Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Commission's Proposed Rule as Circulated for 45-day Public Comment)

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this Rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Comment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. *See Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* or organization who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm*. Similarly, direct adversity can arise when a lawyer cross-

examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] For purposes of this Rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons.*

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially* by the resolution of the matter.

[6] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of

the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[7] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[10] This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[11] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written

consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[12] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.7
(Current Rule 3-310(B), (C))
Conflict of Interest: Current Client

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations: Model Rules 1.7 (Current Client Conflicts); 1.8(f) (third party payments); 1.8(g) (aggregate settlements); and 1.9 (Duties To Former Clients).

The result of the Commission's evaluation is a two-fold recommendation for implementing:

(1) the Model Rules' framework of having separate rules that regulate different conflicts situations: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and

(2) proposed Rule 1.7 (conflicts of interest: current clients), which regulates conflicts situations that are currently regulated under rule 3-310(B) and (C). Proposed rule 1.7 largely tracks the ABA approach to current client conflicts of stating general rules regarding "direct adversity" conflicts between clients of a lawyer (addressed incompletely in current rule 3-310(C)(2) and (C)(3)) and "material limitation" conflicts (e.g., a joint representation conflict), which are currently addressed in current rule 3-310(C)(1) and 3-310(B).

Proposed rule 1.7 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization..

1. ***Recommendation of the ABA Model Rule Conflicts Framework***. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules.[1]

[1] Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client)].)

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers

2. ***Recommendation of the ABA approach of proposed Rule 1.7***. The recommended approach tracks the ABA Model Rule, which generally describes two kinds of conflict situations relating to current clients: (1) those involving direct adversity, (MR 1.7(a)(1)), and (2) those involving a significant risk that a lawyer's representation of current clients will be materially limited by the lawyer's responsibilities to another client or third person, or by the lawyer's personal interests. (MR 1.7(a)(2)).

There are a number of reasons for the Commission's recommendation. *First*, the proposed rule will facilitate compliance with enforcement of the current client conflicts rule provisions by incorporating more clearly-stated general conflicts principles, (see paragraph (a) and introductory clause to paragraph (b)), while providing specific examples in the comments to the rules. *Second*, the approach will also increase client protection by including the generally-stated conflicts principles that are subject to regulation under the rule, rather than limiting the rule's application to several discrete situations as in current rule 3-310(B) and (C). *Third*, by incorporating the generally-stated principles in Model Rule 1.7(a)(1) and (2) into paragraphs (a) and (b), the proposed rule will help promote a national standard in conflicts of interest. *Fourth*, by incorporating the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts into proposed paragraph (d), the proposed rule will move this important concept into the black letter rather than relegate it to two separate Discussion paragraphs in the current rule (see rule 3-310, Discussion paragraphs 2 and 10).

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed Rule 1.7 incorporates the concept of direct adversity of interests of two current clients. This carries forward the concept in current rule 3-310(C)(2) and (3), and Model Rule 1.7(a)(1).

Paragraph (b) incorporates the concept of material limitations on a lawyer's representation of a client because of duties owed another current or former client, or because a relationship with a client or other person. The paragraph borrows the language of Model Rule 1.7(a)(2) in carrying forward the concepts found in current rule 3-310(B) and (C)(1).

Paragraph (c) carries forward the concepts in current rules 3-310(B)(1) and 3-320. Similar to paragraph (b), this paragraph is concerned with limitations on the lawyer's ability to represent a client because of the lawyer's duties to or relationships with other persons. These situation is not included in paragraph (b) because the Commission believes that the standard in current rule 3-310(B) – the lawyer must only provide written disclosure to the client of the relationship – should be carried forward, rather than applying paragraph (b)'s "informed written consent"

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and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is currently studying those rules.

standard.[2] This separate paragraph recognizes that there are certain instances when the duties owed to or relationships with other persons do not create a "significant risk" of a material limitation on the representation so as to require the heightened informed written consent standard, but nevertheless warrants the reduced "written disclosure" standard currently found in rule 3-310(B).

Paragraph (d) incorporates the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts. The concept is currently found in two separate Discussion paragraphs of current rule 3-310 (paragraphs 2 and 10).

Unlike the Model Rule with 35 comments, there are only 12 comments to proposed Rule 1.7, all of which provide interpretative guidance or clarify how the proposed rule, which is intended to govern a broad array of complex conflicts situations, should be applied. Comment [1] explains "direct adversity" of legal interests and importantly distinguishes clients with economically adverse interests. Comment [2] provides a definition of "matter," a concept central to the rule's application. Comment [3] carries forward the concept in current rule 3-310, Discussion ¶.7, and explains the rule's application to joint client representations. Comment [4] carries forward current Discussion ¶.9, which the Supreme Court approved in 2002 after extensive debate among various stakeholders in the insurance industry. Comment [5] explains how paragraph (b) should be applied by providing several discrete examples. Comment [6] explains how paragraph (c) should be applied by comparison to paragraph (b). Comment [7] explains when adverse positions clients have taken on a legal issue may require a lawyer to obtain the clients' informed written consent. Comment [8] crucially explains that a lawyer's duty of confidentiality may preclude the lawyer from providing a disclosure sufficient to ensure the client's consent is informed. Comment [9] carries forward the substance of current Discussion ¶¶.2 and 10 concerning unconsentable conflicts and provides citations to several cases that have addressed the issue. Comment [10] is new and provides interpretative guidance regarding paragraphs (a) and (b) regarding the extent to which they might apply to advance consents to future conflicts of interest. Comment [11] notes that a second consent may be required should the circumstances under which a consent was originally obtained change. Comment [12] provides cross-references to proposed Rules 6.3 and 6.5, both of which permit otherwise conflicted representations or provide exceptions for imputation under certain conditions.

1st Round 90-day Public Comment Period

Following consideration of public comment, the Commission made several changes to both the text and comment of proposed Rule 1.7.

Text. In paragraphs (a) and (b), the Commission added the phrase "in compliance with paragraph (d)" to clarify that a lawyer must not only obtain the client's informed written consent but must also comply with the requirements in paragraph (d).

In paragraph (b), the Commission deleted the examples that had been provided in the public comment draft except for former subparagraph (b)(1), which has been moved to paragraph (c) as subparagraph (c)(1). The version issued for 90-day public comment represented a

[2] The Commission determined that current rule 3-320's requirement of merely "informing" the client of the relationship with the other party's lawyer was not sufficiently rigorous to enhance public protection.

"hybrid" approach that involved merging the "checklist approach"[3] of regulating conflicts involving current clients in current rule 3-310(B) and (C) with the ABA Model Rule's approach, which generally describes two kinds of conflict situations relating to current clients: (1) those involving direct adversity, (MR 1.7(a)(1)), and (2) those involving a significant risk that a lawyer's representation of current clients will be materially limited by the lawyer's responsibilities to another client or third person, or by the lawyer's personal interests. (MR 1.7(a)(2)). After consideration of public comment, including a lengthy letter submitted by the State Bar Committee on Professional Responsibility and Conduct, the Commission no longer favored this hybrid approach and revised the rule to be a variation of the Model Rule 1.7.

The Commission added new paragraph (c), with a new introductory clause. Paragraph (c) carries forward subparagraph (b)(1) of the public comment draft as subparagraph (c)(1) and paragraph (c) of the public comment draft as subparagraph (c)(1). Similar to paragraphs (a) and (b), paragraph (c) provides that not only must the lawyer give written disclosure to the client of the relationships in paragraphs (c)(1) and (2), but must also comply with the requirements in paragraph (d).

Comment. In Comment [2], which addresses the issue of positional conflicts, the first sentence has been deleted and the second sentence has been moved to new Comment [7], which contains a fuller discussion of positional conflicts.

The Commission has added new Comment [2], which explains what is meant by the term "matter." This comment is also cross-referenced in the Comment to both Rule 1.9 (Duties to Former Clients) and Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officials and Employees).

In Comment [4], the Commission added a reference to paragraph (b), which also corresponds to current rule 3-310(C)(3).

In Comment [5], the Commission added the clause "or relationships, whether legal, business, financial, professional, or personal" to clarify the scope of paragraph (b). The last sentence of Comment [5] was also added for the same reason.

New Comment [6] has been added to clarify the scope and application of new paragraph (c). Public comment suggested that the public comment version of paragraphs (b) and (c) as drafted created confusion because their coverage might overlap in some situations.

New Comment [7] contains a fuller discussion of positional conflicts. See Comment [2], above.

In Comment [10] (Comment [8] in public comment draft), the Commission added a new third sentence ("The experience and sophistication … consent.") to identify factors in determining the feasibility of obtaining an advance consent.

[3] The "checklist" approach in current rule 3-310(B) and (C) involves the identification of discrete categories of current conflict situations. Unless an alleged conflict fits within one of these discrete categories, the lawyers involved will not be subject to discipline.

2nd Round 45-day Public Comment Period

Following consideration of a second round of public comments, the Commission made changes to both the text and comment of proposed Rule 1.7.

Text. Paragraphs (a), (b) and (c) identify when a conflict of interest may arise and state that a lawyer must obtain a client's informed consent or make written disclosure to a client, depending on the type of conflict. Paragraph (d) identifies circumstances where a conflict of interests cannot be cured by client consent or disclosure. To reinforce the interrelationship of these paragraphs, in paragraph (d) the Commission added the phrase if "the lawyer complies with paragraphs (a), (b), and (c)." Public comments received stated that this was not clear and might lead to confusion about whether consent or disclosure, standing alone, can cure a conflict.

Comment. Comment [1] explains how to apply the concept of "direct adversity" by providing non-exclusive examples. The Commission revised this comment to expressly state that the identified situations are non-exclusive examples of direct adversity conflicts, and to add an additional example that describes the directly adverse conflict that arises when a lawyer is retained to sue a person who is a current client of the lawyer or the lawyer's firm.

In Comment [2], the Commission added language to clarify that a "matter" for purposes of this rule includes a "transaction," an "investigation," a "charge," an "accusation" or an "arrest." Public comments recommended broader language to avoid an overly narrow construction of the rule.

Comment [4] carries forward Discussion paragraph 9 in current rule 3-310, which the Supreme Court of California approved in 2002 after extensive study with participants of various stakeholders in the insurance industry. Discussion paragraph 9 clarifies the extent to which rule 3-310(C)(3) might apply to a lawyer's duties in an insurance defense tripartite relationship. The Commission has revised the comment to refer only to paragraph (a) of the proposed rule which carries forward current rule 3-310(C)(3).

