

## **AGENDA MATERIALS FOR**

### **III.H. Consideration of Alternatives for Promoting/Encouraging Pro Bono Service**

- Memorandum re Consideration of ABA Model Rule 6.1 (“Voluntary Pro Bono Publico Service”) – Alternatives to Recommending a Rule
  - Exhibit 1 – Full Text of Proposed Rule 1.0 as Recommended by the Drafting Team to Include the New Comment.)
  - Exhibit 2 – Executive Summary on MR 6.1 Submitted to Board Committee on Regulation & Discipline in March 2016 (including Full Text of Model Rule 6.1 and State Bar’s Pro Bono Resolution)
- Excerpt from Rule 1-650 [6.1] Report and Recommendation DFT1.3 (01-06-16) - Attachment 5





# THE STATE BAR OF CALIFORNIA

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OFFICE OF PROFESSIONAL COMPETENCE

PLANNING, AND DEVELOPMENT

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## MEMORANDUM

**DATE:** May 19, 2016

**TO:** Members, Commission for the Revision of the Rules of Professional Conduct

**FROM:** ABA Model Rule 6.1 Drafting Team (Toby Rothschild (L), Lee Harris, and Raul Martinez)

**SUBJECT:** Consideration of ABA Model Rule 6.1 ("Voluntary Pro Bono Publico Service") – Alternatives to Recommending a Rule

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### Summary:

The drafting team assigned to study ABA Model Rule 6.1 ("MR 6.1") recommends that the Commission adopt a new comment to proposed rule 1.0 [1-100] ("Purpose and Function of the Rules of Professional Conduct") that is intended to encourage lawyers to provide voluntary pro bono services as an integral part of their responsibilities as officers of the legal system but at the same time make clear that the comment is not a disciplinary standard. (See Attachment 1 for the full text of proposed rule 1.0 as recommended by the drafting team to include the new comment.)

### Background:

At the Commission's January 22, 2016 meeting, the Commission determined that a proposed California version of MR 6.1 should not be recommended for adoption by the Board. However, the Commission suggested that the drafting team to consider other options for addressing lawyer pro bono service including, a new comment to rule 1.0 or the concept of adding a preamble to the rules. In response, the drafting team met by teleconference on May 11, 2016. Among the items considered by the team were the following: the executive summary of the Commission's consideration of MR 6.1 submitted to Board Committee on Regulation & Discipline in March 2016 that includes the full text of MR 6.1 and the State Bar's Pro Bono Resolution (see Attachment 2); the Commission's January 22 & 23, 2016 meeting agenda materials presenting the drafting team's original proposal for adopting a version of MR 6.1; the preamble to the California Code of Judicial Ethics; the MR Preamble and Scope; the ABA state adoption chart for the Model Rule Preamble; and the ABA state adoption chart for the Model Rule Scope.

### Discussion:

The drafting team recommends the following new Comment [5] to the Commission's proposed rule 1.0 [1-100]:

[5] Although these Rules establish disciplinary standards for lawyers, they are not intended to address or supplant the entire realm of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer

should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. See Business and Professions Code § 6073 (financial support for programs providing pro bono legal services).

The primary purpose of this new comment is to highlight the topic of lawyer pro bono by including it as a part of the Rules of Professional Conduct. The specific provisions, such as the reference to 50 hours of annual service, are consistent with the State Bar's pro bono resolution. Although the new comment would duplicate some of the content in the pro bono resolution, it can be expected to promote a significant heightened awareness and appreciation of a lawyer's special responsibility to assist in providing equal access to justice for all persons. This is because the comment would be: (1) a citable reference in the rules; and (2) taught in law school and MCLE programs as an actual component of California's rules. In addition, legal services organization's recruitment of lawyers and law firms would be enhanced because the new comment and its specific terms could be used in outreach, in addition to the State Bar resolution and related statutory provisions.

Raising the profile of a lawyer's pro bono responsibility in a new comment, however, would not create a duty enforceable by lawyer discipline. The Commission is being careful to assure that the content of comments do not include prescriptive standards or exceptions not found in the black letter of the rules. The new pro bono comment is consistent with this policy in using terms such as "encouraged" and "aspire to," rather than a mandatory "shall" or "must," in describing a lawyer's pro bono responsibility.

