DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-310 [1.7]

Lead Drafter: **Martinez**
Co-Drafters: **Cardona, Eaton, Harris, Stout**
Meeting Date: **February 19-20, 2016**

I. CURRENT CALIFORNIA RULE 3-310

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].)

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II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 1.7 (CLEAN)

Rule 1.7 Conflict of Interest: Current Clients

(a) A lawyer shall not, without informed written consent from each affected client, represent a client if the representation of the client is directly adverse to the representation of another current client, including when the representation of the client is:

(1) in the same matter as the representation of another current client, and the clients' interests actually conflict; or

(2) in a separate matter, and one or more clients' interests in any of the separate matters actually conflict.

(b) A lawyer shall not, without informed written consent from each affected client, represent a client if there is a significant risk the lawyer's responsibilities to another current client or a third person, or the lawyer's own interests, will have a substantial adverse effect on the lawyer's representation of the client, including when:

(1) the representation of the client is in the same matter as the representation of another current client, and the clients' interests potentially conflict; or

(2) the lawyer:

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

(ii) there is a significant risk the relationship would have a substantial adverse effect on the lawyer's representation.

(c) A lawyer shall not represent a client without providing written disclosure when the lawyer:

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

(2) has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, professional, or personal relationship with another person or

entity that the lawyer knows or reasonably should know could be affected by resolution of the matter;

(3) has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, or professional interest in the subject matter of the representation; or

(4) represents a party or witness in the matter who is a spouse, parent or sibling of the lawyer, or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's firm.

(d) Representation is permitted under this Rule only if:

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

(2) the lawyer reasonably believes 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.

(e) For purposes of paragraph (c), "written disclosure" means informing the client, in writing, of the lawyer's responsibility or interest and the potential effect of that responsibility or interest on the representation.

Comment

[1] This Rule does not apply to a lawyer representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless representation of any of the clients would be adversely affected. Factors relevant in determining whether the representation of one or more of the clients would be adversely affected, thus requiring that the clients be advised of the risk include: where the different cases are pending, 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

[2] Paragraphs (a)(1) and (b)(1) 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 informed written consent was originally obtained on the basis of potential adversity, should the potential adversity become actual, the lawyer must

obtain further informed written consent on the basis of the actual adversity.

[3] Notwithstanding *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], [in which the court held that subparagraph (C)(3) of predecessor rule 3-310 [paragraph (a)(3)] 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,] paragraph (a)(2) 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.

[4] Because paragraph (b) concerns relationships or interests that could have a substantial adverse effect on the lawyer's representation, the informed written consent of each affected client is required. See Rule 1.0.1(e). Paragraph (c), on the other hand, concerns other relationships or interests, and so requires only that the lawyer provide the client with written disclosure of those relationships and interests.

[5] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent or provide the written disclosure required to permit representation under this Rule. (See, e.g., Business and Professions 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.

[6] Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or written disclosure is provided 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].)

[7] Unforeseeable developments might create conflicts in the midst of a representation. 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).

[8] For special rules governing membership in a legal service organization, see Rule 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

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IV. PROPOSED RULE 1.7 (REDLINE TO CURRENT RULE 3-310(B), (C), (D))

~~Rule 3-310~~ Rule 1.7 ~~Avoiding The Representation Of Adverse Interests~~ Conflict of Interest: Current Clients

~~(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.~~[1]

(~~C~~a) A ~~member~~ lawyer shall not, without ~~the~~ informed written consent ~~of~~ from each ~~client~~ affected client, represent a client if the representation of the client is directly adverse to the representation of another current client, including when the representation of the client is:

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

~~(2)~~(1) ~~Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or~~ in the same matter as the representation of another current client, and the clients' interests actually conflict; or

~~(3)~~(2) ~~Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or~~ in a separate matter, and one or more clients' interests in any of the separate matters actually conflict.

(b) A lawyer shall not, without informed written consent from each affected client, represent a client if there is a significant risk the lawyer's responsibilities to another current client or a third person, or the lawyer's own interests, will have a substantial adverse effect on the lawyer's representation of the client, including when:

(1) ~~Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~ the representation of the client is in the same matter as the representation of another current client, and the clients' interests potentially conflict; or

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[1] The concepts in rule 3-310(A) have been moved to the global terminology rule, Rule 1.0.1.

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

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

~~(b)~~(ii) there is a significant risk the relationship would have a substantial adverse effect on the lawyer's representation.

~~(B)~~(c) A ~~member~~ lawyer shall not ~~accept or continued representation of~~ represent a client without providing written disclosure ~~to the client~~ when the lawyer:

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

~~(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~~2) ~~The member~~ has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, professional, or personal relationship with another person or entity that the ~~member~~lawyer knows or reasonably should know ~~would~~could be affected ~~substantially~~ by resolution of the matter; ~~or~~

(~~4~~3) ~~The member~~ has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, or professional interest in the subject matter of the representation~~.~~; or

(4) represents a party or witness in the matter who is a spouse, parent or sibling of the lawyer, or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's firm.

(d) Representation is permitted under this Rule only if:

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

(2) the lawyer reasonably believes 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.

~~(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.~~[2]

~~(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.~~[3]

(e) For purposes of paragraph (c), "written disclosure" means informing the client, in writing, of the lawyer's responsibility or interest and the potential effect of that responsibility or interest on the representation.

~~(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.~~[4]

~~Discussion~~Comment

[1] This Rule ~~3-310 is not intended to prohibit a member from~~does not apply to a lawyer representing ~~parties~~ multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless representation of ~~either client~~any of the clients would

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[2] The concept in rule 3-310(D) has been moved to proposed Rule 1.8.7.