Comment [7] in part carries forward Discussion paragraph 1 in current rule 3-310 which explains that representing inconsistent legal positions in different matters ordinarily does not trigger a conflict of interest. The Commission revised the second sentence of Comment [7] to use a simpler sentence structure and to use the phrase "sufficient, standing alone" to avoid the comment from being potentially overbroad. This clarification was recommended by a public comment.

With these changes, the Board's Committee on Regulation and Discipline authorized an additional 30-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule

The additional 30-day public comment period ended on March 6, 2017 and three written comments were received. The Commission considered these comments at its meeting on March 7, 2017. At this meeting, the Commission also considered two comments that were received after the deadline for the prior 45-day comment period. Following consideration of these comments, the Commission made no changes to the rule and voted to recommend the rule for adoption. Members of the Commission submitted dissents to this rule that can be found following the Report and Recommendation.

The Board adopted proposed rule 1.7 at its March 9, 2017 meeting.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.7 [3-310]

Commission Drafting Team Information

Lead Drafter: Raul Martinez
Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Dean Stout

I. CURRENT CALIFORNIA RULE

Rule 3-310 Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893

[142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: March 7, 2017
Action: Recommend Board Adoption of Proposed Rule 1.7 [3-310]
Vote: 12 (yes) – 2 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017
Action: Board Adoption of Proposed Rule 1.7 [3-310]
Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 1.7 [3-310] Conflict of Interest: Current Clients

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is

a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Comment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. *See Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* or organization who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm*. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons.*

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a

husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially* by the resolution of the matter.

[6] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[7] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required,

however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this rule is likewise precluded.

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[10] This rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See rule 1.8.8.

[11] A material change in circumstances relevant to application of this rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in

order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See rule 1.9(c).

[12] For special rules governing membership in a legal service organization, see rule 6.3; and for work in conjunction with certain limited legal services programs, see rule 6.5.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT RULE 3-310(B), (C), (D))

Rule 1.7 [3-310] ~~Avoiding the Representation of Adverse Interests~~ Conflict of Interest Current Clients

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

~~(A) For purposes of this rule:~~

~~(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;~~

~~(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;~~

~~(3) "Written" means any writing as defined in Evidence Code section 250.~~

~~(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:~~

(1) ~~The member has~~the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

~~(2) The member knows or reasonably should know that:~~

~~(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and~~

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

~~(b)~~(2) the ~~previous relationship would substantially affect the member's~~ representation is not prohibited by law; ~~or~~and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

~~(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or~~

~~(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.~~

~~(C) A member shall not, without the informed written consent of each client:~~

~~(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~

Comment

~~(2) Accept or continue~~[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. *See Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; ~~or (3)~~ (ii) ~~Represent~~a

lawyer, while representing a client, accepts in ~~a~~another matter ~~and at the same time in a separate matter accept as a client~~the representation of a person* or ~~entity whose interest~~organization who, in the first matter, is directly adverse to the ~~client in the first matter.~~lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm*. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons.*

~~(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.~~

~~(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.~~

~~(F) A member shall not accept compensation for representing a client from one other than the client unless:~~

~~(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and~~

~~(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and~~

~~(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:~~

~~(a) such nondisclosure is otherwise authorized by law; or~~

~~(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.~~

~~Discussion~~

~~Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.~~

~~Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)~~

~~Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.~~

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

~~Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.~~

~~Subparagraphs (C)(1~~[3] Paragraphs (a) and (~~C)(2) are intended to~~b) apply to all types of legal ~~employment~~representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of ~~an ante-nuptial~~a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. ~~In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain~~If a lawyer initially represents multiple clients with the informed written consent ~~of~~* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients ~~thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member~~, the lawyer must obtain ~~the~~ further informed written consent* of the clients ~~pursuant to subparagraph~~under paragraph (~~C)(2~~a).

~~Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.~~

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a ~~member~~lawyer,

retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, ~~subparagraph (C)(3) is not intended to~~paragraph (a) does not apply with respect to the relationship between an insurer and a ~~member~~lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially* by the resolution of the matter.

[6] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[7] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would

have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this rule is likewise precluded.

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice ~~for non-disciplinary purposes~~to permit representation. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[10] This rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See rule 1.8.8.

[11] A material change in circumstances relevant to application of this rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See rule 1.9(c).

[12] For special rules governing membership in a legal service organization, see rule 6.3; and for work in conjunction with certain limited legal services programs, see rule 6.5.

~~Paragraph (D) is not intended to apply to class action settlements subject to court approval.~~

~~Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)~~

V. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.7)

Rule 1.7 [3-310] Conflict of Interest: Current Clients

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

~~(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:~~

~~(1) the representation of one client will be directly adverse to another client; or~~

(~~2~~c) ~~there is~~Even when a significant risk ~~that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.~~requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

~~(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:~~

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal~~; and~~.

~~(4) each affected client gives informed consent, confirmed in writing.~~

Comment

~~*General Principles*~~

~~[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific rules regarding certain concurrent conflicts of interest, see rule 1.8. For former client conflicts of interest, see rule 1.9. For conflicts of interest involving prospective clients, see rule 1.18. For definitions of "informed consent" and "confirmed in writing," see rule 1.0(e) and (b).~~

~~[2] Resolution of a conflict of interest problem under this rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).~~

~~[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to rule 1.3 and Scope.~~

~~[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See rule 1.9. See also Comments [5] and [29].~~

~~[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See rule 1.9(c).~~

~~*Identifying Conflicts of Interest: Directly Adverse*~~

[~~6~~1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. ~~The client as to whom~~*See Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) can arise in a number of ways, for example when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* or organization who, in the first matter, is directly adverse ~~is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current~~to the lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm*. Similarly, ~~a directly adverse conflict may~~direct adversity can arise when a lawyer ~~is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit~~cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in

unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons.*

~~[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.~~

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

~~*Identifying Conflicts of Interest: Material Limitation*~~

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[~~8~~5] Even where there is no direct ~~adverseness~~adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities ~~or~~, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a ~~lawyer asked to represent~~lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture ~~is likely to be~~, may materially ~~limited in~~limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the ~~others. The conflict in effect forecloses~~other clients. The

risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the ~~client~~clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of ~~the client.~~each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially* by the resolution of the matter.

~~*Lawyer's Responsibilities to Former Clients and Other Third Persons*~~

~~[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.~~

~~*Personal Interest Conflicts*~~

~~[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See rule 1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also rule 1.10 (personal interest conflicts under rule 1.7 ordinarily are not imputed to other lawyers in a law firm).~~

~~[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See rule 1.10.~~

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See rule 1.1 (competence) and rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[176] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a

~~mediation (because mediation is not a proceeding before a "tribunal" under rule 1.0(m)), such representation may be precluded by~~c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b)~~(1)~~.

~~*Informed Consent*~~

~~[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).~~

~~[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.~~

~~*Consent Confirmed in Writing*~~

~~[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See rule 1.0(b). See also rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.~~

~~*Revoking Consent*~~

~~[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.~~

~~*Consent to Future Conflict*~~

~~[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).~~

~~*Conflicts in Litigation*~~

~~[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.~~

[~~24~~7] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer ~~may take~~takes inconsistent legal positions in different tribunals at different times on behalf of different clients. ~~The mere fact that advocating~~ Advocating a

legal position on behalf of ~~one~~a client might create precedent adverse to the interests of ~~a~~another client represented by ~~the~~a lawyer in an unrelated matter ~~does~~ is not sufficient, standing alone, to create a conflict of interest~~. A conflict of interest exists~~ requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that ~~a~~: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case~~;~~, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients ~~need to be advised of the risk~~' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether ~~the issue~~a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the ~~issue~~legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer. ~~If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.~~

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this rule is likewise precluded.

~~[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.~~

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (*See Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

~~*Nonlitigation Conflicts*~~

[10] This rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is

generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See rule 1.8.8.

~~[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].~~

~~[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.~~

~~[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.~~

~~*Special Considerations in Common Representation*~~

~~[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.~~

[~~30~~11] A ~~particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.~~material change in circumstances relevant to application of this rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See rule 1.9(c).

[12] For special rules governing membership in a legal service organization, see rule 6.3; and for work in conjunction with certain limited legal services programs, see rule 6.5.

~~[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that~~

failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

VI. RULE HISTORY

A. Summary of 1972 Amendments

The predecessor to current rule 3-310, former rule 5-102, originally approved and made operative on January 1, 1975, was entitled "Avoiding the Representation of Adverse Interests." Rule 5-102 was adopted following the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. Prior to the enactment of rule 5-102, Rule 7 of the 1928 Rules was the rule that governed conflicts. The text of rule 5-102(A) was identical to the text of the previous rule 7.

> **Rule 5-102. Avoiding the Representation of Conflicting Interests**
>
> A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned.

B. Summary of 1989 Amendments

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-310, which became operative on May 27, 1989.[1] Paragraph (A) continued the disclosure and consent requirements found in former rule 5-102(A) when the attorney has any relationship with the adverse party or any interest in the subject matter of the employment. The proposal expanded the rule to include situations in which the member had a relationship with another party in the past. The amendment was intended to make clear that, should an attorney discover during the course of representing a client that he or she has or had such a relationship or interest, he or she may not continue representation unless the requirements of the rule are met. Former rule 5-102(A) was subject to the interpretation that paragraph (A) was applicable only at the outset of the attorney-client relationship.

Paragraph (B) was derived from former rule 5-102(B), which prohibited an attorney from representing conflicting interests without the written consent of all parties concerned and expanded the rule to clarify that the client's counsel must be informed.

Paragraph (C) was new. Derived from ABA Model Rule 1.8(g), paragraph (G) clarified that an aggregate settlement of the claims of two or more clients is a special conflict situation that required the informed written consent of all the clients.

Paragraph (D) carried forward former rule 4-101 as amended, which prohibited an attorney from accepting employment adverse to a client or former client without the client's informed written consent, when the new employment relates to a matter in which the attorney received confidential information from the client client. The amendment to

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[1] See page 34 of Bar Misc. No. 5626, Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation,‖ December 1987.

the rule limited its applicability of to those situations in which the confidential information is "material to the employment."

Paragraph (E) was new, derived from ABA Model Rule 1.8(f). It regulates those situations in which an attorney is paid by someone other than the client.

