

Proposed Rule 6.2 [n/a]

“Accepting Appointments”

(Draft #4, 3/31/10)

Summary: Proposed Rule 6.2 is based on Model Rule 6.2, which sets forth a lawyer’s duties when a tribunal seeks to appoint the lawyer to represent a person. The Rule closely tracks the Model Rule. Some changes have been made to conform language to California rule style and statutes and a comment added to address concerns of California public defenders. See Introduction and Explanation of Changes.

Comparison with ABA Counterpart

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

Primary Factors Considered

- Existing California Law

Rule	
Statute	Bus. & Prof. Code § 6068(h); Cal. Gov. Code § 27706; Penal Code § 987.2(e).
Case law	

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

- Other Primary Factor(s)

State Bar of California Board of Governors Pro Bono Resolution (2002).

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 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 11

Opposed Rule as Recommended for Adoption 0

Abstain 0

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

California Public Defenders Association; L.A. Public Defender; Riverside Public Defender

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 6.2* Accepting Appointments

April 2010

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 6.2 is based on Model Rule 6.2, which sets forth a lawyer's duties when a tribunal seeks to appoint the lawyer to represent a person. The Rule closely tracks the Model Rule, except for some changes to conform language to California rule style and statutes, and also to conform comment language to the language of proposed Rule 6.1, which concerns the provision of pro bono services. A cross-reference to Business & Professions Code § 6068(h), which provides it is the duty of a lawyer, "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed," has also been added. Model Rule 6.2, cmt. [2], has been stricken because it neither explains nor clarifies the application of the Rule. Finally, a new Comment [3] has been added to address concerns raised by public defenders. See Explanation of Changes for Comment [3].

Minority. A minority of the Commission declines to recommend the Rule because it would allow a lawyer to reject an appointment to represent a client the lawyer considers "repugnant" or who is unpopular. The minority notes that lawyers are traditionally obliged to represent people they consider "repugnant." A client accused of a crime, a philandering spouse, and a protester arrested in a mass demonstration are all entitled to representation, even if the lawyer considers them "repugnant" or unpopular because of their acts or for other reasons. The unpopularity of a client should not permit a lawyer to refuse appointment by a tribunal. An appointed lawyer does not espouse the client or the client's cause.

Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.2, with little variation. New York and Oregon have declined to adopt the Rule, and Georgia has reduced the rule to a single sentence.

* Proposed Rule 6.2, Draft #4 (3/31/10).

<p align="center"><u>ABA Model Rule</u> Rule 6.2 Accepting Appointments</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 6.2 Accepting Appointments</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:</p>	<p>A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:</p>	<p>The introductory clause is identical to its Model Rule counterpart.</p>
<p>(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;</p>	<p>(a) representing the client is likely to result in violation of these <u>the State Bar Act</u>, or other law;</p>	<p>Paragraph (a) is identical to Model Rule 6.2(a), except that “these Rules” has been substituted for “the Rules of Professional Conduct” to conform with the Rules style, and “the State Bar Act” has been added consistent with other Rules.</p>
<p>(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or</p>	<p>(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or</p>	<p>Paragraph (b) is identical to Model Rule 6.2(b).</p>
<p>(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.</p>	<p>(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer-client relationship or the lawyer's ability to represent the client.</p>	<p>Paragraph (c) is identical to Model Rule 6.2(c), except that “lawyer-client” has been substituted for “client-lawyer,” consistent with California rules and statute style.</p>

* Proposed Rule 6.2, Draft 4 (3/31/10). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 6.2 Accepting Appointments Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 6.2 Accepting Appointments Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.</p>	<p>[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. See Business & Professions Code section 6068(h). All lawyers have Every lawyer, as a matter of professional responsibility to, should assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients without expectation of compensation other than reimbursement of expenses. A lawyer may also be subject to appointment by a court tribunal to serve unpopular clients or persons unable to afford legal services.</p>	<p>Comment [1] is based on Model Rule 6.2, cmt. [1], except: (i) a reference to Business & Professions Code § 6068(h), which provides it is the duty of a lawyer, "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed," has been added; (ii) the second sentence has been modified to incorporate the actual language in proposed Rule 6.1; (iii) the clause "without expectation of compensation other than reimbursement of expenses," also from proposed Rule 6.1, has been added to clarify that a lawyer fulfills his or her responsibility under Rule 6.1 only if the representation is accepted without expectation of compensation; and (iv) "tribunal" has been substituted for "court" to conform to the black letter of the introductory clause.</p>
<p>Appointed Counsel</p> <p>[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may</p>	<p>Appointed Counsel</p> <p>[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may</p>	<p>Model Rule 6.2, cmt. [2], has been deleted because it does not explain or clarify the application of the Rule.</p>