A new comment is preferred by the drafting team over the option of a preamble. The drafting team considered a preamble approach by studying the Model Rules Preamble and Scope and the preamble to the California Code of Judicial Ethics. The consensus of the drafting team was that proposed rule 1-100 is the functional equivalent of a preamble and that it would be confusing to add a preamble to the California Rules given that the California rules have never included a preamble since the inception of the rules in 1928. Given the present understanding of the respective roles of the black letter (binding) and comments (non-binding interpretative guidance), the drafting team was concerned that if a preamble were adopted, topics addressed in the preamble, such as pro bono, would reside in a grey area with respect to their binding force. Placing pro bono in a comment sends a clear signal that the provision of pro bono services, while an important aspect of a lawyer's responsibilities as an officer of the legal system, is not mandatory. Another concern was that a preamble would not comport with rule 1-100's statement that the "rules are intended to regulate professional conduct of lawyers through discipline."

#### **Conclusion:**

In accordance with the foregoing, the drafting team recommends that the Commission reconsider the prior adoption of proposed rule 1-100 for the limited purpose of considering the addition of a new Comment [5] addressing a lawyer's pro bono responsibility.

## EXHIBIT 1

### **Rule 1-100 Purpose and Function of the Rules of Professional Conduct**

(Redline version showing the drafting team's proposed amendments to the Commission's rule adopted on May 29, 2015)

(a) Purpose.

The following rules are intended to regulate professional conduct of lawyers through discipline. They have been adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code §§ 6076 and 6077 to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession. These Rules together with any standards adopted by the Board of Trustees pursuant to these Rules shall be binding upon all lawyers.

(b) Function.

- (1) A willful violation of any of these rules is a basis for discipline.
- (2) The prohibition of certain conduct in these rules is not exclusive. Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts.
- (3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these Rules or the Comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(c) Purpose of Comments.

The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the Rules.

(d) These Rules may be cited and referred to as the "California Rules of Professional Conduct."

Comment

[1] The Rules of Professional Conduct are intended to establish the standards for lawyers for purposes of discipline. See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489]. Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]. Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. *Id.*; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571]. A violation of a rule may have other non-disciplinary consequences. See e.g., *Fletcher v. Davis* (2004) 33 Cal.4th 61,

71-72 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement).

[2] While the rules are intended to regulate professional conduct of lawyers\*, a violation of a rule can occur when a lawyer\* is not practicing law or acting in a professional capacity.

[3] A willful violation of a rule does not require that the lawyer intend to violate the rule. *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code § 6077.

[4] In addition to the sources of guidance identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

[5] Although these Rules establish disciplinary standards for lawyers, they are not intended to address or supplant the entire realm of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility, every lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should provide a substantial majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. See Business and Professions Code § 6073 (financial support for programs providing pro bono legal services).

## EXHIBIT 2

### **RULE REVISION CONSIDERED BUT NOT RECOMMENDED FOR ADOPTION (No Current Rule) ABA Model Rule 6.1 Voluntary Pro Bono Publico Service**

#### **EXECUTIVE SUMMARY**

At its January 22, 2016 meeting, the Commission for the Revision of the Rules of Professional Conduct ("Commission") considered a report and recommendation on ABA Model Rule 6.1 (Voluntary Pro Bono Publico Service). The report included the "State Bar of California Pro Bono Resolution" as last amended by the Board on June 22, 2002. Following discussion of the report, the Commission determined that a proposed California version of Model 6.1 should not be recommended at this time. An excerpt from the Commission's January 22, 2016 open session action summary is set forth below. Also provided below are: (1) the full text of ABA Model Rule 6.1; and (2) the State Bar of California Pro Bono Resolution. As indicated in the action summary excerpt, the Commission is contemplating discussion of other possible options for addressing the subject of pro bono, such as inclusion in a new Preamble to the Rules.

#### *COMMISSION ACTION SUMMARY EXCERPT:*

#### III. ACTION

##### a. Report and Recommendation on Rule 1-650 (Limited Legal Services Programs) (ABA Model Rule 6.1 Pro Bono Publico Service)

The Chair recognized Mr. Martinez who, before deferring to Mr. Rothschild to make the presentation of the report and recommendation of the drafting team concerning proposed Rule 6.1, raised the policy issue of whether the Rules of Professional Conduct should include a voluntary pro bono rule that is not intended to be enforced through attorney discipline (hereinafter "aspirational rule").

Following discussion, the Commission considered a recommendation that an aspirational pro bono rule should not be adopted.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-650 drafting team, the Commission hereby adopts the position that an aspirational pro bono rule should not be included as a proposed rule in the Commission's comprehensive set of proposed new and amended Rules of Professional Conduct.