Paragraph (F) was new and intended to define "informed" as the term is used in 3-310.

The rule as originally proposed by the then Commission also included three Discussion paragraphs. The rule, in legislative blackline showing changes to the then current rules, provided:

Rule 3-310. ~~5-102.~~ Avoiding the Re presentation of Adverse Interests

(A) ~~A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment.~~ If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.

(B) A member ~~of the State Bar~~ shall not ~~represent conflicting interests~~ concurrently represent clients whose interests conflict, except with ~~the~~ their informed written consent. ~~of all parties concerned.~~

(C) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, except with their informed written consent.

(D) A member shall not accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client.

(E) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The client consents after disclosure, provided that no disclosure is required if;

(a) such nondisclosure is otherwise authorized by law, or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or members of the public.

(F) As used in this rule "informed" means full disclosure to the client of the circumstances and advice to the client of any actual or reasonably foreseeable adverse effects of those circumstances upon the representation.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Paragraph (A) is intended to apply to all types of legal employment, including the representation of multiple parties in litigation or in a single transaction or other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, § 962) and must obtain the consent of the clients thereto. Moreover, if the potential adversity should become actual, the member must obtain the further consent of the clients pursuant to paragraph (B).

Paragraph (E) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

C. Summary of 1992 Proposed Amendments

Amendments to Blackletter Text

In 1992, in response to an inquiry from the Supreme Court, a substantial number of substantive and non-substantive amendments were made to rule 3-310. Structurally, former paragraph (F) became new paragraph (A), former paragraph (A) became new paragraph (B), former paragraph (B) became new paragraph (C), and the remaining sections were re-lettered accordingly.

Instead of defining "informed," new subparagraph (A)(1) defined the term "disclosure." The definition remained substantially the same except that: 1) the new definition applied

expressly to former clients; 2) the phrase “effects of those circumstances upon the representation” found in former paragraph (F) was replaced with the phrase “consequences to the client or former client;” and 3) the term “relevant” was added before the word “circumstances” :

> (1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

New subparagraph (A)(2) defined the phrase “informed written consent”:

> (2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure;

New subparagraph (A)(3) defined the term “written” bu reference to the California Evidence Code:

> (3) “Written” means any writing as defined in Evidence Code section 250.

As explained by the then Commission, the definition was intended to provide flexibility in the application of the rule.

New paragraph (B) amended former paragraph (A) in two principal ways. It:(i) required “written disclosure” rather than “informed written consent;” and(ii) expanded variety of relationships and interests that the member would be required to disclose in writing to the client, including relationships with witnesses. It was believed that the client's interests are adequately protected by requiring written disclosure without written consent. Additionally, the written disclosure requirement provided both the attorney and the client with a writing evidencing disclosure to the client. Regarding witness relationships, as a member's relationship with a witness could affect the member's examination of such witness to the detriment of the client, such a relationship must also be disclosed to the client. The introductory clause of paragraph (B) thus provided:

> (~~A~~B) ~~If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.~~ A member shall not accept or continue representation of a client without providing written disclosure to the client where:

Generally, the four subparagraphs in new paragraph (B) expressly identified the relationships and interests that previously had only been implied by the broad language in former paragraph (A). The subparagraphs also generally expanded the scope of paragraph (B)’s coverage to encompass both past and present relationships with witnesses.

New subparagraph (B)(1) prohibited a lawyer from accepting or continuing representation absent written disclosure where the lawyer has any of several kinds of *current* relationships with a party or witness in the same matter:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

The enumeration of the relationships was intended to clarify the kinds of relationship that require written disclosure even if *de minimus* in nature.

New subparagraph (B)(2) prohibited a lawyer from accepting or continuing representation absent written disclosure where the lawyer has reason to know that: 1) the lawyer previously had any of several kinds of relationship with a party or witness in the same matter; and 2) the previous relationship would substantially affect the representation.

(2) The member knows or reasonably should know that:

(a) The member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, and

(b) The previous relationship would substantially affect the member's representation; or

The phrase "knows or reasonably should know" was included to recognize the difficulties in cataloguing all past relationships and interests, especially where the member could not know that a particular relationship would be relevant to a later representation. Additionally, the proposed new rule recognized that a past relationship may have no substantial effect on the member's representation and therefore need not be disclosed.

New subparagraph (B)(3) prohibited a lawyer from accepting or continuing representation absent written disclosure where the lawyer has or had any of the identified relationships with another person or entity that would be affected substantially by resolution of the matter:

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

New subparagraph (B)(4) prohibited a lawyer from accepting or continuing representation written disclosure where the member has or had any of the identified interests in the subject matter of the representation.

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

As such an interest could affect the member's zealous and impartial representation, the interest should be disclosed .

New subparagraphs (C)(1) and (C)(2) combined and continued the concepts found in then current paragraph (B) and Discussion ¶. 2regarding joint representations, i.e., the representation of multiple clients in a single action or transaction. Subparagraph (C)(1) addressed joint representation situations where the clients' interests *potentially* conflict; subparagraph (C)(2) addressed joint representation situations where the clients' interests *actually* conflict. This rule amendment simply transferred the concept from the Discussion to the black letter text.

New subparagraph (C)(3) addressed the situation where a member represents Client A versus Party B and at the same time wishes to represent Party B versus Party C. Paragraph (C) thus provided:

> (~~B~~C) ~~A member shall not concurrently represent clients whose interests conflict, except with their informed written consent.~~ A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
>
> (3) Represent a client in a matter and at the same time in a separate matter accept as a c lien t a person or entity whose interest in the first matter is adverse to the client in the first matter.

Paragraph (D) was identical to then current paragraph (C) except for a non-substantive clarifying syntax change:

> (~~C~~D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients , ~~except with their~~ without the informed written consent of each client.

Paragraph (E) was identical to then current paragraph (D) except for a non-substantive clarifying syntax change:

> (~~D~~E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to ~~a~~ the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment ~~except with the informed written consent of the client or former client~~.

A proposed amendment to then current subparagraph (E)(3) imposed a stricter standard by requiring the lawyer to obtain informed written consent rather than simply obtaining the client's consent after disclosure. In effect, the proposed amendment added a writing requirement:

(~~E~~F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of ~~a~~ the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent~~s after disclosure~~, provided that no disclosure or consent is required if:

(a) such nondisclosure is otherwise authorized by law~~,~~; or

(b) The member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or ~~members of~~ the public.

Amendments to Discussion section

Then current Discussion ¶.1 was carried forward verbatim.

New Discussion ¶. 2 provided notice to lawyers that, in some instances, a client's identity or nature of representation may be a client confidence.

New Discussion ¶. 2 clarified that amended paragraph (B) was not intended to apply to the relationship of a member to another party's lawyer and that such relationships are governed by rule 3-320 (Relationship With Other Party's Lawyer).

New Discussion ¶¶. 4 and 5 clarified the relationship between amended paragraphs (B) and (E).

New Discussion ¶. 6 clarified that rule 3-310(B) was not intended to apply to situations in which a lawyer fails to advise any affected client of a relationship or interest which a partner or associate in the member's firm may have with another party unless the lawyer was aware of such relationship or interest.

New Discussion ¶. 7 clarified that rule 3-310(C) was intended to apply to representations of clients in both litigation and transactional matters.

The amendment to then current Discussion ¶. 2 (renumbered 8) simply conformed it to the relettering of the blackletter text paragraphs.

New Discussion ¶. 9 provided notice to members that written conflict waivers pursuant to this rule might not suffice for non-disciplinary purposes, such as motions for disqualification. Case authority was provided in support of the stated proposition.

New Discussion ¶. 10 clarified that amended paragraph (C) was not intended to apply to class action settlements subject to court approval. In this situation, it was believed that clients' interests are protected by the court.

The amendment to then current Discussion ¶. 3 (renumbered 11) simply conformed it to the relettering of the blackletter text paragraphs.

The proposed Discussion paragraph provided in its entirety:

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is preclude d, informed written consent is likewise precluded. (See, e.g., Business and Professions C ode section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraph s are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the m ember knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

~~Paragraph (A)~~ Subparagraphs (C)(1) and (C)(2) ~~is~~ are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed

written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph ~~(B)~~ (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 1 85]; *Klemm v . Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 5 09]; *Ishmael v. Millington* (196 6) 24 1 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (~~E~~F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

D. Summary of 2002 Proposed Amendments

An amendment to rule 3-310, new Discussion ¶. 9, was adopted by the Board on May 4, 2002 and was subsequently approved by the Supreme Court. The amendment was developed in response to Business and Professions Code § 6068.11, requiring the State Bar to conduct a study, in consultation with representatives of the insurance defense bar, plaintiff's bar, the insurance industry and the Judicial Council, concerning the legal and professional responsibility conflict of interest issues arising from the decision of the California Court of Appeal in *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20].

New Discussion ¶. 9 paragraph clarified that rule 3-310(C)(3) does not apply when the lawyer-client relationship with an insurance company client arises from the handling of a defense matter for a policyholder of the insurance company. This proposed Discussion section was to appear between paragraph eight and nine.

In *State Farm Mutual Auto Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422, the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to action.

The first sentence of Discussion ¶. 9 clarified that the *State Farm* holding occurred in a specific and narrow fact setting.

The second sentence of clarified that the *State Farm* holding does not apply where there is no direct action against an insurer client and the insurer client's only interest is that of an indemnity provider.

In effect, new Discussion ¶. 9 also clarified the application of the rule to an insurance defense setting, which previously had been addressed in then Discussion ¶. 11, which provided in relevant part: "Paragraph (F) [regarding fees paid by a person other than the client] is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interests."

No amendments have been made to rule 3-310 since the 2002 amendments.

VII. OFFICE OF CHIEF TRIAL COUNSEL / 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] However, to avoid confusion, subsection (d) should state: "Even with the client's informed written consent, …" OCTC recognizes that Comment 7 explains that, but it should be in the rule, not a Comment.

   Commission Response: The Commission agrees and has revised the rule to capture the concept described in the suggested change. See revised paragraphs (a), (b) and (c).

2. OCTC supports Comments [1], [2], [3], [4], [5], [6], [9], and [10]. OCTC has no position on Comment 8 [advanced waivers]. If the Comments discuss advanced waivers, however, they should also discuss the requirements for an adequate advanced waiver.

   Commission Response: No response required.

