable belief. The opinion does not say if there was compliance with the informed written consent requirements of the Rule, but that would have been between lawyer and client and not between the lawyer and the payor of the lawyer=s fees.]; *Daniels v. DeSimone*, 13 Cal. App.4th 600, 620 (1993) [affirming a grant of summary judgment in favor of a lawyer in a malpractice case based on the conclusion that the lawyer=s storage of files and a computer diskette on behalf of an ill former partner provided no basis for a jury to conclude that the defendant had undertaken a lawyer-client relationship with the plaintiff]; and Cal. State Bar Opn. 2003-164. The concept of reasonable belief sometimes is phrased as an examination of whether the Aclient@ reasonably and detrimentally relied on the attorney to provide legal services. *Hensley v. Caietti*, 13 Cal. App.4th 1165, 1173 (1993) [Having discovered the alleged negligent act and unmistakably acted to end the attorney-client relationship, Hensley has no equitable claim for a limitations period longer than that afforded a person who discovers negligence after the discharge or withdrawal of counsel.]; *Sky Valley Limited Partnership v. ATX Sky Valley*, 150 F.R.D. 648, 651-52 (N.D. Cal. 1993) (based on California law) [Where there is no express contract,] resolution of the dispute [as to the existence of a lawyer-client relationship] will turn on whether a contractual relationship was formed implicitly. To answer that question, courts necessarily look to circumstantial evidence, taking into account all kinds of indirect evidence and contextual considerations that appear relevant to determining whether it would have been reasonable for the person to have inferred that she was the client of the lawyer.]. This is consistent with the Restatement approach that is directed to the Aclient=s@ reasonable reliance

on the lawyer to provide legal services. Restatement Third, The Law Governing Lawyers '14(1)(b).

The same generally is true outside California. See *Manion v. Nagin*, 394 F.3d 1062, 1068 (8th Cir. 2005) [reaching the same conclusion under Florida and under Minnesota law]; *Professional Service Industries, Inc. v. Kimbrell*, 758 F. Supp. 676, 682-83 (D. Kan. 1991) [finding there was no attorney-client relationship because, even if the plaintiff believed there was, this was not reasonable in the circumstances]; *Hacker v. Holland*, 570 N.E.2d 951, 955 (Ind. App. 1991) [“A would-be client's unilateral belief cannot create an attorney-client relationship. (citation omitted)”]; *Breuer-Harrison, Inc. v. Combe*, 799 P.2d 716, 727-28 (Utah App. 1990) [following *Fox v. Pollack* under Utah law]; *Robertson v. Gaston Snow & Ely Bartlett*, 404 Mass. 515 (Mass.), cert. denied, 493 U.S. 894 (1989) [despite previously having represented the plaintiff in other matters and continuing to retain the original of the Will the defendant attorneys had prepared for the him, in the totality of the circumstances it was unreasonable for the plaintiff to believe the defendant lawyers represented him with regard to the reorganization of corporation in which the plaintiff was a part owner]; *Bobbitt v. Victorian House, Inc.*, 545 F. Supp. 1124 (N.D. Ill. 1982) [the question must be decided on the individual facts of each case; here, it was not reasonable for a 50% shareholder in a closely held corporation to think the corporation's attorney represented him, individually, although the attorney had represented the shareholder, individually, in the formation of the corporation, the shareholder had provided confidential information to him after the incorporation, and the attorney had represented the shareholder in three minor matters unrelated to the corporation]; *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318-20 (7th Cir. 1978); *Cinema 5, Ltd. v. Cinerama, Inc.* 528 F.2d 1384 (2d Cir. 1976) [the Court found clear under the circumstances that the client reasonably expected continued loyalty from the lawyer, and that the lawyer should not have been surprised when the failure to act accordingly resulted in disqualification.]; *Chem-Age Industries, Inc. v. Glover*, 652 N.W.2d 756, 768-69 (S.D. 2002); *Meyer v. Mulligan*, 889 P.2d 509, 513 (Wy. 1995) [ADetermining the existence of an attorney-client relationship >depends on the facts and circumstances of each case= and >may be implied from the conduct of the parties, such as the giving of advice or assistance, or such as failing to negate the relationship when the advice or assistance is sought if the attorney is aware of the reliance on the relationship.= @]; Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 Clinical L. Rev. 147, 181-82 (2000); and *Developments in the Law - Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1323 (1981).

November 1, 2009 Sapiro E-mail to RRC:

1. In the Introduction and in the Summary, I recommend two stylistic changes. In the second line of the Summary, and the third line of the Introduction, I would delete the comma after the word “non-substantive.” In the third line of the Summary and the fourth line of the Introduction, I would delete the comma after “e.g.” and I would change “e.g.” so it is italicized.
2. I recommend only one substantive change to the rule. I agree with the last sentence of proposed Comment [4]. Once a conflict is detected, the personally conflicted lawyer should be screened from the adverse representation. However, I think that should be part of the black letter rule and not just a “should be” recommendation in the Comment. I think it should be mandatory.

November 1, 2009 KEM E-mail to RRC:

1. I agree with Jerry's substantive change to the Rule in his item #2, below.
2. This was one of a laundry list of issues that were identified long before Howard Miller became involved earlier this year in the process of accelerating the drafting of a 6.5-like rule, the one that eventually became 1-650. We were going to revisit those issues after this Rule returned to us. However, we have not because events have overtaken us.
3. Below is an e-mail I sent in June 2009 to the drafters that identifies this issue, among others. I am not recommending we revisit those issues -- I'm satisfied that the Rule is otherwise fine. However, I think the screening issue is important. As you might recall, we began our discussion of 6.5 well before the other 6 series of rules because we identified it as a rule that implicated the concept of screening. I didn't think screening was necessary back then but I've come to conclude that it is appropriate. The clients that are being served under this rule deserve no less in the event that the lawyer discovers the lawyer's firm is adverse to the client.

See **June 26, 2008 KEM E-mail to Snyder:**, above.

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/rtrfb.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. If 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 why 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, 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 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.

**RRC – Rule 6.5 [1-650]
E-mails, etc. – Revised (11/3/2009)**

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.

November 1, 2009 Snyder E-mail to RRC:

I agree with Jerry and Kevin that the personally conflicted attorney should be screened.