

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 6.5 [1-650]**

### **Commission Drafting Team Information**

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### **I. CURRENT CALIFORNIA RULE**

#### **Rule 1-650 Limited Legal Services Programs**

- (A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:
  - (1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and
  - (2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.
- (B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.
- (C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

#### **Discussion**

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a

short-term limited representation would not be reasonable under the circumstances, the member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm would be disqualified under rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) imputes conflicts of interest to the participating member when the member knows that any lawyer in the member's firm would be disqualified under rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.

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

### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 6.5 [1-650]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 6.5 [1-650]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **III. PROPOSED RULE 6.5 [1-650] (CLEAN)**

#### **Rule 6.5 [1-650] Limited Legal Services Programs**

- (a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
  - (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows\* that the representation of the client involves a conflict of interest; and
  - (2) is subject to Rule 1.10 only if the lawyer knows\* that another lawyer associated with the lawyer in a law firm\* is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.
- (c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

#### **Comment**

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms that will assist persons\* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent\* to the limited scope of the representation. See Rule 1.2(b). If a short-term limited representation would not be reasonable\* under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, these Rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1) and Rules 1.6 and 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with Rules 1.7 and 1.9(a) only if the lawyer

knows\* that the representation presents a conflict of interest for the lawyer. In addition, paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows\* that another lawyer in the lawyer's law firm\* would be disqualified under Rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm,\* paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) imputes conflicts of interest to the participating lawyer when the lawyer knows\* that any lawyer in the lawyer's firm\* would be disqualified under Rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm\* or preclude the lawyer's law firm\* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

#### IV. **COMMISSION'S PROPOSED RULE 6.5** **(REDLINE TO CURRENT CALIFORNIA RULE 1-650)**

##### **Rule 6.5 [1-650] Limited Legal Services Programs**

- (Aa) A ~~member~~lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the ~~member~~lawyer or the client that the ~~member~~lawyer will provide continuing representation in the matter:
- (1) is subject to ~~rule 3-310~~Rules 1.7 and 1.9(a) only if the ~~member~~lawyer knows\* that the representation of the client involves a conflict of interest; and
  - (2) ~~has an imputed conflict of interest~~is subject to Rule 1.10 only if the ~~member~~lawyer knows\* that another lawyer associated with the ~~member~~lawyer in a law firm\* ~~would have a conflict of interest under rule 3-310~~is prohibited from representation by Rule 1.7 or 1.9(a) with respect to the matter.
- (Bb) Except as provided in paragraph (Aa)(2), ~~a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm~~Rule 1.10 is inapplicable to a representation governed by this Rule.

- (Cc) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

### DiscussionComment

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms —that will assist persons\* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the ~~lawyer's~~lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A ~~member~~lawyer who provides short-term limited legal services pursuant to ~~rule 1-650~~this Rule must secure the client's informed consent\* to the limited scope of the representation. See Rule 1.2(b). If a short-term limited representation would not be reasonable\* under the circumstances, the ~~member~~lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. ~~See rule 3-110.~~ Except as provided in this ~~rule 1-650, the~~Rule, these Rules of Professional Conduct and the State Bar Act, including the ~~member's~~lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1), ~~and Rules 1.6 and Rule 1.9,~~ are applicable to the limited representation.

[3] A ~~member~~lawyer who is representing a client in the circumstances addressed by ~~rule 1-650~~this Rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (Aa)(1) requires compliance with ~~rule 3-310~~Rules 1.7 and 1.9(a) only if the ~~member~~lawyer knows\* that the representation presents a conflict of interest for the ~~member~~lawyer. In addition, paragraph (Aa)(2) imputes conflicts of interest to the ~~member~~lawyer only if the ~~member~~lawyer knows\* that another lawyer in the ~~member's~~lawyer's law firm\* would be disqualified under ~~rule 3-310~~Rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the ~~member's~~lawyer's law firm\*, paragraph (Bb) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (Aa)(2). Paragraph (Aa)(2) imputes conflicts of interest to the participating ~~member~~lawyer when the ~~member~~lawyer knows\* that any lawyer in the ~~member's~~lawyer's firm\* would be disqualified under ~~rule 3-310~~Rules 1.7 or 1.9(a). By virtue of paragraph (Bb), moreover, a ~~member's~~lawyer's participation in a short-term limited legal services program will not be imputed to the ~~member's~~lawyer's law firm\* or preclude the ~~member's~~lawyer's law firm\* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the ~~program's~~program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with ~~rule 1-650, a member~~this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, ~~rule 3-310 and all other rules~~Rules 1.7, 1.9(a), and 1.10 become applicable.