[3] The concept in rule 3-310(E) as it applies to former clients has been moved to proposed Rule 1.9. The concept as it applies to current clients is found in proposed Rules 1.6 [3-100] and proposed Rule 1.8.2 [Confidential Information of a Current Client].

[4] The concept in rule 3-310(F) has been moved to proposed Rule 1.8.6.

be adversely affected. Factors relevant in determining whether the representation of one or more of the clients would be adversely affected, thus requiring that the clients be advised of the risk include: where the different cases are pending, 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.

~~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, subdivsion (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.~~[5]

~~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.~~[6]

~~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.~~[7]

~~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.~~[8]

[2] ~~Subparagraphs (C)(1) and (C)(2) are intended to apply~~ Paragraphs (a)(1) and (b)(1) apply to

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[5] Rule 3-310, Discussion ¶. 3 has been deleted because the rule it cross-references, rule 3-320, has been imported in proposed Rule 1.7 as paragraph (c)(4).

[6] Rule 3-310, Discussion ¶.4 has been deleted because the first sentence states the obvious and the second sentence refers to paragraph (E), the concept of which has been moved to proposed Rule 1.9.

[7] Rule 3-310, Discussion ¶.5 has been deleted because the first sentence simply restates the content of 3-310(B) [now rule 1.7(c)] and the second sentence refers to paragraph (E), the concept of which has been moved to rule 1.9.

[8] Rule 3-310, Discussion ¶.6 has been deleted because its concept, that the provisions of paragraph (B) apply to other lawyers in the member's law firm, has been incorporated into the relevant black letter subparagraphs of paragraph (c).

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 lawyer 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~~ If informed written consent was originally obtained on the basis of potential adversity, should the potential adversity ~~should~~ become actual, the lawyer must obtain ~~the~~ further informed written consent ~~of the clients pursuant to subparagraph (C)(2)~~on the basis of the actual adversity.

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

[3] ~~In~~ Notwithstanding *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], [in which the court held that subparagraph (C)(3) of predecessor rule 3-310 [paragraph (a)(3)] 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, subparagraph (C)(3) is not intended to~~,] paragraph (a)(2) 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.

[4] Because paragraph (b) concerns relationships or interests that could have a substantial adverse effect on the lawyer's representation, the informed written consent of each affected client is required. See Rule 1.0.1(e). Paragraph (c), on the other hand, concerns other relationships or interests, and so requires only that the lawyer provide the client with written disclosure of those relationships and interests.

[5] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent or provide the written disclosure required to permit representation under this Rule. (See, e.g., Business and Professions 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.

[6] Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or written disclosure is provided 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].)

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[7] Unforeseeable developments might create conflicts in the midst of a representation. 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).

[8] For special rules governing membership in a legal service organization, see Rule 6.3; 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.~~[9]

~~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].)~~[10]

V. PROPOSED RULE 1.7 (REDLINE TO MODEL RULE 1.7)

Rule 1.7 Conflict of Interest: Current Clients

~~(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)~~(a) ~~the representation of one client will be directly adverse to another client; or~~ A lawyer shall not, without informed written consent from each affected client, represent a client if the representation of the client is directly adverse to the representation of another current client, including when the representation of the client is:

(1) in the same matter as the representation of another current client, and the clients' interests actually conflict; or

(2) in a separate matter, and one or more clients' interests in any of the separate matters actually conflict.

~~(2)~~(b) ~~there is 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~~

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[9] Rule 3-310, Discussion ¶.11 has been deleted because paragraph (D) is now proposed Rule 1.8.7.

[10] Rule 3-310, Discussion ¶.12 has been deleted because paragraph (F) is now proposed Rule 1.8.6.

~~or by a personal interest of the lawyer.~~ A lawyer shall not, without informed written consent from each affected client, represent a client if there is a significant risk the lawyer's responsibilities to another current client or a third person, or the lawyer's own interests, will have a substantial adverse effect on the lawyer's representation of the client, including when:

(1) the representation of the client is in the same matter as the representation of another current client, and the clients' interests potentially conflict; or

(2) the lawyer:

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

(ii) there is a significant risk the relationship would have a substantial adverse effect on the lawyer's representation.

(c) A lawyer shall not represent a client without providing written disclosure when the lawyer:

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

(2) has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, professional, or personal relationship with another person or entity that the lawyer knows or reasonably should know could be affected by resolution of the matter;

(3) has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, or professional interest in the subject matter of the representation; or

(4) represents a party or witness in the matter who is a spouse, parent or sibling of the lawyer, or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's firm.

~~(b)~~(d) ~~Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if~~ Representation is permitted under this Rule only if:

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

(2) the lawyer reasonably believes 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.~~

(e) For purposes of paragraph (c), "written disclosure" means informing the client, in writing, of the lawyer's responsibility or interest and the potential effect of that responsibility or interest on the representation.

Comment

[1] This Rule does not apply to a lawyer representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless representation of any of the clients would be adversely affected. Factors relevant in determining whether the representation of one or more of the clients would be adversely affected, thus requiring that the clients be advised of the risk include: where the different cases are pending, 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

[2] Paragraphs (a)(1) and (b)(1) 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 informed written consent was originally obtained on the basis of potential adversity, should the potential adversity become actual, the lawyer must obtain further informed written consent on the basis of the actual adversity.

[3] Notwithstanding *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], [in which the court held that subparagraph (C)(3) of predecessor rule 3-310 [paragraph (a)(3)] 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,] paragraph (a)(2) 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.