All members present voted yes with the exception of Mr. Rothschild and Mr. Tuft who voted no.

It was understood that the foregoing vote did not foreclose the consideration of other potential drafting team recommendations to respond to the recognized need for voluntary pro bono services in California. Among the options that the drafting team was encouraged to consider were: (1) adding a new comment to proposed amended rule 1-100 [1.0] (re purpose and function of the rules) emphasizing the importance of voluntary

pro bono; (2) adding a new preamble to the rules on voluntary pro bono; (3) drafting a mandatory rule to be enforced through attorney discipline; or (4) including the text of an aspirational pro bono rule in the materials submitted to the Board but with a proviso explaining that although the Commission has rejected a Rule of Professional Conduct, the Board might consider other options for “codifying” an aspirational rule, such as a State Bar rule or as a Rule of Court.

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## **ABA MODEL RULE 6.1**

### **Voluntary Pro Bono Publico Service**

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
  - (3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

### **Comment**

[1] Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer

hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory lawyers' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare

programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

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### **STATE BAR OF CALIFORNIA PRO BONO RESOLUTION**

(Adopted by the Board of Governors of the State Bar of California  
at its December 9, 1989 meeting and amended at its June 22, 2002 Meeting)

**RESOLVED** that the Board hereby adopts the following resolution and urges local bar associations to adopt similar resolutions:

**WHEREAS**, there is an increasingly dire need for pro bono legal services for the needy and disadvantaged; and

**WHEREAS**, the federal, state and local governments are not providing sufficient funds for the delivery of legal services to the poor and disadvantaged; and

**WHEREAS**, lawyers should ensure that all members of the public have equal redress to the courts for resolution of their disputes and access to lawyers when legal services are necessary; and

**WHEREAS**, the Chief Justice of the California Supreme Court, the Judicial Council of California and Judicial Officers throughout California have consistently emphasized the pro bono responsibility of lawyers and its importance to the fair and efficient administration of justice; and

**WHEREAS**, California Business and Professions Code Section 6068(h) establishes that 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”; now, therefore, it is

**RESOLVED** that the Board of Governors of the State Bar of California:

- (1) Urges all attorneys to devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice;
- (2) Urges all law firms and governmental and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, at least 50 hours per year, toward their billable hour requirements, or by otherwise giving actual work credit for these activities;
- (3) Urges all law schools to promote and encourage the participation of law students in pro bono activities, including requiring any law firm wishing to recruit on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities; and
- (4) Urges all attorneys and law firms to contribute financial support to not-for-profit organizations that provide free legal services to the poor, especially those attorneys who are precluded from directly rendering pro bono services.



## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]

Lead Drafter: Martinez  
Co-Drafters: Harris, Rothschild  
Meeting Date: November 13-14, 2015

### D. Concepts Recommended (Pros and Cons): Recommend adoption of versions of Model Rules 6.1, 6.3, and 6.4

#### 1. **Proposed Rule 6.1.**

Introduction: Proposed Rule 6.1, which encourages lawyers to provide or enable the direct delivery of pro bono publico services to persons of limited means, tracks Model Rule 6.1, except that it incorporates language from the Board of Governors Pro Bono Resolution (2002) ("Board Resolution," attached) and includes specific references to California statutory law.

- Pros: This rule is critical for addressing California's access to justice crisis and, in the first Commission, had the strong support of the legal services community. This rule is consistent with existing California law (Bus. & Prof. Code §§ 6068(h) and 6072 - 6073) and the Board of Trustee's Pro Bono Resolution. Although it is admittedly aspirational, it is not a rule that purports to be a disciplinary standard. One could narrowly construe the Commission's charter as rejecting only those aspirational rules that create a misleading impression that they are disciplinary. This proposed rule does not mislead. It appeals to a lawyer's sense of professional obligation without the façade of a disciplinary intent.
- Cons: By its terms, this rule is not a lawyer disciplinary standard. Aspirational provisions are not appropriate for the California rules given the Commission's charter. In addition, depending on one's perspective, the concept of "pro bono" described in the rule might be criticized as both under-inclusive (e.g., community and civic activities unrelated to the legal profession are not recognized) or over-inclusive (e.g., true pro bono should be limited to direct delivery of legal services to persons of limited means and should not include participation in activities to improve the law).