3. If subsection (d) is revised as indicated above, the Commission might want to reconsider Comment [7].

   Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017 (In response to 45-day public comment circulation):**

For the 45-day public comment version of the rule, OCTC re-submitted substantially the

[2] OCTC, however, is concerned about the proliferation of conflict rules as discussed in the General Comments section of its September 27, 2016 letter.

same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

- **State Bar Court:** No comments were received from State Bar Court.

VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, seventeen public comments were received. Five comments agreed with the proposed Rule, ten comments agreed only if modified, and two comments did not indicate a position. During the 45-day public comment period, five public comments were received. All five comments agreed only if modified. During the 30-day public comment period, three comments were received. One comment agreed with the proposed Rule and two comments agreed only if modified. (Two late comments received after the 45-day public comment deadline were considered by the Commission with the comments received during the 30-day public comment period. These two comments agreed only if modified.)

Two speakers appeared at the public hearing whose testimony was in support of the proposed rule if modified. That testimony and the Commission's response is included in the 90-day public comment synopsis table. Public comment synopsis tables also are provided for the 45-day and 30-day public comment periods.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section VI on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

1. General Overview of Conflicts.

    - *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620], review denied (6/23/2010)
    - *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal. Rptr. 3d 771]
    - *People ex rel Dept. of Corp. v. Speedee Oil Change Sys.*, Inc. (1999) 20 Cal.4th 1135, 1151-1152 [86 Cal. Rptr. 2d 816]
    - *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal. Rptr. 2d 537]

2. Conflicts Involving Current Clients (3-310(B), (C)).

- *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284 [36 Cal. Rptr. 2d 537] (representation directly adverse to current client). ("The primary value at stake in cases of simultaneous or dual representation is the attorney's duty-and the client's legitimate expectation-of loyalty, rather than confidentiality.")
- *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action)
- *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict)
- *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20] (insurance defense)
- *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]
- *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392] (relationship between insurers and lawyers representing insureds)
- State Bar Formal Ethics Op. 2003-163, available at: http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=xVPoTzYq93U%3d&tabid=838

3. Conflicts Involving Corporate Affiliates.

- *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223 [81 Cal. Rptr. 2d 425]
- *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248 [70 Cal. Rptr. 2d 419]

4. Unwaivable (Prohibited or Unconsentable) Conflicts of Interest.

- *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185];
- *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509];
- *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592]

5. Advance Consents to Conflicts.

- *In re Shared Memory Graphics LLC* (Fed. Cir. 2011) 659 F.3d 1336 (applying California law) (permitted).
- *UMG Recordings, Inc. v. MySpace, Inc.* (C.D.Cal. 2008) 526 F.Supp.2d 1046 (permitted).
- *Concat LP v. Unilever, PLC* (N.D.Cal.2004) 350 F.Supp.2d 796 (not permitted).
- *Visa U.S.A., Inc. v. First Data Corporation* (N.D.Cal.2003) 241 F.Supp.2d 1100 (permitted).

- *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285 [37 Cal.Rptr.2d 754] (permitted).

6. Substantial Relationship Test.

Given that the standard in rule 3-310(E) is the "materiality" of the information to the current matter, it has been left to the courts to craft a test to determine whether information a lawyer likely acquired from a former client is "material." The courts have accomplished this by creating a substantial relationship test that is applied in civil actions to determine whether a lawyer should be disqualified. See, e.g., *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445 [280 Cal.Rptr. 614] (To establish substantial relationship of matters, inquire re: (1) factual similarity of the cases; (2) their legal similarity; and (3) the extent of the lawyer's involvement in the cases). See also *Adams v. Aerojet-General Corp*. (2001) 86 Cal.App.4th 1324 [104 Cal.Rptr.2d 116]; *City National Bank v. Adams* (2002) 96 Cal.App.4th 315 [117 Cal.Rptr.2d 125]. Conversely, unlike CR 3-310(E), MR 1.9(a) does not explain why the substantial relationship inquiry is made: to determine whether the lawyer acquired confidential information material to the present matter.

In *Jessen v. Hartford General Casualty Co.* (2003) 3 Cal.Rptr.3d 877, 884-885 [111 Cal.App.4th 698], the court stated that the test for determining whether a substantial relationship exists between the current matter and the former matter "turns on two variables: (1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation." See also *Farris v. Fireman's Fund Ins. Co.* (2004) 119 Cal.App.4th 671 [14 Cal.Rptr.3d 618] (Figure 17); *Brand v. 20th Century Ins. Co.* (2004) 124 Cal.App.4th 594 [21 Cal.Rptr.3d 380] (Figure 18). In effect, *Jessen* conflates the first two factors of the H.F. Ahmanson test (similarity of factual and legal issues) into one. Although *Jessen*, *Farris* and *Brand* provide a test that arguably is broader and more likely to result in disqualification than the test originally set out in *H.F. Ahmanson*, more recent decisions have held that mere conclusory allegations by the moving party of the migrating lawyer's alleged relationship to the former client will not be sufficient to meet the moving party's burden to prove the matters are substantially related. See, e.g., *Faughn v. Perez* (2006) 145 Cal.App.4th 592 [51 Cal.Rptr.3d 692] (moving party's heavy reliance on inferences and failure to submit direct evidence that pointed to specific confidential information to which attorney could have had access required denial of disqualification motion)

B. ABA Model Rule Adoptions

Model Rule 1.7. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.7: Conflicts of Interest: Current Client," revised September 5, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7.authcheckdam.pdf [Last visited 2/6/17]

- Nineteen jurisdictions have adopted Model Rule 1.7 verbatim.[3] Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.7.[4] Ten jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.7."[5]

Model Rule 1.7, Comment [34] (Parent/Subsidiary Conflicts Situations). The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct Rule 1.7, Comment [34]," revised October 21, 2010, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7_cmt_34.authcheckdam.pdf [Last visited 12/28/15]

- Thirty jurisdictions have adopted Model Rule 1.7, Comment [34] verbatim.[6] Three jurisdictions have adopted a modified version of Model Rule 1.7, Comment [34].[7] Thirteen jurisdictions have not adopted a version of the Comment."[8]

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

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of the ABA Model Rules' approach to have separate rules for different conflicts of interest situations, i.e., Rule 1.7 (current client conflicts), Rule 1.9 (former client duties), Rule 1.8.6 (third-party payor), Rule 1.8.7 (aggregate settlements), rather than amalgamating the provisions in a single rule, current rule 3-310.

    - Pros: Such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Separate rules should reduce confusion and

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[3] The nineteen jurisdictions are: Arkansas, Colorado, Delaware, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Utah, Vermont, and West Virginia.

[4] The twenty-two jurisdictions are: Alaska, Arizona, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, Washington, Wisconsin, and Wyoming.

[5] The ten jurisdictions are: Alabama, California, District of Columbia, Florida, Georgia, Michigan, Mississippi, North Dakota, Ohio, and Texas.

[6] The thirty jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

[7] The three jurisdictions are: Alaska, District of Columbia, and New York.

[8] The thirteen jurisdictions are: Alabama, California, Florida, Louisiana, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, and Virginia.

provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules.

- Cons: Current rule 3-310 has been applied without any perceived problems for over 25 years. There has been no showing of a compelling need to change the basic structure of the conflicts rules in California.

2. Recommend adoption of the ABA Model Rule approach to current client conflicts in Rule 1.7.

   - Pros: The ABA's explicit conflicts standards set forth in paragraph (a) of Model Rule 1.7 are a clear, succinct and straightforward statement – in two subparagraphs – of the kinds of conflicts that involve a current client. These two kinds of conflict situations are implemented in the proposed rule in two paragraphs: (i) paragraph (a) addresses direct adversity conflicts, a concept found in current rule 3-310(C)(2) and (3); and (ii) paragraph (b) addresses conflicts where there is a significant risk that a lawyer's duties to or relationships with another person, or the lawyer's own personal interests, will materially limit the representation. These latter conflicts situations are currently addressed in rule 3-310(B)(2) through (4) and 3-310(C)(1). Paragraph (b) of Model Rule 1.7 explicitly identifies those conflict situations that are not consentable in three subparagraphs (Model Rule 1.7(b) is found in proposed Rule 1.7(d).) Notwithstanding its succinctness, the Model Rule and proposed rules are more comprehensive in their scope of coverage and would be more protective of a client's interests. Nearly every jurisdiction in the country has adopted the Model Rule either verbatim or a very close approximation. California should similarly adopt the basic framework and language of Model Rule 1.7 and contribute to the establishment of a national standard. Finally, the twelve proposed Comments to the rule, substantially fewer in number than the Model Rule Comments, all provide guidance on how the rule should be interpreted and applied. The number of Comments is the same number of Discussion paragraphs in current rule 3-310, many of which have been carried forward in the proposed rule.

   - Cons: The Model Rule may appear to be straightforward but the devil is in the details, which the Model Rule addresses by including 35 Comments, many of them lengthy. The first Commission also used the Model Rule structure and language, and inserted 41 Comments of explanation. The number of Comments accompanying both versions of the Model Rule approach would appear to belie a claim that the rule is straightforward. Straight adoption of the ABA Model Rule approach would completely forego the current California Rule approach, which has proved workable and useful.

3. Retain the current California Rules' standard for obtaining a client's consent to most conflicted representations, "informed written consent," rather than the Model Rules' less robust standard, "consent, confirmed in writing."

    - Pros: This standard is more client-protective because written disclosure is required, a consent being informed only to the extent that the disclosure is sufficient. Retaining the standard carries forward long-standing California policy. There is no evidence the requirement does not work in practice or is ignored.

    - Cons: None identified.

4. Retain the current California Rules' less stringent standard of requiring only "written disclosure" in some situations based on a lawyer's duties to or relationships with other persons, or the lawyer's personal interests. (See discussion of proposed paragraph (c), below.)

    - Pros: Carries forward long-standing California policy intended to ensure that a client is made aware of a much broader set of lawyer relationship and interests that would not otherwise be disclosed under the Model Rule's "significant risk that a lawyer's representation will be materially limited" standard in Model Rule 1.7(a)(2), thus avoiding the under-regulation of that standard. There is no evidence that California's approach is broken. Moreover, the perceived under-regulation problem of current rule 3-310(B), i.e., that serious relationship or personal interest conflicts do not require informed consent, is obviated by the recommended adoption of paragraph (b).

