

# **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 6.3**

## **Commission Drafting Team Information**

**Lead Drafter:** Raul Martinez

**Co-Drafters:** Lee Harris, Toby Rothschild

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## **I. CURRENT ABA MODEL RULE**

**[There is no California Rule that corresponds to Model Rule 6.3,  
from which proposed Rule 6.3 is derived.]**

### **Rule 6.3 Membership In Legal Services Organization**

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
- (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.

### **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 respect can enhance the credibility of such assurances.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 6.3 [1-650]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

**Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 6.3 [1-650]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

**III. COMMISSION'S PROPOSED RULE 6.3 (CLEAN)**

**Rule 6.3 Membership In Legal Services Organization**

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 Business and Professions Code § 6068(e)(1) or Rules 1.7 or 1.9; 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.

**Comment**

Lawyers should 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.

**IV. COMMISSION'S PROPOSED RULE 6.3  
(REDLINE TO MODEL RULE 6.3)**

**Rule 6.3 Membership In Legal Services Organization**

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~~[Business and Professions Code § 6068\(e\)\(1\) or Rules 1.7 or 1.9](#); 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.

#### **COMMENT** [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 respect can enhance the credibility of such assurances.~~

#### **V. RULE HISTORY**

Although the origin and history of Model Rule 6.3 was not the primary factor in the Commission's consideration of proposed Rule 6.3, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 719 - 722, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

#### **VI. OCTC / STATE BAR COURT COMMENTS**

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**  
(In response to 90-day public comment circulation):
  - 1. OCTC supports this rule, but the Comment is unnecessary. It is merely a philosophical discussion of the reasons for the rule, which are evident.
- **State Bar Court:** No comments were received from State Bar Court.

#### **VII. PUBLIC COMMENT & PUBLIC HEARING TESTIMONY**

Five comments, including the above comment from OCTC, were received. Four agreed with the proposed rule. One agreed only if modified. A public comment synopsis table,

with the Commission's responses to each comment, is provided at the end of this report.

## **VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

- **Massachusetts Rule 6.3** is identical to Model Rule 6.3:

### **Massachusetts Rule 6.3 Membership In Legal Services Organization**

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

(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.

#### **A. ABA Model Rule Adoptions**

The ABA Comparison Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 6.3: Membership in Legal Services Organizations," revised May 4, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_6\\_3.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_3.pdf)
- Thirty-eight jurisdictions have adopted Model Rule 6.3 verbatim.<sup>1</sup> Seven states have adopted a slightly modified version of Model Rule 6.3.<sup>2</sup> Two states have adopted a version of the rule that is substantially different from Model Rule 6.3.<sup>3</sup> Four states have not adopted any version of Model Rule 6.3.<sup>4</sup>

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<sup>1</sup> The thirty-eight jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>2</sup> The seven states are: Florida, Georgia, Illinois, Kansas, Maryland, New York, and Tennessee.

<sup>3</sup> The two states are: Michigan and New Jersey.

<sup>4</sup> The four states are: California, Kentucky, Ohio, and Texas.

**IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES;  
NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

**A. Concepts Accepted (Pros and Cons):**

1. Proposed Rule 6.3 – inclusion of reference to Business and Professions Code section 6068(e)(1).
  - Pros: The ABA does not include a reference to confidentiality but California has a tradition of heightened client protection in this area. Including a reference to section 6068(e)(1) is an appropriate companion to the reference to rule 1.7 that codifies loyalty, rule 1.9 that codifies duties to former clients and rule 1.18 that codifies duties to prospective clients.
  - Cons: None identified.

**B. Concepts Rejected (Pros and Cons):**

1. Recommend inclusion of Model Rule Comment [2]
  - Pros: Consistent with the rule adopted in most jurisdictions.
  - Cons: The Comment is aspirational and inconsistent with the Commission's Charter.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

**C. Changes in Duties/Substantive Changes to the Current Rule:**

1. If proposed Rule 6.3 is adopted, it would be a new rule establishing a new charging vehicle for misconduct. While certain concepts overlap with other existing law, such as the duty of loyalty, the statement of these duties in this new rule constitute substantive changes to the current rules.

**D. Non-Substantive Changes to the Current Rule:**

None.

**E. Alternatives Considered:**

1. The primary alternative policy was to reject the addition of these Model Rules for which there are no current California counterparts.

**X.     RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

That the Board of Trustees of the State Bar of California adopt proposed Rule 6.3 in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 6.3 in the form attached to this Report and Recommendation.