[4] Because paragraph (b) concerns relationships or interests that could have a substantial adverse effect on the lawyer's representation, the informed written consent of each affected client is required. See Rule 1.0.1(e). Paragraph (c), on the other hand, concerns other relationships or interests, and so requires only that the lawyer provide the client with written disclosure of those relationships and interests.

[5] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent or provide the written disclosure required to permit representation under this Rule. (See, e.g., Business and Professions 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.

[6] Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or written disclosure is provided 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].)

~~[5]~~[7] 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 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).

[8] For special rules governing membership in a legal service organization, see Rule 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

VI. PUBLIC COMMENTS SUMMARY

1. Law Firm General Counsel Roundtable. Suggests amending rule to allow for different presumptions to apply to the enforceability of conflict waivers depending on the client's sophistication. Highlight consumer protection laws that apply differently to sophisticated consumers, and believe similar treatment with conflict waiver enforceability will protect clients' right to choice of counsel by preventing sophisticated clients from alleging conflicts for tactical purposes:

   "(F) A written waiver of a present conflict of interest, or an advance waiver of future conflicts of interest as to matters not substantially related to the matters as to which the lawyer performs services shall be presumed to be informed if: (a) the waiver was signed by an attorney acting for the client, (b) the client was advised by counsel, whether in-house or outside counsel or (c) the client is a corporation or entity that is an experienced user of the legal services to be provided by the lawyer."

2. Orange County Bar Association. Recommends rule or comment on advance conflict waivers (MR 1.7, Comment [22]) consistent with current California case law, to provide guidance to

attorneys and eliminate differences with the national standard. Recommend adoption of a rule on imputed conflicts and screening (MR 1.10) to provide concise and accessible guidance and a uniform approach across jurisdictions.

3. Margaret Thum. Suggest the rule clarify the responsibility of agency attorneys and outside counsel and prohibit certain types of multiple client representations and the withholding of information by outside counsel.

4. Group of law professors (Drafters: Geoffrey C. Hazard, Deborah L. Rhode and Richard Zitrin). Supports adoption of conflicts rule modeled after MR 1.7. Some signatories oppose adoption of a comment on advanced waivers. Concerned that comments included in former proposed rule 1.7 were not carefully vetted. Suggests careful review of comments to ensure clarity and harmony with the rule. Recommends retention of the broader, more client-protective California definition of "informed written consent" rather than the ABA definition found in MR 1.0(e).

5. Bar Association of San Francisco. Concerned that the current conflicts rule differs significantly from national standards and lacks key components and definitions. Recommends a version of MR 1.7-1.9 rather than modification to the current rule.

6. State Bar Committee on Professional Responsibility and Conduct (COPRAC). Suggest comprehensive set of conflict rules that closely resemble the model rules to cover topics not addressed in the current rules, eliminate the significant differences between California and ABA, and provide greater guidance in the area of conflicts.

VII. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, _____, 2016:**

  A comment on current rule 3-310 is anticipated.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

  Rule 1.7. [Conflict of Interest: Current Clients].

  1. OCTC believes this rule is an improvement from the original proposal, but still has significant concerns about the rule and especially its 38 comments. There are too many comments and many are too long and incorporate other rules and comments, making this rule overly complicated and confusing. This rule is simple: an attorney shall not without informed written consent represent a client when to do so will involve a conflict of interest with another current client or the lawyer's personal interests (or other fiduciary duties). The proposal and its comments, however, make complex this simple proposition.

  2. The proposed rule's use of the term 'directly adverse" is vague, ambiguous, and potentially too limiting and confusing. We believe that the term "directly adverse" will be

subject to a great deal of interpretation and, therefore, litigation. The use of the modifier "directly" may pose problems for the lawyer trying to comply with the rule. Lawyers may not understand the distinction between an "adverse" as opposed to "directly adverse" interest and may, therefore, fail to seek the appropriate client consent. The use of the term "directly" may also pose problems for OCTC, the State Bar Court, and the Supreme Court as they attempt to evaluate possible violations on the proposed rule. Using the term "adverse" without the modifier "directly" may be clearer, less ambiguous and more appropriate.

3. OCTC recognizes that the Commission has tried to explain the term "directly adverse" in Comments 6 and 7. (It has reserved Comment 5.) However, those Comments may not provide adequate guidance in distinguishing the difference, if any, between "adverse" and "directly adverse" interests and may, instead, add to the problems with enforcement of the rule. If the word "directly" is stricken from proposed rule 1.7, then Comments 6 and 7 should also be deleted.

4. Comment 6 defines an attorney's cross-examination of his or her own client, even if the client is not a party to the particular action, as directly adverse. OCTC understands that the cross-examination of one's own client is an example of an adverse situation, but, contrary to this Comment, it does not seem directly adverse where the cross-examination does not affect the client in the representation for which the client hired the attorney. If a client is not a party to the action, then one must examine the client's reasonable expectations, as well as the impact of such cross-examination on the client's interests and on the attorney's duty of loyalty and confidentiality to the client. Such analysis is necessary regardless of whether the modifier "directly" is included in the proposed rule.

5. OCTC recommends striking the second sentence of Comment 6 because, if a client is adversely affected by an attorney's work on matter, even if the client is not a party to the matter, it may still raise the issue of whether the attorney adhered to his or her duty of undivided loyalty and, if not, create a direct conflict of interest. OCTC recommends striking the modifier directly before adverse in Comment 7.