    - Cons: The justification for requiring only written disclosure, to increase the breadth of relationships and interests that are disclosed, is attractive in theory but it is only when a client is confronted with signing a disclosure document that the client will take the time to consider whether the relationship or interest is sufficiently inconsequential and proceed with the lawyer's representation. There is also a reasonable likelihood that if a consent is not required, lawyers will honor the rule primarily by its breach.

5. Recommend adoption of paragraph (a), which incorporates the general concept of direct adversity found in Model Rule 1.7(a)(1).

    - Pros: A criticism of current rule 3-310(C) has been that it does not capture this broader concept of direct adversity. By substantially adopting the Model Rule 1.7(a)(1) language, the proposed rule will capture the broader concept of direct adversity that was identified in *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537], and has been absent in current rule 3-310(C). This is clarified in proposed Comment [1].

    - Cons: There is no need to broaden rule 3-310(C)(3) as the broader concept of direct adversity is already recognized in case law, i.e., the *Flatt* case. Further,

the Supreme Court has already interpreted current rule 3-310(C)(3) to encompass the *Flatt* standard when it adopted rule 3-310, Discussion ¶. 9, concerning conflicts in the insurance defense context.

6. Recommend adoption of paragraph (b), which incorporates Model Rule 1.7(a)(2)'s general concept of a lawyer's ability to represent a client being compromised by a relationship with, or responsibilities owed to another client or third person, or by the lawyer's personal interests.

    - Pros: See "Pros" in Section IX.A.1, above. Of special note is the Commission's recommendation that the heightened requirement of "informed written consent" be applied to these material limitation conflicts rather than the less stringent "written disclosure" requirement in current rule 3-310(B). As to current rule 3-310(C)(1), which addresses a "potential" conflict in a joint client representation, rule 3-310 currently requires informed written consent.

    - Cons: See "Cons" in Section IX.A.1, above, as to the recommendation to adopt the Model Rule approach.

7. Recommend adoption of paragraph (c), which (i) carries forward current rule 3-310(B)(1) largely intact, and (ii) adds the concept in current rule 3-320 regarding a lawyer's relationship with another party's lawyer.

    - Pros: The situations described in subparagraphs (c)(1) and (2) carry forward current rule 3-310(B)(1) and 3-320, respectively. Regardless of whether informed written consent is required under paragraph (b) because there is a significant risk the representation will be materially limited, the lawyer should have a duty to provide written disclosure of the described relationships or responsibilities so that the client can decide whether to retain the lawyer or seek other counsel. Further, paragraph (c) and Comment [6] recognize that in practice, where the question is close, a prudent lawyer will comply with the informed written consent requirement of paragraph (b) rather than providing only written disclosure under paragraph (c). Finally, incorporating current, standalone rule 3-320 into the proposed rule brings into a single rule all of the relationship and personal interest conflicts, increasing the likelihood that lawyers from other jurisdictions practicing in California as authorized under California's multijurisdictional framework will be able to find them.

    - Cons: Paragraph (c) requires written disclosure of a relationship with or responsibility to a party, a witness or with another party's lawyer, even when a significant risk that would require disclosure and consent under paragraph (b) is not present. It thus requires written disclosure in circumstances that do not present a conflict of interest. It will only cause confusion because it will be difficult to know when there is significant risk that will trigger the application of paragraph (b). Further, the argument that when the question is close, a lawyer will err on the side of caution, would apply equally in the absence of paragraph (c). Finally, incorporating current rule 3-320 risks confusion by

removing a separate California rule that has been in place with no indication that it is not working in this form.

8. Recommend adoption of paragraph (d), which incorporates the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts of interest.

    - Pros: Proposed paragraph (d) moves the important concept of unconsentable conflicts into the blackletter rather than relegate it to two separate Discussion paragraphs (see rule 3-310, Discussion paragraphs 2 and 10). A provision that in effect provides an insurmountable obstacle to obtaining a client's consent to a conflicted representation belongs in the black letter of the Rule. Further, by including a cross-reference to paragraph (d) in each of paragraphs (a), (b) and (c), as well as a cross-reference to the latter paragraphs in paragraph (d), the rule makes clear that not only must informed consent be obtained or written disclosure made, but also each of the conditions in paragraph (d) must be satisfied before a lawyer may represent a client in a conflict situation governed by the proposed rule.

    - Cons: There is no evidence that including the concept only in the Discussion section of rule 3-310 has caused any lack of awareness of the concept. Further, there is a abundant case law that sets forth the principle of unconsentable conflicts of interest.

9. Recommend adoption of Comment [1], which is derived in part from Model Rule 1.7, Cmt. [1].

    - Pros: By identifying undivided loyalty as the primary principle involved in conflicts of interest involving current clients, the rule provides important interpretative guidance on the scope and application of the rule. Further, by providing examples of how directly adverse conflicts can arise, the rule provides useful and important guidance on the scope and application of paragraph (b).

    - Cons: None identified.

10. Recommend adoption of Comment [2], which provides examples of what constitutes a matter" within the scope of the rule. Derived from Model Rule 1.11(e), it is also cross-referenced in proposed Rules 1.9, 1.11, and 1.12.

    - Pros: The Comment provides meaningful and useful guidance by way of non-exclusive examples regarding the wide array of situations under which a conflict of interest between or among clients might arise.

    - Cons: The proposed Comment is a definition and should be in the black letter of the rule.

11. Recommend adoption of Comment [3], which carries forward the concept in current rule 3-310, Discussion ¶. 7, concerning joint client conflicts in a single matter.

    - Pros: Provides meaningful and useful guidance on the application of the rule to particular joint client situations that often arise in practice. It importantly recognizes and alerts lawyers to the fact that a representation that might begin as a material limitation conflict governed by paragraph (b) can transform into a direct adversity conflict, governed by paragraph (a), requiring a separate consent from the affected clients. The current Discussion paragraph has been in place for over 25 years and there is nothing to suggest that it has been unnecessary or unhelpful.

    - Cons: None identified.

12. Recommend adoption of Comment [4], which carries forward largely unchanged current rule 3-310, Discussion ¶. 9, concerning conflicts that might arise in the insurance defense context.

    - Pros: The Supreme Court approved this Comment in 2002 after extensive debate among various stakeholders in the insurance industry. It provides meaningful and useful guidance regarding a particular situation that often arises in insurance contexts. The current Discussion paragraph has been in place for nearly 15 years and there is nothing to suggest that it has been unnecessary or unhelpful.

    - Cons: None identified.

13. Recommend adoption of Comment [5], which is new and concerns paragraph (b).

    - Pros: Comment [5], which is derived from Model Rule 1.7, Cmt. [8], provides meaningful and useful interpretative guidance regarding paragraph (b). It provides several examples that alert lawyers to how situations requiring a client's informed written consent might arise.

    - Cons: None identified.

14. Recommend adoption of Comment [6], which is new, and explains the rationale for the different disclosure and consent regimes in paragraph (b) ["informed written consent"] and paragraph (c) ["written disclosure"].

    - Pros: By explaining the rationale for the different approaches to relationship and personal interest conflicts in paragraphs (b) and (c), the Comment provides interpretative guidance on when one or the other of the paragraphs might apply in situations not expressly identified in a subparagraph of either paragraph.

    - Cons: None identified.

15. Recommend adoption of Comment [7], derived in part from Model Rule 1.7, Cmt. [7], which carries forward the concept in current rule 3-310, Discussion ¶.1 concerning positional conflicts that might arise in representing different clients in separate matters. (See, e.g., State Bar Formal Ethics Op. 1989-108.) The Comment was substantially expanded following public comment from the State Bar's Committee on Professional Responsibility and Competence (COPRAC).

    - Pros: The Comment provides meaningful and useful guidance on application of the rule to the situations that arise involving positional conflicts. The current Discussion paragraph has been in place for over 25 years and there is nothing to suggest that it has been unnecessary or unhelpful in this complex area of the law.

    - Cons: None identified.

16. Recommend adoption of Comment [8], which carries forward the concept in current rule 3-310, Discussion ¶. 2, which explains that when disclosure is precluded by rules protecting the confidentiality of another client's information, representation in situations covered by paragraphs (a) through (c) is prohibited.

    - Pros: Maintains a current Comment that emphasizes the overarching duty to protect confidential client information. Provides meaningful guidance to alert lawyers that an inability to disclose confidential client information may preclude compliance with the disclosure requirements of the conflict rule. Current Discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or unhelpful.

    - Cons: None identified.

17. Recommend adoption of Comment [9], which carries forward current rule 3-310, Discussion ¶. 10 concerning unconsentable conflicts, and notes that paragraph (d) is the blackletter manifestation of the concept.

    - Pros: Provides an important explanation of paragraph (d), which in effect describes conflicts where consent cannot be obtained or written disclosure will not suffice, thereby overriding the other provisions of the Rule (paragraphs (a) through (c).)

    - Cons: None identified.

18. Recommend adoption of Comment [10], which provides that the Rule does not prohibit a lawyer from entering into an agreement with a client under which the client provides an "advance consent" to a future conflict of interest.

    - Pros: In modern practice involving large law firms, a client otherwise might be precluded from retaining the lawyer or law firm of the client's choice because the lawyer foresees that a conflict might arise in the future between the client and a current client of the lawyer, and wants assurance that the new client will

not later prevent representation of the current client. This provision provides assurance that a lawyer will not be disciplined simply from entering into such an agreement. It does not, however, sanction enforcement of the agreement or attempt to define specific requirements for such an agreement to be effective. These will be determined on a case-by-case basis by the courts.

- Cons: This is an area of law that should be left to be developed on a case-by-case basis in the civil courts.

19. Recommend adoption of Comment [11], which explains that material changes in the circumstances under which a consent was obtained may require a lawyer to obtain a new consent.

    - Pros: This Comment importantly clarifies that the effectiveness of a consent might become diminished over time and a change in circumstances. It is a general statement of the principle alluded to in the last sentence of Comment [3].

    - Cons: None identified.

20. Recommend adoption of Comment [12], which provides cross-references to two proposed Rules, recommended for adoption by this Commission, which permit otherwise conflicted representations or provide exceptions for imputation under certain conditions.

    - Pros: Both referenced rules, proposed Rules 6.3 and 6.5, promote lawyer conduct that promotes confidence in the legal profession or the administration of justice, or would increase the access to justice, or both. Lawyers should be made aware that the principles set forth in proposed Rule 1.7 are not intended to prevent such conduct.

    - Cons: None identified.