## V. RULE HISTORY

Current rule 1-650 is based on Model Rule 6.5. As explained in section **Error! Reference source not found.** (Background/Purposed), below, the rule became operative in 2009 to promote the provision of short-term limited legal services to persons requiring such services in the face of the severe economic downturn at the end of the last decade. In part, both Rule 1-650 and MR 6.5 function to increase access to justice through lawyers volunteering to deliver pro bono legal services.

Model Rule 6.5 is one of five rules in Chapter 6 of the Model Rules, which is entitled “Public Service.” The other four rules are:

- 6.1 Voluntary Pro Bono Publico Service
- 6.2 Accepting Appointments
- 6.3 Membership in Legal Services Organization
- 6.4 Law Reform Activities Affecting Client Interests

For the most part, these rules are permissive and not intended as a source of discipline. Rather, they are intended to provide guidance and assurance to lawyers who choose to provide volunteer legal services or engage in other volunteer legal activities.

In 2009, many Californians who confronted serious legal issues because of the severe economic downturn, appeared in the courts as self-represented litigants without the benefit of any legal advice or counsel.<sup>1</sup> The issues included foreclosure, eviction, mortgage loan refinance, domestic violence, unemployment, guardianship, bankruptcy, and other legal problems. To assist people who could not afford lawyers, local bar associations and legal aid providers offered limited, short-term legal assistance at pro bono clinics. Although law firm lawyers were interested in volunteering at such clinics, they were reluctant because of concerns about potential conflicts of interest that would result in the disqualification of the lawyer providing assistance and, by imputation, the lawyer’s firm. A conflict could arise if, after the lawyer provided advice to an individual at the clinic, it is subsequently discovered that the volunteer lawyer or the lawyer’s firm represents a client with interests adverse to the individual.

The concern existed because California, unlike most other jurisdictions, had not adopted a rule similar to Model Rule 6.5. Model Rule 6.5 recognizes that it is impractical to conduct a thorough conflict check in limited legal service situations and, in effect, provides an exception to the imputation of conflicts within a law firm. With the express encouragement of the Board of Governors, the first Commission developed a

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<sup>1</sup> See Dhyana Levy, “As Foreclosures Rise, Pro Pers Clog the Courts,” San Francisco Daily Journal, May 20, 2009, p. 1, at Exhibit 4.

proposed rule 1-650<sup>2</sup> that was based on Model Rule 6.5 and was drafted to provide a narrow exception to the conflict of interest rules.

The proposed rule, modified for application in California,<sup>3</sup> was adopted by the Board and approved by the Supreme Court, effective August 28, 2009.<sup>4</sup>

Rule 1-650 applies to short-term *and* limited legal services provided by a lawyer to a client under a program sponsored by a court, government agency, bar association, law school,<sup>5</sup> or nonprofit organization, that is, where there is no expectation by the lawyer or client that the lawyer will provide continuing representation. In these circumstances, rule 1-650 provides that 1) the lawyer is subject to Rule of Professional Conduct 3-310 [Avoiding the Representation of Adverse Interests] only if the lawyer knows that the representation of the client involves a conflict of interest with another client; and 2) the lawyer is subject to an imputed conflict of interest only if the lawyer knows that another attorney in the lawyer's law firm would be subject to a conflict of interest under rule 3-310 with respect to the matter. Except for the latter situation, a conflict of interest

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<sup>2</sup> Number "1-650" was recommended for the rule number so that it followed current rule 1-600 [Legal Services Programs].

<sup>3</sup> The modification to Model Rule 6.5 takes into account the difference in purpose between the California rules and ABA Model Rules. The California rules regulate the professional conduct of members of the State Bar through discipline. (See rule 1-100(A) "Purpose and Function" of the California RPCs, and the Discussion comments to rule 1-100 which further state "These rules are not intended to supersede existing law relating to members in non-disciplinary contexts.") The Model Rules, on the other hand, provide lawyer conduct standards that may have more than one purpose. Some Model Rules are imperatives intended to be enforced through discipline. Other Model Rules, however, provide guidance concerning a lawyer's professional role and general obligations, and may have non-disciplinary consequences in the event of a violation. (See ABA Model Rules, Scope, paragraph [14] (the ABA Model Rules are "partly obligatory and disciplinary" and "partly constitutive and descriptive"). The Model Rules are available at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

Model Rule 6.5 both limits a lawyer's disciplinary exposure and provides guidance to lawyers and courts in determining issues of disqualification in a non-disciplinary context (i.e., a court case). Model Rule 6.5 also refers to Model Rule 1.10, which concerns imputation of conflicts of interests that are prohibited by the Rules. California has no counterpart to Model Rule 1.10, addressing imputation of conflicts in case law. Rule 1-650 takes these differences into account.