* Proposed Rule 6.2, Draft 3 (3/31/10). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 6.2 Accepting Appointments Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 6.2 Accepting Appointments Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.</p>	<p>also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.</p>	
<p>[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.</p>	<p>[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and, confidentiality, <u>and competence</u>, and is subject to the same limitations on the client-lawyer-<u>client</u> relationship, such as the obligation to refrain from assisting the client in violation of the<u>these</u> Rules <u>or the State Bar Act. See Rule 1.2(d).</u></p>	<p>Comment [2] is based on Model Rule 6.2, cmt. [3], except that “competence” has been added to emphasize that an appointed lawyer owes the same duty of competence as is owed when retained. In addition, a reference to Rule 1.2(d), which prohibits a lawyer from assisting a client to engage in criminal or fraudulent conduct, has been added to provide further guidance on the limits of a representation.</p>
	<p><u>[3] Paragraph (c) does not apply to public defenders or federal public defenders or a subordinate lawyer in their offices where appointment is governed by statute. See Cal. Government Code section 27706; Penal Code section 987.2(e); 18 U.S.C. section 3006A(g); Fed. R. Crim. Proc. 44. See also Rule 5.1, Comment [6].</u></p>	<p>Comment [3] has no counterpart in Model Rule 6.2. It has been added to address concerns raised by the California Public Defender Association that paragraph (c) might interfere with the ability of institutional public defenders to effectively manage their case loads and supervise the subordinate lawyers in their offices.</p>

Rule 6.2: Accepting Appointments

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

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of these Rules, the State Bar Act, or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client.

COMMENT

- [1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. See Business & Professions Code section 6068(h). ~~All lawyers have~~ Every lawyer, as a matter of professional responsibility, should assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients without expectation of compensation other than reimbursement of expenses. A lawyer may also be subject to appointment by a tribunal to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

- ~~[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause includes situations where the lawyer would not be able to handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.~~

- [32] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty, confidentiality, and competence, and is subject to the same limitations on the lawyer-client relationship, such as the obligation to refrain from assisting the client in violation of these Rules or the State Bar Act. See Rule 1.2(d).

- [3] Paragraph (c) does not apply to public defenders or federal public defenders or a subordinate lawyer in their offices where appointment is governed by statute. See Cal. Government Code section 27706; Penal Code section 987.2(e); 18 U.S.C. section 3006A(g); Fed. R. Crim. Proc. 44. See also Rule 5.1, Comment [6].

Rule 6.2: Accepting Appointments
(Commission's Proposed Rule – CLEAN)

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of these Rules, the State Bar Act, or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client.

[2] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty, confidentiality, and competence, and is subject to the same limitations on the lawyer-client relationship, such as the obligation to refrain from assisting the client in violation of these Rules or the State Bar Act. See Rule 1.2(d).

[3] Paragraph (c) does not apply to public defenders or federal public defenders or a subordinate lawyer in their offices where appointment is governed by statute. See Cal. Government Code section 27706; Penal Code section 987.2(e); 18 U.S.C. section 3006A(g); Fed. R. Crim. Proc. 44. See also Rule 5.1, Comment [6].

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. See Business & Professions Code section 6068(h). Every lawyer, as a matter of professional responsibility, should assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients without expectation of compensation other than reimbursement of expenses. A lawyer may also be subject to appointment by a tribunal to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

**Rule 6.2 Accepting Appointments
[Sorted by Commenter]**

**TOTAL = 6 Agree = 4
Disagree = 1
Modify = 1
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
*2	California Public Defenders Association ("CPDA") (Sheela, Barton)	M			We agree with all of the remarks of Michael Judge, Los Angeles County Public Defender.	See Response to Michael Judge, below.
2	Committee on Professional Responsibility and Conduct ("COPRAC")	A		Comment [1]	COPRAC support adoption of this rule. COPRAC also recommends that the last two sentences in Comment [1] of the proposed Rule 6.2 be deleted. A lawyer's acceptance of "unpopular matters" or "indigent or unpopular clients", as stated in the Comment [1], does not equate with compliance with proposed Rule 6.1. Such references imply that a lawyer can meet her pro bono obligations in these ways, which may be misleading.	No response required. The Commission agrees that the last two sentences in the Comment might be potentially misleading, and has revised them to remove the suggestion that accepting a compensated appointment will comply with Rule 6.1.

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

² The two comments marked with an asterisk are informal e-mail messages sent to the Commission after the public comment deadline. They were considered at the Commission's March 26-27, 2010 meeting. These comments are not written comments that were submitted in response to the State Bar's official request for public comment. In addition, with regard to the message from L.A. Public Defender Michael Judge, he participated in the Commission's March meeting and provided additional oral comments on proposed changes to the version of Rule 6.2 that was issued for public comment.