6. Comment 8 is too long and confusing. OCTC recommends striking sentences 2-4. Sentence 5 is placing in a Comment an expanded version of the current version of 3-310 (C). If the Commission wants to state that this rule is not intended to change the current rule, it should just state that. If it believes the language in the Comment is preferable to the language in the proposed rule, it should adopt the language in the Comment as the rule. It, however, should not attempt to do so by a Comment.

7. Comment 9 appears unnecessary in light of proposed rule 1.9 and the language in proposed rule 1.7(a)(2). If the Commission is concerned about a conflict of interest created by an attorney's other fiduciary duties (such as when he or she is acting as trustee, executor or corporate director), it should include in 1.7(a)(2) after the words "representation of one or more clients" words such as "or the attorney's duties as a

fiduciary to others."

8. OCTC believes Comment 10 is unnecessary in light of proposed rule 1.7(a)(2). Comment 12 is unnecessary in light of proposed rule 1.8.10. Comment 13 is unnecessary in light of proposed rule 1.8.6. Comment 34 seems unnecessary in light of proposed rule 1.13(a). Comment 38 seems unnecessary in light of proposed rules 6.3 and 6.4.

9. Comments 14-17A could be reduced and the language tightened. Comments 23-25 are too long and confusing. The same is true for Comments 26-27, 29-29A and 32-33. Many of these comments seem unnecessary or duplicative of other comments. They should be reduced and tightened up

10. Comment 19 is confusing and could send the wrong signal to attorneys that they may fail to make the disclosure necessary to obtain consent. If the attorney cannot make the disclosure necessary to obtain consent, the attorney should not represent the client. Further, if the drafters reduce and tighten the language in Comments [14]-[17A], then the reference to Comments [14] –[17A] in Comment 19 could be stricken.

11. OCTC recommends striking the first sentence of Comment 20, but supports the rest of the Comment. Comment 1 lists the duties the conflict rules are concerned with. It could be understood to suggest that, if one concern exists and another does not, there may or may not be a conflict. It should be amended to explain whether any one of these factors require finding a conflict. In addition, it cites several conflict rules, including 1.8. This could be confusing because technically there is no rule 1.8, but several separate rules under the 1.8 category. (See rules 1.8.1 through 1.8.11.)

12. With respect to Comment 30, OCTC believes this is an improvement and concurs that rule 1.4 requires the attorney to advise the clients of the potential adverse consequences of joint representation. However, Comment 30 does not specifically require this in order to have informed consent.

    Comment 22 is too long and confusing. It discusses advanced waivers. There are no reported disciplinary cases on advanced waivers. Some civil courts have held that an attorney may have an advanced conflict waiver, but those have been in very limited situations. OCTC is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. Under these circumstances, an advanced waiver could easily be abused. Furthermore, even the attorney cannot fully understand or be able to adequately explain the ramifications of a potential conflict. For these reasons, OCTC recommends that advanced conflict waivers be prohibited.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-310 [1.7]

Lead Drafter: **Martinez**
Co-Drafters: **Cardona, Eaton, Harris, Stout**
Meeting Date: **February 19-20, 2016**

- **MIKE NISPEROS, OCTC, 9/27/2001:**

18. Rule 3-310. ~~Avoiding interests Adverse to a Client~~ *Avoiding Conflicts of Interest with Clients*.

OCTC's recommends clarifying and simplifying the application of this rule regarding conflicts of interest. OCTC also recommends changing the title of the rule for the purpose of clarity.

Revise the rule and discussion section as follows:

Rule 3-310. ~~Avoiding interests Adverse to a Client~~ *Avoiding Conflicts of Interest with Clients.*

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of *adequate information and an explanation of* the relevant circumstances, ~~and~~ of the actual and reasonably foreseeable adverse consequences *and material risks* to the client or former client, *and providing the client or former client with reasonable available alternatives to the proposed course of action*;

(2) "informed written consent" means the client or former client's written agreement to the representation following written disclosure *and adequate time to make an intelligent reasoned decision to give the consent;*

(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.~~

(*B) Except as provided in paragraph (c) a member or law firm shall not accept representation or continue to represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest embraces all situations in which an attorney's loyalty to, or efforts on behalf of a client are threatened or a reasonable client would believe could be threatened by the member's responsibilities or relationship to another client, to a third person, or by the member's own interests. This will include, but not be limited to:*

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

(2) there is a significant risk that the representation of one or more clients will be materially limited by the member's responsibilities or relationship to another client, a former client, a third person, or by a personal interest of the lawyer.

(C) Notwithstanding the existence of a concurrent conflict of interest under paragraph (B) a member or law firm may represent a client if:

(1) the member or law firm reasonably believes that the member will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

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

(4) each affected client gives informed written consent confirmed in writing after disclosure as that term is defined in paragraph (a) of this rule.

(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 or law firm 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 material relevant 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;

(2) Information relating to representation of the client is protected as required by Business & 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 non-disclosure 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;

(G) A member who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.

(H) A member shall not, unless the former client gives informed written consent, agree to or continue to represent a person in the same or substantially related matter in which the firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interest are materially adverse to that person; and

(2) about whom the lawyer has acquired information protected by Business & Professions Code section 6068, subdivision (e).

(I) A member or firm who formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter must not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known: or

(2) reveal information relating to the representation except as these rules would permit or require with respect to the client.

(J) While members are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by these rules unless

the prohibition is based on a personal interest of the prohibited lawyer and does not represent a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(K) When a member has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated member and not currently represented by the firm unless:

(1) the matter is the same or substantially related to that in which the formerly associated member represented the client; and

(2) any lawyer remaining in the firm has information protected by Business & Professions Code section 6068, subdivision (e), that is material to the matter.