<sup>4</sup> The Supreme Court approved proposed Rule 1-650 on July 29, 2009. (See Request That The Supreme Court Of California Approve New Rule Of Professional Conduct 1-650, And Memorandum And Supporting Documents In Explanation, May 29, 2009, Supreme Court Case No. S173373.)

<sup>5</sup> The Model Rule is limited to programs sponsored by courts and nonprofit organizations. The first Commission recognized that limited legal services programs are also sponsored by bar associations, government agencies and law schools, some of which are proprietary. There appeared to be no sound reason to exclude limited legal services programs sponsored by these organizations from the protections against disqualification of volunteer lawyer and firm afforded by rule 1-650.

arising from the lawyer's participation in one of the sponsored programs is not to be imputed to the lawyer's law firm.

The Discussion section accompanying the rule describes the important public protection rationale underlying the rule and provides guidance to attorneys.

## **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.
  2. OCTC supports Comments 2 and 5.
  3. OCTC is concerned that Comments 1, 3, and 4 are more appropriate for treatises, law review articles, and ethics opinions.
- **State Bar Court:** No comments were received from State Bar Court.

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

Five comments were received. Four, including the above comment from OCTC, agreed with the proposed rule, one did not indicate a position. A public comment synopsis table is provided at the end of this report.

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

- **Pennsylvania Rule 6.5** is identical to Model Rule 6.5:

### **Pennsylvania Rule 6.5 Nonprofit And Court-Annexed Limited Legal Services Programs**

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

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



## A. ABA Model Rule Adoptions

The ABA State Adoption Chart for the ABA Model Rule 6.5, which is the counterpart to current rule 1-650, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_6\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_5.authcheckdam.pdf)
- Forty-nine jurisdictions have adopted a rule counterpart to Model Rule 6.5. Thirty-four jurisdictions have adopted Model Rule 6.5 verbatim.<sup>6</sup> Fifteen jurisdictions have adopted a modified version of Model Rule 6.5.<sup>7</sup> Only two jurisdictions have not adopted any version of Model Rule 6.5.<sup>8</sup>

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

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

1. Recommend that the current rule be continued without changes in duties
  - Pros: The current rule is of relatively recent vintage, having been approved by the Supreme Court in 2009. The drafting team is not aware of any problems with the current rule and did not identify any issues. The rule promotes legal services activities by lawyers and aids in addressing the current access to justice crisis in California.
  - Cons: None identified.
2. Substitute the term “lawyer” for “member”.
  - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

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<sup>6</sup> The thirty-four jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia.

<sup>7</sup> The fifteen jurisdictions are: California, District of Columbia, Georgia, Massachusetts, Minnesota, Mississippi, New Hampshire, New Mexico, New York, North Dakota, Ohio, Washington, Wisconsin, and Wyoming.

<sup>8</sup> The two jurisdictions are: Florida and Texas.

- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
- 3. Recommend substituting references to possible new rules that would be numbered using the Model Rules numbering system, including rules on conflicts and imputation of conflicts.
  - Pros: This is not intended to be a substantive change. It anticipates necessary conforming changes that would follow the Model Rule numbering system. However, Commission’s consideration of the conflicts rules (including a potential new rule on conflicts imputation) is pending.
  - Cons: None identified.

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

1. In rule 6.5, the team considered but rejected a requirement (“shall” or “must”) or best practice guidance (“should”) that the lawyer participating in a limited legal services program be screened if a conflict subsequently is discovered between a person served in the program and a client of the participating lawyer’s firm.
  - Pros: A requirement for, or guidance on, screening would promote confidence in the legal profession and administration of justice by assuring a person who makes use of short-term legal services that the lawyer providing the service will not disclose the person’s confidential information to a law firm representing the person’s adversary.
  - Cons: Forcing the law firm to implement a screen would add an unnecessary layer of process to the operation of the law firm, which would more likely than not discourage participation in the programs. The point of the rule is to encourage participation, so requiring or even recommending a screen should not be included in the rule. Further, screening is unnecessary because the participating lawyer still owes a duty of confidentiality (and arguably loyalty) to the short-term legal services client.

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. There are no substantive changes in duty. (See IX.A.1 above.)

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

1. Using “lawyer” rather than “member” in each proposed new rule. (See IX.A.2, above.)

2. Adopting the Model Rule numbering for each proposed rule.

**E. Alternatives Considered:**

1. There were no alternatives considered in regards to rule 6.5.

**X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

**Recommendation:**

The Commission recommends adoption of proposed Rule 6.5 [1-650] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Board of Trustees of the State Bar of California adopts proposed Rule 6.5 [1-650] in the form attached to this Report and Recommendation.