#### 2. **Proposed Rule 6.1** – Move Comment [12] of Model Rule 6.1 into the rule text as a new paragraph (c).

- Pros: This change to the Model Rule version of 6.1 helps assure that lawyers, judges, and the public will know that the Rule is not intended to be a disciplinary standard. This change also is consistent with the objective of avoiding commentary that might contradict the terms of a rule.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]

**Lead Drafter:** Martinez  
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**Meeting Date:** November 13-14, 2015

- Cons: Making the non-disciplinary nature of this rule more prominent might dilute the intended effect of the rule in encouraging pro bono activity.

The following is a clean version of proposed Rule 6.1

### **Rule 6.1 Voluntary Pro Bono Publico Service**

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should aspire to provide or enable the direct delivery of at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the 50 hours of legal services without expectation of compensation other than reimbursement of expenses to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
  - (3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of increasing access to justice.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

- (c) The responsibility set forth in this Rule is not enforceable through disciplinary process.

### **Comment**

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]**

**Lead Drafter:** Martinez  
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**Meeting Date:** November 13-14, 2015

the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means. In addition, see Rule 5.4(a)(5) regarding a lawyer's agreement to pay court awarded fees to a legal services organization.

[5] While it is preferable that a lawyer fulfill his or her annual responsibility to perform pro bono services through activities described in paragraphs (a)(1) and (2), the lawyer's commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers from performing the pro bono services outlined in paragraphs (a)(1) and (2).

## **DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]**

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Accordingly, where those restrictions apply, government and public sector lawyers may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate is encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]

Lead Drafter: Martinez  
Co-Drafters: Harris, Rothschild  
Meeting Date: November 13-14, 2015

The following is a redline version of proposed Rule 6.1 to ABA Model Rule 6.1

### Rule 6.1 Voluntary Pro Bono Publico Service

Every lawyer ~~has a~~, as a matter of professional responsibility ~~to~~, should provide legal services to those unable to pay. A lawyer should aspire to ~~render~~ provide or enable the direct delivery of at least ~~(50)~~ hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the ~~(50)~~ hours of legal services without ~~fee or~~ expectation of ~~fee~~ compensation other than reimbursement of expenses to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
  - (3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of increasing access to justice.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

(c) The responsibility set forth in this Rule is not enforceable through disciplinary process.

### Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. ~~The American Bar Association urges all lawyers to provide a minimum of~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1-650 [and Model Rules 6.1, 6.2, 6.3 & 6.4]

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~~50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that~~ In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in ~~programs funded by the~~ a qualified legal services ~~Corporation~~ program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without ~~fee or expectation of fee~~ compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means. In addition, see Rule 5.4(a)(5) regarding a lawyer's agreement to pay court awarded fees to a legal services organization.

[5] While it is ~~possible for~~ preferable that a lawyer ~~to~~ fulfill ~~the~~ his or her annual responsibility to perform pro bono services ~~exclusively~~ through activities described in

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paragraphs (a)(1) and (2), ~~to the extent that any hours of service remained unfulfilled, the remaining lawyer's~~ commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers ~~and judges~~ from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers ~~and judges~~ may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. ~~Participation in judicare programs and~~ Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate ~~are~~is encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono

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services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

~~[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.~~

- Variations in other jurisdictions. Nearly every jurisdiction has adopted some version of Model Rule 6.1. There is a wide range of variation in their adoption of Model Rule 6.1, with some retaining the 1983 version, some adopting the 2002 version, and others implementing unique provisions, ranging from D.C.'s relatively short rule to Florida's rule, which establishes an elaborate pro bono framework. As of 2013, 7 states have mandatory pro bono reporting (Florida, Hawaii, Illinois, Maryland, Mississippi, Nevada, and New Mexico); 8 states have formally rejected mandatory pro bono reporting (Colorado, Indiana, Massachusetts, Minnesota, New York, Pennsylvania, Tennessee, and Utah); 11 states encourage voluntary pro bono reporting (Arizona, Georgia, Kentucky, Louisiana, Missouri, Montana, New Mexico, Oregon, Texas, Utah, and Washington); and 2 states were actively considering voluntary pro bono reporting (Michigan and Vermont). Moreover, as of January 1, 2015, New York will require all applicants to the New York State Bar (except those applying for admission by motion) to show that they have completed at least 50 hours of law-related pro bono service as a condition of bar admission. California has no comparable rule. See: <http://apps.americanbar.org/legalservices/probono/reporting.html>.