(L) When a member becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which the lawyer is disqualified under the rules unless:

(1) the personally disqualified lawyer is, when permitted, timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given any affected former client to enable the former client to ascertain compliance with the provisions of the Rule.

Discussion

This rule, although written differently than former rule 3-310, is not intended to change existing law. It merely simplifies and expands the language so that it embraces the Supreme Court's rulings on this issue. However, this rule as rewritten does require informed written consent for all conflicts or potential conflicts, not just some, as was the case in the former rule.

* * *

~~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 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~~ *Paragraphs (B) and (E*) are to apply as complimentary provisions.

. . . ~~Paragraph (B) is intended to apply only to 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.~~

. . .

OCTC COMMENTS:

The current rule is confusing and at times has left gaps that do not address what would appear to be a conflict of interest as defined by case law. OCTC suggests that some of the categories be more like the proposed ABA rules. (See proposed Model Rules 1.7-1.11.) Moreover, as the Supreme Court has held "[c]onflicts 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." (People v. Bonin (1989) 47 Cal.3d 808, 835.) This rule should, therefore, embrace and incorporate that principle in its categories. Although, due to time constraints, we have not done so, the Commission should consider dividing this rule into more than one rule and possibly simplifying the rule even more. Obtaining an interest in subject matter of the litigation still would constitute a conflict of interest. The purpose of the conflicts rules is to protect the client's expectation of loyalty and the duty of the attorney to preserve his or her client's confidences and secrets and not use them for anyone else's advantage, including the attorney's advantage. Anything that reasonably raises questions about a lawyer's impartiality is a conflict.

Furthermore, all conflicts should require informed written consent. This will ensure that consent is fully understood and agreed to and it protects the attorney from accusations by the client later and any argument as to whether the attorney obtained the consent.

The proposed rule uses the term "when permitted" in reference to ethical walls or screens within a law firm. Thus, as written, it does not change the law regarding whether ethical walls or screens should be permitted. However, OCTC suggests that the Commission might want to explore the issue of ethical walls or screening. In California, the law has been that once an attorney in a firm has been found to have a conflict of interest, the conflict extends to the entire firm. (See e.g. *People ex rel Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135.) Generally, screens to avoid conflicts have not been accepted in California, except as to government and former government lawyers. (See e.g. *Henricksen v. Great American Savings and Loan* (1992) 11 Cal. App.4th 109, 115-116.) A recent Ninth Circuit decision has, however, cast doubt on that principle. (See *In re County of Los Angeles* (2000) 223 Fed.3d 990.) That decision may be speculative as to the California Supreme Court's position. Thus, now might be the time to address this issue in the rule. (See proposed Model Rule 1.10 and 1.11) The general principle that ethical screens are not valid makes OCTC's job much easier. But OCTC also recognizes that others may see the need for ethical screens in a time of global firms, larger law firms, and more mobile attorneys. OCTC therefore asks that, if the Commission decides to address ethical walls, that at the very least attorneys be required to inform every client in writing of the conflict and the screening and that everything is done to protect a client's confidences and secrets.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-310 [1.7]

Lead Drafter: **Martinez**
Co-Drafters: **Cardona, Eaton, Harris, Stout**
Meeting Date: **February 19-20, 2016**

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

VIII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **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 May 13, 2015, is available at:

  http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7.pdf [Last visited 12/28/15]

  - Nineteen jurisdictions have adopted Model Rule 1.7 verbatim.[11] Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.7.[12] Ten jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.7."[13]

- **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.[14] Three jurisdictions have adopted a modified version of Model Rule 1.7, Comment [34].[15] Thirteen jurisdictions have not adopted a version of the Comment."[16]

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[11] 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.

[12] 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.

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

[14] 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.

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

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-310 [1.7]

Lead Drafter: **Martinez**
Co-Drafters: **Cardona, Eaton, Harris, Stout**
Meeting Date: **February 19-20, 2016**

IX. 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 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 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, (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.
   - 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

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

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 proposed Rule's complexity may confuse lawyers as to their duties and risks weakening both compliance with and enforcement of basic conflicts principles. The Rule's combination of approaches is not found in any other jurisdiction and maintains California's departure from a national standard. A current conflicts rule should adhere to either the current rule's approach or adopt the Model Rule's approach.

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 for most conflicts based on a lawyer's relationships or personal interests. (See proposed paragraph (c).
   - 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 MR 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) while at the same time carrying forward current rule 3-310(C)(2) and (C)(3), with the latter provision expanded in paragraph (a)(2) to 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].
   - Pros: A criticism of current rule 3-310(C) has been that it does not capture this broader concept of direct adversity. See also discussion of Pros of the "hybrid" approach in paragraph 2 above.
   - 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. See also discussion of Cons of the "hybrid" approach in paragraph 2 above.
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 responsibilities owed another client or third person, or by the lawyer's personal interests, but at the same time provide concrete examples of the concept from current rule 3-310(C)(1) and 3-310(B)(2).
   - Pros: See Pros in paragraph 2, above. Of special note is the drafting team's recommendation that the heightened requirement of "informed written consent" be applied to current rule 3-310(B)(2). Rule 3-310(B)(2) requires only "written disclosure" when the lawyer "knows or reasonably should know" of a former legal, business, etc. relationship with a party or witness that "would substantially affect the member's representation." The drafting team believes that if the relationship would have a *substantial effect* on the lawyer's representation of the current client, the heightened "informed written consent" requirement should be applied. 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 paragraph 2, above, as to the recommendation to adopt a hybrid approach. Concerning the transfer of paragraph (B)(2) to proposed paragraph (b)(2) and imposing the heightened "informed written consent" requirement, no cons identified.
7. Recommend adoption of paragraph (c), which largely carries forward current rule 3-310(B) intact, but (1) broadens its application to relationships or personal interests of other lawyers in the law firm that the lawyer "knows" exist; and (2) adds the concept in current rule 3-320 regarding a lawyer's relationship with another party's lawyer.
   - Pros: See discussion of Pros of the "hybrid" approach in paragraph 2 above. With respect to extending to relationships and interests of other lawyers in the firm, increases client protection while not over-reaching because of the requirement that the lawyer know if these relationships and interests. With respect to incorporating 3-320, brings into a single rule all of the relationship and interest conflicts, increasing likelihood that lawyers from other jurisdictions