21. Delete Discussion paragraphs 3 through 6, 8, 11, and 12 of current rule 3-310.

    - Pros: As noted in the redline comparison of the proposed Rule to current rule 3-310 in Section IV, above, each of these paragraphs has not been carried forward because the proposed revisions to the 3-310 provisions which they are intended to explain have been deleted, moved to another rule, incorporated in the black letter of this rule, or rendered irrelevant because a cross-referenced rule has been imported into the proposed Rule.

    - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of a "hybrid" approach to the current conflicts rule provisions by merging the "checklist approach" to regulating conflicts involving

current clients, (i.e., as is done in current rule 3-310(B) and (C)) with the ABA Model Rule's approach, which generally describes two kinds of conflict situations relating to current clients: (1) those involving direct adversity, (Model Rule 1.7(a)(1)), and (2) those involving a significant risk that a lawyer's representation of current clients will be materially limited by the lawyer's relationships with, or responsibilities to, another client or third person, or by the lawyer's personal interests.

- Pros: ***First***, as explained more fully below, a hybrid rule will facilitate compliance with enforcement of the current client conflicts rule provisions by incorporating more clearly-stated general conflicts principles, (see introductory clauses to proposed paragraphs (a) and (b)), while providing specific examples ("checklist items") within each category that carry over the current California Rule requirements which clarify how situations that violate those principles might be recognized in practice.

  Second, this hybrid approach will also increase client protection by including the generally-stated conflicts principles that are subject to regulation under the rule, rather than limiting the rule's application to several discrete situations as in the current rule (Compare current rule 3-310(B) and (C)).

  Third, by incorporating the generally-stated principles in Model Rule 1.7(a)(1) and (2) into the introductory clauses of paragraphs (a) and (b), the proposed rule will help promote a national standard in conflicts of interest.

  Fourth, by incorporating the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts into proposed paragraph (d), the proposed rule will move this important concept into the blackletter rather than relegate it to two separate Discussion paragraphs (see rule 3-310, Discussion paragraphs 2 and 10).

  Fifth, by retaining a written disclosure requirement that broadly applies to a much broader category of potential personal conflicts of a lawyer, (see current rule 3-310(B) and proposed paragraph (c)), the rule will continue to increase client protection and promote confidence in the legal profession and administration of justice by requiring written disclosure of even those relationships or interests that do not rise to the level of presenting a significant risk they will have a substantial effect on the lawyer's representation of the client.

- Cons: The hybrid approach of the proposed Rule is more complex than either the current rule provisions or Model Rule 1.7. The hybrid approach's complexity might confuse lawyers as to their duties and risks weakening both compliance with and enforcement of basic conflicts principles. A combination of approaches is not found in any other jurisdiction and would maintain California's departure from a national standard that would operate more effectively to regulate national practices across jurisdictions. A current

conflicts rule should adhere to either the current rule's approach or adopt the Model Rule's approach. Perhaps more important, nearly all of the concepts that are listed as favoring the "hybrid" approach are carried forward in proposed Rule 1.7, the only concept not being carried forward being the blackletter "checklist" of specific material limitation conflicts that are now in current rule 3-310(B)(1) through (4). (See next paragraph.)

2. Retain the current "checklist" approach in current California rule 3-310 (B) and (C), without incorporating general principle concepts from Model Rule 1.7.

    - Pros: The rule has been in existence for over 25 years. There is no evidence that lawyers cannot understand their duties as stated in the rule, or that compliance with it, or discipline under it, is impaired. See also "Cons" in Section IX.B.2, above.

    - Cons: See "Pros" in Section IX.B.2, above.

3. Recommend adoption of a definition of "written disclosure" for purposes of this Rule.

    - Pros: Provides a definition that explains the scope of disclosure required under paragraph (c). This is a necessary addition to the Rule because, while informed consent" and "informed written consent" are defined in the global terminology rule (see proposed Rule 1.0.1(e) and (e-1)), neither "disclosure" nor "written disclosure" is. It would be both confusing and redundant to place a definition of "disclosure" in Rule 1.0.1 because the definition of "informed written consent" already describes the disclosure that is required to obtain such consent.

    - Cons: The Commission has moved to the Model Rule approach of defining "informed consent" rather than the approach in current rule 3-310(A) of defining "disclosure" in subparagraph (A)(1) and in subparagraph (A)(2) defining "informed written consent" to mean the client's "written agreement to the representation following disclosure." A separate definition of "written disclosure" is not necessary because implied in the definition of "informed consent" is the requirement of "disclosure."[9]

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.

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[9] Proposed rule 1.0.1(e) provides:

"Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

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

1. Paragraph (a) is a substantive change in that it incorporates and describes the situations corresponding to current rule 3-310(C)(2) and (C)(3)] as situations involving direct adversity. Paragraph (a) is also a substantive change to the extent that it impliedly incorporates the holding of *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537], which is broader than the concept in current rule 3-310(C)(3).

2. Paragraph (d) is a substantive change because it moves the description of unconsentable conflicts into the black letter of the Rule.

D. Non-Substantive Changes to the Current Rule:

1. 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.)

    - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).

    - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

    - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. Paragraph (a)'s substitution of "representation" for "accept or continue the representation" in current rule 3-310(C)(2) and (3) is not a substantive change.

4. All other changes to the rule are not intended as substantive changes in lawyers' duties.

E. Alternatives Considered:

1. In addition to the alternatives discussed in "Concepts Rejected" above, the Commission also considered simply carrying forward the various provisions in current rule 3-310 as separate standalone rules, with 3-310's provisions amended to incorporate the global changes the Commission has agreed to ("lawyer" for "member," etc.) and the separate standalone rules corresponding to the ABA numbering. The Commission abandoned that approach at an early stage of its deliberations. A copy of the rules considered under this approach is attached.

XI. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr and Mr. Martinez submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XII. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.7 [3-310] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.7 [3-310] in the form attached to this Report and Recommendation.

Commission Member Dissent, Submitted by Robert Kehr,
on the Recommended Adoption of Proposed Rule 1.7

This message states my dissent from proposed Rule 1.7(b) and (c), with the request that it be included with the Commission's submission to the Board of Trustees, and if needed then to the Supreme Court.

The Commission's Charter directs us to "…ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives." Proposed Rule 1.7(b) presents a serious violation of those directions.

Rule 1.7 addresses current-client conflicts. Its analog in our current Rules is rule 3-310. Rules 3-310(A) (definitions), (D) (aggregate settlements), (E) (certain confidentiality issues), and (F) (fee payments on behalf of a client) are located in other proposed Rules and are not pertinent here. Proposed Rue 1.7(b) is intended to embody the conflicts now stated in rules 3-310(B) (conflicts resulting from a lawyer's relationships and personal interests) and (C)(1) and (2) (potential and actual conflicts resulting from a lawyer's representation of multiple clients in a single matter – joint representations).[1]

Here are the exact words of the proposal:

> A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

This statement expresses a non-controversial view – surely no lawyer should represent a client without the client's informed approval when there is a significant risk that the lawyer other duties or relationships, or the lawyer's personal interests, might interfere with the lawyer's full performance of all duties owed to the client. Because a lawyer's duties include loyalty – meaning, among other things, preserving a client's trust in the lawyer because this is essential to the proper functioning of the lawyer–client relationship - disclosure to and approval from the client are indispensable.[2] I should add that the disclosure and consent process also serves to remind the lawyer of where the lawyer's duties lie.

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[1] A lawyer's representation of two or more clients in the same matter properly is called a "joint representation". *See*, *e.g., Roush v. Seagate Technology, LLC*, 150 Cal. App.4th 210, 225 (1970).

[2] As suggested by my earlier reference to the duty of loyalty, the quality of a lawyer's work is a civil standard. A client who later discovers that its lawyer did not reveal, for example, that the lawyer had been cross-examining the lawyer's next door neighbor, cousin or client in another matter, will lose trust in the lawyer and the legal system, and the conflict rules should be designed to avoid that result. See *Hernandez v. Paicius*, 109 Cal. App.4th 452, 463-468 (2003), disapproved on other grounds in *People v. Freeman*, 47 Cal.4th 993, 1006 (2010).

The single proposed paragraph (b) sentence therefore is a correct, even elegant, statement of what each lawyer should do. The problem with this formulation is that it does not identify the relationship conflicts or personal interest conflicts pinpointed in current rule 3-310(B)(1) – (4) and only hints at the joint-representation conflicts now covered by rule 3-310(C)(1) and (2). Proposed paragraph (b) therefore can be criticized as an aspirational standard, and it is, but I think of it more as being an undifferentiated amalgam of a multiple distinct elements.

I know those elements because my many years of activity in the legal ethics field have left me with a mental roadmap of the rule 3-310 checklist. For others who do not carry that checklist, and I mean by this virtually every California lawyer, the meaning of paragraph (b) would require study of the proposed Rule 1.7 Comments. A diligent and able lawyer might be able to locate in those Comments all of the elements of the current rule. I say "might" because I am skeptical that many lawyers would be able to reverse engineer rules 3-310(B) and (C) by reading the proposed Comments and because it is my opinion that these proposed Comments are not complete. What I think much more likely is that many lawyers will not trouble to read the Comments, and instead will understand "significant risk" and "materially limited" as giving them the freedom to judge their own ability to do a good job. Lawyers have any number of reasons to convince themselves there is no conflict of interest: including the financial benefits of a representation, the excitement of a particular project, reputational benefits within a firm as being known as a client developer, and the opportunity to be a client's savior at a time of client stress and risk. As a consequence, many lawyers will prove themselves effective salesmen in convincing themselves to go forward without providing the disclosure that now would be required under rule 3-310.[3]

The material limitation standard, because it will be a temptation to many lawyers, would result in a dilution of client protection. Another result would be that lawyers will be blindsided and will get into disciplinary and civil hot water. Neither result is desirable, nor will be the further injury to the reputation of lawyers and the legal system.

The proposed Rule contains direct proof of my concern that the application of proposed paragraph (b) is indefinite and unpredictable. Proposed paragraph (c) states:

> Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where: (1) [there is a conflict under what amounts to current rule 3-310(B)(4)] …."

[3] One commenter suggested to me that this is like the so-called "good deal" exception to the securities laws. Some securities promoters will think they don't have to comply with the securities laws because the deal is so good that nothing could go wrong.

