

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

(Draft #3, 6/8/09)

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

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

Primary Factors Considered

Existing California Law

Rules

Statute

Case law

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

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 6

Opposed Rule as Recommended for Adoption 5

Abstain 0

Approved on Consent Calendar

Approved by Consensus

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

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Commission on Access to Justice

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.3* Membership in Legal Services Organization

November 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

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

MINORITY. A minority of the Commission believes subparagraphs (a) and (b) of this Rule will create disciplinary risks for lawyers and thereby discourage them from participating in legal services organizations. Virtually every aspect of the normal duties of a director or officer of the organization may violate both subparagraphs. This Rule does not give guidance about what will or will not lead to discipline. See the minority statement, which is provided in these materials after the Comment Comparison Chart. A second minority believes that the subject of this Rule is not an appropriate topic for Rules of Professional Conduct. This minority notes that the main purpose of the Rule is motivational and, although the minority concurs in the noble motive which the Rule expresses, the minority believes that the Rule, like all aspirational principles, has no place in a disciplinary rule. Moreover, the minority considers the limitations on lawyers' social action expressed in proposed paragraphs (a) and (b) to be mistaken, and probably unconstitutional limitations on a lawyer's freedom of speech and political action. The minority takes the position that lawyers' duties to clients are comprehensive; but they should not and cannot limit the lawyer's freedom to advocate and support social actions and objectives that the lawyer wishes to support outside the scope of the engagement and on the lawyer's own time.

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

<p style="text-align: center;"><u>ABA Model Rule</u></p> <p style="text-align: center;">Rule 6.3 Membership in Legal Services Organization</p>	<p style="text-align: center;"><u>Commission's Proposed Rule</u></p> <p style="text-align: center;">Rule 6.3 Membership in Legal Services Organization</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:</p>	<p>A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:</p>	<p>The introductory clause to proposed Rule 6.3 is identical to that of the Model Rule.</p>
<p>(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or</p>	<p>(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 or Business and Professions Code § 6068(e)(1); or</p>	<p>The reference to B & P Code § 6068(e)(1) has been added to emphasize the importance of maintaining client confidences and secrets.</p>
<p>(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.</p>	<p>(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.</p>	<p>Paragraph (b) is identical to Model Rule 6.3(b).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 6.3 Membership in Legal Services Organization Comment</p>	<p align="center"><u>Commissions Proposed Rule</u></p> <p align="center">Rule 6.3 Membership in Legal Services Organization Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.</p>	<p>[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.</p>	<p>Comment [1] is identical to Model Rule 6.3, cmt. [1].</p>
<p>[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.</p>	<p>[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances, including assurances that confidential client information will be protected.</p>	<p>Comment [2] is based on Model Rule 6.3, cmt. [2]. The added clause at the end of this Comment is intended to emphasize the importance of maintaining client confidences and secrets.</p>

Rule 6.3 Membership in Legal Services Organization

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7 or Business and Professions Code [§section 6068\(e\)\(1\)](#); or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

respect can enhance the credibility of such assurances, including assurances that confidential client information will be protected.

COMMENT

- [1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.
- [2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this

Rule 6.3: Membership in Legal Services Organization Rules Revision Commission — Minority Dissent

The beginning of this rule is laudable. Lawyers should be encouraged to participate in legal services organizations. But subparagraphs (a) and (b) will create disciplinary risks for lawyers and thereby discourage them from doing so. Rule 6.3 will be a disciplinary rule, binding on all members of the State Bar. A breach may expose a lawyer to discipline. Bus. & Prof. Code § 6077. However, this rule does not tell lawyers what will be permitted or prohibited. For example, if the lawyer has a client whose interests are adverse to the interests of a client of the legal services organization, will the lawyer voting on the budget of the legal services organization violate paragraph (a) or not? If the lawyer participates in a decision whether to hire or fire an employee of the organization, will that violate paragraph (a) or not? Conversely, paragraph Rule 6.3 (b) will also expose lawyers to discipline for good faith participation in decisions of the legal services organization. Participating in discussions about or votes on a budget for, or to hire or fire an employee, “could have a material adverse effect on the representation of a client of the organization.” Virtually every aspect of the normal duties of a director or officer of the organization may violate both paragraphs (a) and (b). Under what circumstances will the lawyer have to obtain the informed written consent of the lawyer’s clients before participating in a decision affecting a legal services organization? Neither Rule 6.3 nor Rule 1.7 gives any guidance about what will or will not lead to discipline. A Rule of Professional

Conduct ought to give clear indication of what conduct is or is not permissible under it. Rule 6.3 does not. If it is adopted, a lawyer who participates in a legal services organization that has a client adverse to the lawyer’s firm’s own client will do so at considerable risk. This will have a chilling effect on lawyers’ decisions whether to participate in a legal services organization. Neither the State Bar nor a Rule of Professional discipline should discourage lawyers from doing so. Therefore, this rule should not be adopted as proposed.

Rule 6.3 Membership in Legal Services Organization (Commission's Proposed Rule – Clean Version)

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.6, Rule 1.7 or Business and Professions Code section 6068(e); or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

respect can enhance the credibility of such assurances, including assurances that confidential client information will be protected.

COMMENT

- [1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a lawyer-client relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.
- [2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this

Rule 6.3: Membership in Legal Services Organizations

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2008 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

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

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

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

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

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

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

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

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

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

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

TOTAL = __ Agree = 3
Disagree = 1
Modify = 1
NI = __

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

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

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

TOTAL = __ Agree = 3
Disagree = 1
Modify = 1
NI = __

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