practicing in California will be able to find them.
   - Cons: See discussion of Cons of the "hybrid" approach in paragraph 2 above. With respect to extending to relationships and interest of other lawyers in the firm, reflects a form of implicit imputation that should be addressed in a separate rule. With respect to incorporating 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.
   - 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.
9. Recommend adoption of paragraph (e), which provides a definition of "written disclosure" for purposes of this Rule.
   - Pros: Provides a definition that explains the scope of disclosure required under paragraph (d). This is a necessary addition to the Rule because, while informed consent" and "informed written consent" are defined in the global terminology rule (proposed Rule 1.0.1), neither "disclosure" nor "written disclosure" is. It would be both confusing and redundant to place either of those definitions in Rule 1.0.1 because the definition of "informed written consent" already describes the disclosure that is required to obtain such consent.
   - Cons: None identified.
10. Recommend adoption of Comment [1], which carries forward 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.)
   - Pros: Provides meaningful and useful guidance on application of the rule to a particular situation likely to occur. Current discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or unhelpful.
   - Cons: None identified.
11. Recommend adoption of Comment [2], which carries forward current rule 3-310, Discussion ¶. 7, concerning joint client conflicts in a single matter.
   - Pros: Provides meaningful and useful guidance on application of the rule to particular situations likely to occur. Current discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or unhelpful.
   - Cons: None identified.
12. Recommend adoption of Comment [3], which carries forward current rule 3-310, Discussion ¶. 9, concerning conflicts that might arise in the insurance defense context.
   - Pros: Provides meaningful and useful guidance on a particular situation likely to occur to which the rule is not applicable. Current discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or

unhelpful.
- Cons: None identified.
- [Note: The drafting team is tentatively proposing a modification of the comment to omit the detailed description of the holding of the cited case contained in the bracketed language. Favoring this is the general principle that comments should be shortened, and the belief that the detailed description of the holding is unnecessary given the significant time that has passed since the decision and the now general acceptance of the principle of the decision reflected in the balance of the comment. Against this is the recognition that the comment as a whole was the subject of extensive drafting debate at the time it was created, and that it appears to have served its purpose for many years.]

13. Recommend adoption of Comment [4], 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 interpretive 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.
14. Recommend adoption of Comment [5], which carries forward 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.
15. Recommend adoption of Comment [6], 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 that paragraph (d) describes conflicts when consent cannot be obtained or written disclosure will not suffice, thereby trumping the other provisions of the Rule (paragraphs (a) through (c).)
    - Cons: None identified.
16. Recommend adoption of Comment [7], derived from Model Rule 1.7, cmt. [5], which addresses the concept of "thrust-upon" or "unforeseeable" conflicts of interest.
    - Pros: The comment provides guidance to a lawyer regarding the lawyer's responsibilities in a relatively uncommon but recurring situation where, for example, a conflict is created by the merger of a client with an entity that is adverse to another client in a matter where the lawyer represents the other client.

- Cons: The comment does not provide guidance on interpreting or applying the rule in a disciplinary context, but simply provides practice guidance on what a lawyer might be able to do in a disqualification context.

17. Recommend adoption of Comment [8], 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.
18. 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 (see notes 5 to 10), each of these paragraphs have 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. 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 paragraph A.2 above.
    - Cons: See Pros in paragraph A.2, above.
2. Recommend adoption of the ABA Model Rule approach in Rule 1.7.
    - Pros: The ABA's explicit conflicts standards set forth in paragraph (a) of MR 1.7 are a clear and straightforward statement – in two subparagraphs – of the kinds of conflicts that involve a current client. Paragraph (b) explicitly identifies those conflict situations that are not consentable in three subparagraphs. The Model Rule is more comprehensive in its 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.
    - 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. RRC1 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.

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

1. The introductory clause in paragraph (a) is a substantive change only because it describes subparagraphs (a)(1) and (a)(2) [corresponding to current rule 3-310(C)(2) and (C)(3)] as situations involving direct adversity.
2. Paragraph (a)(2) is a substantive change because it broadens the scope of current rule 3-310(C)(3) to include direct adversity situations as contemplated by *Flatt*.
3. Paragraph (b)(2) is a substantive change because it now requires "informed written consent" of the client, while the corresponding provision in current rule 3-310(B)(2), requires only "written disclosure."
4. The addition of the clause "or knows that another lawyer in the lawyer's firm has or had" in paragraphs (c)(2) and (c)(3) is substantive change in that the concept has been moved from a Discussion paragraph in rule 3-310 to the black letter of the proposed Rule.
5. Paragraph (d) is a substantive change because it moves the description of unconsentable conflicts into the black letter of the Rule.
6. Paragraph (e) is a substantive change in defining "written disclosure" specifically in relation to the situations described in paragraph (c), which corresponds to current rule 3-310(B). Current rule 3-310 does not include a definition specifically addressing the standard in paragraph (B).