Here is one example of what this means: Current rule 3-310(B)(1) requires a lawyer to make a "disclosure"[4] to the client when the lawyer has a personal or other relationship with a party or witness in the same matter. There are no exceptions. Disclosure always is required in this situation. Proposed paragraph (b) waters down the current rule by requiring disclosure only when the lawyer's relationship to a party or witness rises to the level of posing a "significant risk" of the lawyer's representation being "materially limited". So in addition to the lack of clarity that results from the blending of elements of the current rule, the resulting standard will not always reach as far as the current rule.[5]

There appear to be three main arguments in favor of proposed Rule 1.7(b). *First*, it is argued that California's current check-list approach is incomplete while the Model Rule approach borrowed in proposed Rule 1.7 is complete. Assuming there something of potential importance has been omitted from our current check list (although that is hard to imagine), and assuming it could not be added to the check list, there would be a resulting trade-off between logical completeness and, on the other hand, the loss of check-list clarity and the more and more rigid disclosure requirements of rule 3-310(B). *Second*, it is argued that national uniformity is important. Assuming national uniformity were important (and ignoring that no jurisdiction has adopted the Model Rules intact and that Rule 1.7 is one with many local variations),[6] it is my opinion that the Model Rule approach is essentially flawed and that, as California has done with some other Rules, the Model Rule approach should be rejected. *Third*, it is argued that all law students are taught and tested on the Model Rules and understand Model Rule 1.7. It has been my experience, as one who frequently fields inquiries from lawyers, that there is no topic on which lawyers are less prepared or more confused than the correct way to analyze conflicts of interest. This is true without regard to where or when they attended law school, and generally is true even with lawyers the best and most conscientious lawyers. Conflicts analysis often is obscure, and the Rules should not make it more so.

I so far have explained my principal objection to Rule 1.7, but I have these additional comments:

- Current rule 3-310(B) requires disclosure but proposed paragraph (b) would heighten the requirement to one of informed written consent. I do not object strongly to that change but want to point out that the increased requirement easily could be applied to current rule 3-310(B) if the current check-list format were retained.

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[4] This term now is defined in rule 3-310(A)(1) and will become part of the definition of "informed consent" under proposed Rule 1.0.1(e). I have used the current terminology in this Dissent because I think it makes it easier to picture the two steps in which the lawyer provides information and explanation and the client then provides its consent.

[5] And because proposed paragraph (c)(1) would require a "disclosure" when there is no material limitation, it is not apparent what explanation the lawyer would provide of what is not a conflict under paragraph (b).

[6] Compare, for example, Rule 1.7 in Washington D.C., New York, and Texas (the last of these numbered as Rule 1.06).

- I agree with proposed paragraph (a), but its meaning cannot be fully understood with an explanation of "direct adversity".[7] The proposed Comment does not adequately explain the concept and I fear will lead to wide-spread misunderstanding. The directions to remove practice guidance from the Comments led the second Commission to remove important explanation of the meaning of "direct adversity".

- Part of the attempted explanation of "direct adversity" in Comment [1], referring to joint representations, talks of when "a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict". This is conceptually wrong. A lawyer does not have a conflict because the clients have conflicts. A lawyer properly can jointly represent business competitors if the subject of the representation excludes any matter on which the lawyer might be called on to provide advice or representation that favors one client over the other. Even the most vigorous competitors can have common interests, and a lawyer can represent them with a sensible limitation on the scope of the representation. Any discussion of conflicts between clients is misleading when speaking of a lawyer's conflict of interest. A lawyer has a potential conflict of interest if the lawyer might be required to choose between conflicting duties or to reconcile conflicting interests; a lawyer has an actual conflict of interest when required to choose between conflicting duties or to reconcile conflicting interests. "A potential conflict is a reasonable set of circumstances which could impair a lawyer's ability to fulfill his or her professional obligations to each client in the proposed engagement." *Havasu Lakeshore Investments, LLC v. Fleming*, 217 Cal. App.4th 770, 779 (2013).

- Proposed paragraph (c)(2) is taken from current rule 3-320. The current rule requires "notice" to the client (a standard lower than "disclosure") if the lawyer has one of certain personal relationships with another Party's lawyer. Proposed paragraph (c)(2) would make three material changes in the current provision. The first would be to heighten the notice requirement to one of formal "disclosure". I don't see the need for that change because I don't think it requires any explanation for a client to understand the significance of, for example, an opposing lawyer being the spouse of the first client. However, this not my major concern. The proposal also would expand the scope to include "disclosure" of intimate relationships between any firm lawyer and an opposing lawyer, not just the first lawyer's own personal relationships. And the first lawyer's conduct would be measured by the "reasonably should know" standard, defined in proposed Rule 1.0.1(j) as meaning "…that a lawyer of reasonable prudence and competence would ascertain the matter in question." This would an obligation to investigate on firm lawyers no matter how large and geographically dispersed the firm, and including governmental offices. This likely would conflict with privacy

[7] There is no corollary in our current rules because an oversight in the writing of the 1989 Rules left it out, and a later effort in 1996-97 to correct the oversight was unsuccessful. Proposed paragraph (b) also encompasses current rule 3-310(C)(3).

rights and is unsupportable. There is no evidence of any deficiency in current rule 3-320.

For these reasons, I respectfully dissent from proposed Rule 1.7(b) and (c). I see this proposed Rule as a prime example of the dangers inherent in materially changing California law with its substantial body of case and other authority on the meaning and application of our current rule.

Commission Member Dissent, Submitted by Raul Martinez, on the Recommended Adoption of Proposed Rule 1.7

The Commission's inclusion of Paragraph (c) will dilute the obligations under Paragraph (b) and introduce a subjective test. Paragraph (c) requires written disclosure to the client, but not written consent, with respect to legal, business, financial or personal relationships that the lawyer or another lawyer in the lawyer's firm has with a party or witness in a matter. Thus, under Paragraph (c), the lawyer must make an initial determination as to whether the significant risk of a material limitation on the lawyer's responsibilities mentioned in Paragraph (b) "is not present." Paragraph (c) effectively invites the lawyer to make a subjective determination as to whether a given relationship involves a significant risk of materially limiting the lawyer's responsibilities to the client. The Rule provides little guidance to a lawyer seeking to ascertain whether the "conflict" requires informed written consent under Paragraph (b) or written disclosure under Paragraph (c). The end result will be that many lawyers will "default" to Paragraph (c), not Paragraph (b). This problem is compounded by the overarching requirement in Paragraph (d)(1) that the lawyer "reasonably believes" he or she can provide competent representation to each client. Although the "reasonable belief" standard as defined in Rule 1.0.1(i) is intended to import an objective test (i.e., that "the circumstances are such that the belief is reasonable"), in practice, lawyers will see it as a purely subjective one. The Rule would be better written and confusion can be avoided by simply deleting Paragraph (c). Alternatively, Paragraph (c) could be revised and re-drafted as a standalone rule, untethered to the material limitation concept, as is current Rule 3-320.

Paragraph (c) does not set forth a clear and enforceable disciplinary standard. The dividing line between circumstances covered by Paragraphs (b) and (c) is unclear. The disciplinary standard of a "significant risk" of "material limitation" of the lawyer's representation of a client is by itself a difficult concept to grasp and apply. This standard becomes unworkable under Paragraph (c) when a lawyer is called upon to make a current determination that a "significant risk" under Paragraph (b) "is not present."

Paragraph (c)(2) would require implementation of cumbersome, if not impossible, conflict check systems for law firms. Paragraph (c)(2) imposes a "reasonably should know" standard on a lawyer to determine whether another lawyer in the lawyer's law firm has a spousal, parental, sibling, cohabitational, or attorney-client relationship with a lawyer in the matter the lawyer is involved in. The "reasonably should know" standard contained in Paragraph (c)(2) would require the lawyer, and in turn, the lawyer's law

firm, to conduct a reasonable investigation (i.e., a conflicts check) to determine if other lawyers in the firm have one of the requisite relationships. As defined by Rule 1.0.1(j), the phrase “Reasonably should know” means that a lawyer "of reasonable prudence and competence *would ascertain* the matter in question." Rule 5.1 would impose on a law firm a concomitant obligation to undertake reasonable efforts to insure lawyers comply with their ethical obligations--in other words, implement a conflict check system that would reveal these relationships. Law firms are not equipped (nor should they be) to conduct the type of conflict check system that would be required to comply with this Paragraph. Compliance with this aspect of the Rule would be burdensome, confusing and potentially invasive on the privacy rights of lawyers.

Paragraph (c) is overly broad in that it would require disclosure of de minimis relationships that do not impact the lawyer's obligations. Because it reaches relationships that do not present a significant risk of materially limiting the lawyer's responsibilities to a client, Paragraph (c) is not a true conflict of interest rule. Paragraph (c)(1) requires written disclosure to the client of a host of business, financial, professional, or personal relationships with a party or witness in a matter that would not affect the lawyer's representation of the client. Similarly, Paragraph (c)(2) would require disclosure of relationships involving other lawyer's in the firm that would have no impact on the lawyer's obligations to the client. Yet both Paragraphs can provide a basis for discipline even in situations where client loyalty is in no way impaired. (See *People v. Bonin* (1989) 47 Cal.3d 808, 835 [“Conflicts of interest broadly embrace all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests.”].) Paragraph (c) would result in discipline of lawyers in situations where there is no actual or potential client harm. Worse yet, it would discipline lawyers for making the wrong call in deciding whether Paragraph (c), rather than Paragraph (b), applies to any given circumstances and where it is later determined that written disclosure rather than informed written consent was mandated.

Example (ii) in Comment [1] is overly broad and contradicts the black letter of the Rule since representation of a client's adversary in unrelated litigation is not "direct adversity." Turning to the comments, Comment [1] cites as an example of a "directly adverse conflict under Paragraph (a)" the situation where: "(ii) a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer’s client." This example, which is derived from current Rule 3-310(C)(3), describes a *material limitation* conflict under Paragraph (b), not a directly adverse conflict under Paragraph (a). The representation of a client's adversary in an unrelated matter is not directly adverse to the client in the first matter where the second client is not a party to the first matter. Comment [6] of ABA Model Rule 1.7 more accurately describes direct adversity by explaining that "absent consent, a lawyer may not act as an advocate in one matter *against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated." Example (ii) goes beyond this important principle. Rather than explaining the black letter of the Rule, Example (ii) expands on it.