**Rule 6.2 Accepting Appointments
[Sorted by Commenter]**

TOTAL = 6 **Agree = 4**
Disagree = 1
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
*3	Judge, Michael Los Angeles County Public Defender	M		6.2(b)	<p>The appointment of institutional Public Defenders in California is controlled by Penal Code Section 987.2(e) which provides: "In a county of the first, second or third class, the court shall first utilize the services of the Public Defender to provide criminal defense services for indigent defendants."</p> <p>The only exception is if the public defender determines that accepting the case would create an excessive workload, such that the client would not receive adequate assistance of counsel, and therefore declares the Public Defender's Office unavailable; or if the public defender determines that a conflict of interest exists such that undertaking the representation of the client would conflict with pre-existing legal obligations or duties to others, or would create an appearance of a lack of full allegiance to the client (e.g., the Public Defender's family is the victim of the crime.)</p> <p>Except for the above, Public Defender offices do not seek to avoid appointments on cases. Since Public Defenders are financed and resourced by the government there is no financial burden, unreasonable or otherwise,</p>	<p>No response required.</p> <p>No response required.</p> <p>The Commission recognizes, and public defenders conceded, that because the public defenders are financed by the government, paragraph (b) could never be used by a deputy in the office to refuse an</p>

³ See note 2, above.

**Rule 6.2 Accepting Appointments
[Sorted by Commenter]**

TOTAL = 6 **Agree = 4**
Disagree = 1
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				6.2(c)	<p>placed on the public defender by virtue of accepting a case, so paragraph (b) is inapplicable.</p> <p>With respect to the issue of the client and/or the cause being repugnant, the public defender represents the “worst of the worst” and others as well. That’s the essence of the mission of the public defender. The application paragraph (c) to Public Defender offices would provide all the authority an individual Deputy Public Defender (DPD) who is a cynical shirker would need to exploit the rule and cause unpleasant cases to be shifted to his or her colleagues, without any effective management response realistically possible.</p> <p>In the Los Angeles County Public Defender’s Office we ask each person who applies for a position as a DPD whether there is any kind of case or client the candidate would not be able to properly represent. If there is, such a person does not get hired. If one were to be untruthful, or later experience a change of perspective, we possess all full range of options from counseling, a temporary respite, to reduction in rank and pay to only handle minor charges, to discipline for insubordination, administration of a plan for improvement, to termination.</p>	<p>appointment, so no change has been made.</p> <p>As with proposed Rule 5.1, the Commission recognizes that proposed Rule 6.2(c) might interfere with the operation of institutional public and federal defenders offices in California and, with the assistance of representatives of the public defenders community, the Commission has drafted new Comment [3] to address the concerns expressed. See Explanation of Changes for Comment [3] in the Rule & Comment Comparison Chart.</p>

**Rule 6.2 Accepting Appointments
[Sorted by Commenter]**

TOTAL = 6 **Agree = 4**
Disagree = 1
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					I strongly urge the Commission to either exempt Public Defender offices from the operation of the rule entirely or to draft the rule in a manner that it applies only to the Public Defender and not the DPD's, and further exempt Public Defender offices from the application and operation of subsections (b) and (c).	See Responses, above.
3	Office of the Chief Trial Counsel	D			OCTC appreciates the intent of this Rule, but is concerned that this Rule as written is not enforceable. OCTC would also strike the Comments as unnecessary.	The Commission disagrees. Nearly every jurisdiction has adopted some version of Rule 6.2. Among the issues addressed, the Rule offers protection to the criminal defendant to ensure that he or she has competent counsel unhindered by overriding personal prejudice. It further reinforces the goal of Access to Justice. This Rule is an appropriate addition to the Rules of Professional Conduct. Moreover, the comments provide important clarification as to the application of the Rule.
4	Orange County Bar Association	M			It is not clear whether the proposed Rule applies to any attorney who is asked by a judicial officer to take on a particular representation, or only to those lawyers who voluntarily place themselves on panels for such appointments. In the former case, we believe the ability of a lawyer to decline the "appointment" should be even broader than stated in this proposed Rule.	The Commission does not believe it necessary to distinguish between an attorney who voluntarily places himself or herself on a panel for appointment and one who does not do so. If the assignment presents this problem for a panel attorney, the overriding concern should be the attorney's impairment under the circumstances and his or her ability to competently represent the criminal defendant.

**Rule 6.2 Accepting Appointments
[Sorted by Commenter]**

TOTAL = 6 **Agree = 4**
Disagree = 1
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					In addition, it is not clear whether the proposed Rule also would apply to public defenders and, if so, how the Rule would intersect with a criminal defendant's constitutional right to counsel.	See Response to Michael Judge, above.
5	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response required.
6	Santa Clara County Bar Association	A			No comment.	No response required.

Rule 6.2: Accepting Appointments

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

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

Georgia shortens ABA Model Rule 6.2 to a single sentence: “For good cause a lawyer may seek to avoid appointment by a tribunal to represent a person.”

New York: In the rules effective April 1, 2009, New York omits Rule 6.2.

North Carolina omits Rule 6.2.

Ohio substitutes the word “court” for “tribunal” in the first line of the rule to reflect the Ohio Supreme Court’s view that “the inherent authority to make appointments is limited to courts and does not extend to other bodies” included within the definition of “tribunal.” Ohio also omits ABA Model Rule 6.2(c) because “the substance . . . is addressed in Rule 1.1, which mandates that a lawyer shall provide competent representation to a client.”