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. The addition of paragraph (c)(4) is not a substantive change because the concept is now in the black letter of current rule 3-320.

E. Alternatives Considered:

1. In addition to the alternatives discussed in "Concepts Rejected" above, the drafting team 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 drafting team abandoned that approach at an early stage of its deliberations. A copy of the rules considered under this approach is attached.

X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) Should the bracketed language in proposed Comment 3 be deleted (the tentative recommendation of the drafting team) or retained? [See discussion in paragraph IX(A)(12).

(2) Should an additional comment be added to discuss application of the relationship and interest provisions to a lawyer's professional relationship with a particular expert witness arising from the lawyer's repeated retention of that expert witness in other cases?

XI. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

None

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-310 [1.7]

Lead Drafter: **Martinez**
Co-Drafters: **Cardona, Eaton, Harris, Stout**
Meeting Date: **February 19-20, 2016**

XII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-310 [1.7] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-310 [1.7] in the form attached to this Report and Recommendation.

XIII. DISSENTING POSITION(S)

None.

XIV. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 3-310

"Avoiding the Representation of Adverse Interests"

I. Introduction

Current rule 3-310 is a long, complex rule with 12 discussion paragraphs that addresses the topic of conflicts of interest. As a disciplinary rule, current rule 3-310 takes a substantially different approach to conflicts from the corresponding Model Rules.

First, rule 3-310 is a single rule addressing multiple topics (current client conflicts, former client conflicts, conflicts in aggregate settlements; conflicts when there is a third-party payor).[1] The Model Rules, on the other hand, assign separate rules or rule provisions to those same topics.[2]

Second, as a disciplinary rule, rule 3-310 takes a "checklist" approach to current client conflicts in paragraphs (B) and (C), i.e., the rule identifies several discrete categories of conflict situations for which a lawyer must either provide written disclosure to the current client, (paragraph (B)), or obtain the current client's informed written consent (paragraph (C)), in order to accept or proceed with the conflicted representation. The Model Rules, on the other hand, more generally describe two kinds of conflicts:

1. Directly adverse conflicts, (i.e., MR 1.7(a)(1), which corresponds to rule 3-310(C)); and

2. Conflicting interests of the lawyer that create a significant risk that the lawyer's representation of a current client will be materially limited, (i.e., MR 1.7(a)(2), which corresponds to rule 3-310(B)).

Because of the different approaches taken by rule 3-310 and the Model Rules, in section IX, the suggested initial two issues are:

1. Whether the understanding and application of rule 3-310 would be improved by dividing into several different rules similar to the Model Rules; and

2. Whether rule 3-310's checklist approach has deficiencies as a disciplinary standard that warrant consideration of the Model Rules' more general statement of conflicts.

These are separate issues. For example, the drafting team could decide to recommend adopting the Model Rules' multi-rule structure but retain the checklist approach, or vice versa. To assist the drafting team in considering these issues, staff has prepared

[1] In addition, the provisions in current rule 3-310 also would govern conflicts arising from the lateral movement of a former or current government lawyer, or a former judge or judicial employee, topics that are addressed in separate model rules.

[2] Model Rule 1.7 concerns current client conflicts, Model Rule 1.9 concerns former client conflicts, Model Rule 1.8(f) addresses third-party payors, and 1.8(g) concerns aggregate settlements. In addition, Model Rule 1.11 regulates government lawyer conflicts and Model Rule 1.12 governs conflicts involving former judges or judicial employees. Finally, Model Rule 1.10 concerns imputation of conflicts within a law firm, a concept that resides in California case law. (See VI.D, below.)

"mockups" of proposed rules 1.7, 1.9, 1.8.6 and 1.8.7, which simply take the content of current rule 3-310 and insert it in several rules corresponding to the Model Rule counterparts, updated to incorporate this Commission's style conventions (e.g., "lawyer" for "member," lower case lettering, etc.) These mockups are provided as Attachment 1 to this Assignment Memo. The staff's preparation of the mockups does not reflect a preference for one approach over the other; the mockups have been prepared to assist the drafting team in studying the issue and provide the team with an idea of what separate rules might look like were the drafting team to decide to recommend retaining California's checklist approach.

In addition to considering the substantive content of rule 3-310, the drafting team is also requested to consider several topics covered in the Model Rules that are not part of the California Rules but are addressed in California case law: Model Rule 1.10 (imputation of conflicts and ethical screening), Model Rule 1.11 (conflicts involving current or former government lawyers), and Model Rule 1.12 (conflicts involving former judges, neutrals and their assistants). All of these topics are set forth in the Potential Issues section of this Assignment Memo, (see section IX, below), or discussed in the California Context section, (section VI, below.) As these topics are not a part of the current rules, it is recommended that the drafting team first focus on the concepts that are in rule 3-310.

II. Text of Current 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].)

III. Background/Purpose:

At present, conflicts of interest arising from duties owed either current or former clients, and responsibilities to third persons, are addressed in current rule 3-310. Current rule 3-310 originally became operative on May 27, 1989, and was amended in 1992 and again in 2003.

A. Former Rule 7 (1928)

Rule 3-310 has its origin in the first rules promulgated in 1928. (The 1928 rules are found at 204 Cal. at p. xci.) Former Rule 7 provided:

> A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned.