Commission's Response to Dissents Submitted by Robert Kehr & Raul Martinez, on the Recommended Adoption of Proposed Rule 1.7

Proposed Rule 1.7(a):

Kehr Dissent. The Kehr dissent agrees with proposed paragraph (a), but argues that the proposed Comment does not adequately explain the concept of "direct adversity." As the dissent notes, the Commission's Charter directed it to limit the number and length of its comments. With this directive in mind, the Commission believes that proposed Comment [1] provides sufficient guidance on "direct adversity." The Kehr dissent argues that example (i) in Comment [1] does not describe an instance of direct adversity. The Commission disagrees. Example (i) refers to the situation not where two clients' interests in unrelated matters conflict, but where there is a conflict between the interests of two clients in the same matter in which the lawyer is representing both. Under these circumstances, the lawyer necessarily will be forced to choose between conflicting duties or to reconcile conflicting interests in the matter in which the lawyer is representing both clients. This is a direct adversity conflict, as is recognized in current Rule 3-310(C)(2).

Martinez Dissent. With respect to proposed Comment [1], the Martinez dissent argues that example (ii) does not illustrate direct adversity. The Commission disagrees. Example (ii) is derived from current Rule 3-310(C)(3) and addresses the situation where, for example, Client A, represented by lawyer, sues Defendant B in Matter 1, and Defendant B then retains the same lawyer to defend against Plaintiff C in unrelated Matter 2. This results in direct adversity in Matter 1, where it did not exist before lawyer's retention by B in Matter 2. After B's retention of lawyer, both sides in Matter 1 (A and B) are now clients of the lawyer, albeit in unrelated matters. This is an example of direct adversity, as is recognized in current Rule 3-310(C)(3) and by the California Supreme Court in its 2002 amendment to current Rule 3-310, when it added Discussion paragraph 9 to make clear that, "Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider *and not as a direct party to the action*." (emphasis added). *See also* ABA Model Rule 1.7, Comment [6] (in discussing direct adversity, stating that "absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.")

Proposed Rule 1.7(b):

The Commission agrees with the Kehr dissent that paragraph (b) of the proposed Rule "expresses a non-controversial view" in precluding a lawyer from representing a client without the client's informed written consent where there is a significant risk that the lawyer's other duties, relationships, or personal interests will materially "interfere with the lawyer's full performance of all duties owed to the client." The Commission also agrees with the dissent that paragraph (b) is a "correct, even elegant, statement of what each lawyer should do" to further this view. Further, the Commission agrees with the dissent that, except for those few lawyers with "many years of activity in the legal ethics

field," virtually every other California lawyer does not have "a mental roadmap of the current Rule 3-310 checklist." As a result, the overwhelming majority of California lawyers are ill-equipped to think about and identify the conflicts enumerated in that checklist on a day-to-day basis. It is for all these reasons that the Commission recommends a shift from the current checklist approach to proposed paragraph (b), which sets forth a straightforward statement of the general rule that is consistent with that applied in virtually every jurisdiction in the country, and in doing so increases public protection by: (a) putting lawyers on notice in plain terms of when they will need to engage in further inquiry to determine if representation may run afoul of the Rule and (b) encouraging lawyers to make the necessary disclosures to obtain the client's informed written consent if there is any uncertainty.

The Kehr dissent argues that paragraph (b) will decrease client protection because lawyers may "understand 'significant risk' and 'materially limited' as giving them the freedom to judge their own ability to do a good job." This is not how the ABA Model Rule has been interpreted or applied. Moreover, paragraph (b) is no different in this regard than current Rules 3-310(B)(2) and (B)(3), both of which apply only upon a determination of a substantial effect on the representation or the relationship that triggers the duty to disclose. Like the "substantial effect" standard of the current Rule, the "significant risk" and "materially limited" standards of proposed paragraph (b) do not require a lawyer's actual knowledge. By not requiring actual knowledge, they appropriately further client protection, and the preservation of client trust, by encouraging lawyers to err on the side of disclosure to obtain the client's informed written consent.

The Kehr dissent also argues that proposed Rule 1.7 "contains direct proof" that "application of proposed paragraph (b) is indefinite and unpredictable," the purported proof being paragraph (c) of the proposed Rule. In characterizing paragraph (c) as proof of paragraph (b)'s unpredictability, however, the dissent misapprehends the relationship between paragraphs (b) and (c) and the way in which they carry forward certain provisions of current Rule 3-310 to maintain heightened client protection. The dissent argues: (1) current Rule 3-310(B)(1) always requires disclosure when a lawyer has a personal or other relationship with a party or witness in the same matter; (2) paragraph (b) "waters down" the current rule by requiring disclosure only when the relationship rises to the level of posing a "significant risk" of representation being "materially limited"; and (3) therefore, "in addition to the lack of clarity that results from the blending of elements of the current rule, the resulting standard will not always reach as far as the current rule." Paragraphs (b) and (c), however, impose distinct obligations. Paragraph (c), like current Rule 3-310(B)(1), requires *disclosure* of the relationship without regard to whether there is a "substantial risk" that the representation will be "materially limited." Contrary to the dissent's position, paragraph (c) carries forward the same level of client protection provided by the current Rule. Paragraph (b), on the other hand, requires informed written consent when a relationship, responsibilities owed a third person, or the lawyer's own interests pose a "significant risk" that the representation will be "materially limited." The heighted consent requirement provides greater client protection than the current rule, which merely requires "written disclosure,"

even where the relationship, whether prior (current Rule 3-310(B)(2)) or current (current Rules 3-310(B)(1) or (3)) is such that it presents a significant risk of a material limitation on the representation. Accordingly, the Commission believes there is no lack of clarity or decreased level of client protection.

Proposed Rule 1.7(c)

Paragraph (c) articulates a clear and enforceable disciplinary standard. The Martinez dissent argues that paragraph (c) does not set forth a clear and enforceable disciplinary standard because it applies only where the lawyer makes a determination that a "significant risk" of "material limitation" under paragraph (b) is not present. The Commission disagrees. Paragraph (c) imposes disclosure obligations under well-defined circumstances, that is, whenever a relationship of the type listed is present. Paragraph (c) carries forward the situations addressed in current Rules 3-310(B)(1) and 3-320, which have been in place for decades and have not posed the alleged problems cited by the dissent. Paragraph (b) adds a heightened level of protection by requiring not just disclosure of the relationship, but "informed written consent," when a relationship of the type listed is present and the relationship poses a "significant risk" of "material limitation." In the absence of such a risk, paragraph (c) requires disclosure; where such a risk is present, paragraph (b) requires informed written consent. In combination, paragraphs (b) and (c) articulate clear and enforceable disciplinary standards that enhance client protection.

Paragraph (c) does not dilute paragraph (b)'s obligations. The Martinez dissent also argues that paragraph (c) dilutes the obligations under paragraph (b) by encouraging lawyers to "make a subjective determination as to whether a given relationship involves a significant risk of materially limiting the lawyer's responsibilities to the client." The Commission disagrees for two reasons.

First, as discussed above, paragraph (b) does not require actual knowledge with respect to the significant risk of material limitation, and so does not apply a subjective test. The Martinez dissent argues that the inclusion of paragraph (d), which provides an overarching bar to representation if the lawyer does not "reasonably believe" that he or she can provide competent and diligent representation, will lead lawyers to believe that this is a "purely subjective" determination. As the Martinez dissent recognizes, however, the "reasonably believe" test in paragraph (d) is explicitly defined by proposed Rule 1.0.1(i) to be an objective standard. Moreover, proposed paragraphs (b), (c), and (d) all make clear that the requirements of paragraph (d) apply *in addition to* (and not as a replacement for) the standards set out in paragraphs (b) and (c). *See also* proposed Comment [9] ("Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing as required by paragraph (c)."

Second, as discussed above, the dissent's "dilution" argument misapprehends the relationship between paragraphs (b) and (c). If a listed relationship is present, paragraph (c) will require at a minimum written disclosure. If the relationship poses a

significant risk of material limitation, paragraph (b) would require compliance with the more rigorous standard that California has employed for decades in its conflicts rules, informed written consent. Because a lawyer would bear the risk of discipline if the lawyer incorrectly assesses whether a particular set of facts creates a significant risk that a representation will be materially limited and chooses (c), an uncertain lawyer will appropriately err on the side of greater client protection, that is, on seeking informed written consent to ensure compliance with paragraph (b). This informed written consent will also satisfy paragraph (c) because obtaining informed written consent necessarily provides written disclosure. *See* proposed Rule 1.0.1(e) and (e-1) (definitions of "informed consent" and "informed written consent," respectively).

Paragraph (c) is not overly broad. The Martinez dissent also argues that paragraph (c) is "overly broad in that it would require disclosure of *de minimis* relationships that do not impact the lawyer's obligations." The relationships covered by paragraph (c), however, are those covered by current Rules 3-310(B)(1) and 3-320, which similarly impose disclosure requirements without regard to the effect on the lawyer's obligations. Paragraph (c) simply carries forward the same policy determination as reflected in the current Rules of Professional Conduct that these relationships are of a type that they should be made known to the client, even if there is not a significant risk they will affect representation. The Commission does not believe there is a valid reason for rejecting this determination to the detriment of client protection.

Paragraph (c)(2) would not require a law firm to implement a cumbersome conflicts check system. The Martinez dissent argues that paragraph (c)(2) would "require implementation of cumbersome, if not impossible, conflict check systems for law firms." The Kehr dissent makes a similar argument, and contends in partial support that paragraph (c)(2) "would expand the scope [of current Rule 3-320] to include disclosure of intimate relationships between any firm lawyer and an opposing lawyer, not just the first lawyer's own personal relationships." These arguments misread paragraph (c)(2), which, with the exception of *client* relationships, limits the relationships that must be disclosed to those of the lawyer herself, just as in current Rule 3-320. Paragraph (c)(2) requires written disclosure of the relationship, where a lawyer knows or reasonably should know that another party's lawyer is (1) a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, or has an intimate personal relationship with the lawyer or (2) a client of the lawyer or another lawyer in the lawyer's firm. Thus, the only extension of paragraph (c)(2) to firm lawyers is with respect to lawyer-client relationships, which should be readily revealed by the most basic of conflicts checks systems. The result is that paragraph (c)(2) should not require the implementation of any additional "cumbersome" conflict check systems because the other listed relationships apply only when personal to the lawyer, just as in current Rule 3-320. The "reasonably should know" standard effectively requires, therefore, only that the lawyer engage in reasonable inquiries to ascertain who the opposing lawyer is, and whether that lawyer has one of the listed relationships with the lawyer herself. The Commission believes this is not unduly burdensome and appropriately furthers client protection.