B. Summary of 1975 Rules – Rules 5-102 and 4-101

The immediate predecessors to current rule 3-310 were rules 5-102 and 4-101. Rule 5-102 was entitled "Avoiding the Representation of Adverse Interest." Rule 5-102 was adopted following the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. Rule 5-102(A) provided:

> (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.

Former Rule 7 was carried forward verbatim in the 1975 rules as rule 5-102(B).

In addition to rule 5-102, rule 4-101 of the 1975 Rules, titled "Accepting Employment Adverse to a Client," provided:

> A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client.

The 1975 rules became operative on January 1, 1975.

C. 1989 Approval of Rule 3-310

In 1987, as part of a comprehensive review and amendment of the Rules of Professional Conduct, the State Bar recommended approval of rule 3-310, which carried forward the concepts in rules 4-101 and 5-102, and added new provisions. The black letter of the 1989 version of rule 3-310 provided:[3]

Rule 3-310 Avoiding the Representation of Adverse Interests

[3] The rule also included three Discussion paragraphs, which provided:

> 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].)

(A) 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 shall not concurrently represent clients whose interests conflict, except with their informed written consent.

(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.[4]

[4] See 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, at Enclosure 1.

The State Bar's memorandum to the Supreme Court in support of the amendments included the following explanation:

> Paragraph (A) continues the disclosure and consent requirements found in current rule 5-102(A) when the attorney has any relation with the adverse party or any interest in the subject matter of the employment. The proposal would expand the rule to include situations in which the member had a relationship with another party in the past. The amendment is 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. Current rule 5-102(A) is subject to the interpretation that this paragraph was applicable only at the outset of the attorney-client relationship.
>
> Paragraph (B) is derived from current rule 5-102(B), which prohibits an attorney from representing conflicting interests without the written consent of all parties concerned and expands the rule to make clear that the client's counsel must be informed.
>
> Paragraph (C) is new and is adopted from ABA Model Rule 1.8(g). It is intended to make clear that an aggregate settlement of the claims of two or more clients is a specie of conflict and may not be entered into absent the informed written consent of the client.
>
> Paragraph (D) is derived from current rule 4-101, which prohibits an attorney from accepting employment adverse to a client or former client without their informed and written consent, when the new employment relates to a matter in which the attorney received confidential information from the client or former client. The amendment is intended to limit the applicability of the rule to situations in which the confidential information is "material to the employment."
>
> Paragraph (E) is new and is adopted from ABA Model Rule 1.8(f). it is intended to regulate those situations in which an attorney is paid by someone other than the client.
>
> Paragraph (F) is new and is intended to define "informed" as the term is used in 3-310.[5]

The Supreme Court approved rule 3-310, operative May 27, 1989.[6]

[5] *Id*. at pages 34-35.

D. 1992 Amendments to Rule 3-310

In 1992, the State Bar recommended numerous substantive changes to rule 3-310, including many in response to public comment. The proposed amended black letter of the rule, shown in legislative blackline style, provided:[7]

(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

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[6] 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.

[7] The proposed rule also included 11 Discussion paragraphs, eight of which were new. They are identical to the corresponding Discussion paragraphs in the current rule, except for current Discussion paragraph 9, which was added, operative March 3, 2003.

(~~A~~4) ~~If a~~The member has or had a ~~relationship with another party interested in the representation~~ legal, business, financial, or ~~has an~~ professional interest in ~~its~~ the subject matter~~,~~ of the ~~member shall not accept or continue such~~ representation ~~without all affected clients' informed written consent~~.

(~~B~~C) A member shall not ~~concurrently represent clients whose interests conflict~~, ~~except with their~~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.

(~~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.

(~~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~~.

(~~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 ~~client consents after disclosure~~ 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 ~~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.~~[8]

The State Bar's memorandum to the Supreme Court in support of the amendments included the following explanation:

> Proposed amendments to rule 3-310 are substantive and substantial. Structurally, current paragraph (F) would become new paragraph (A), current paragraph (A) would become new paragraph (B), current paragraph (B) would become new paragraph (C), and so on throughout the rule.
>
> New subparagraph (A)(1) would define the term "disclosure" rather than the term "informed." The definition would remain substantially the same except that: 1) the new definition would apply expressly to former clients; 2) the phrase "effects of those circumstances upon the representation" found in current paragraph (F) would be replaced with the phrase "consequences to the client or former client" (no substantive change is intended);" and 3) the term "relevant" is added before the word "circumstances."
>
> Subparagraph (A)(2) is entirely new and would define the phrase "informed written consent" to mean the client's or former client's written agreement to the representation following written disclosure.
>
> Subparagraph (A)(3) is entirely new and would define the term "written" to mean any writing as defined in California Evidence Code, section 250. This is intended to provide flexibility in the application of the rule.
>
> New paragraph (B) would amend current paragraph (A) in several ways. It would: 1) require "written disclosure" rather than "informed written consent;" and 2) expand and clarify the universe of relationships and interests which the member would be required to disclose in writing to the client, including relationships with witnesses. It is believed that the client's

[8] See Bar Misc. No. _____, "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 1991, at Enclosure 2, pages 10-12.

interests are adequately protected by requiring written disclosure without written consent. Additionally, the written disclosure requirement provides the attorney 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 should be disclosed to the client.

Generally, the four subparagraphs in new paragraph (B) state expressly the relationships and interests which were implied in current paragraph (A) and expand the scope of the paragraph to encompass past and present relationships with witnesses.

New subparagraph (B)(1) would prohibit a member from accepting or continuing representation of a client without providing written disclosure to the client where such member has a current legal, business, financial, professional, or personal relationship with a party or witness in the same matter. The enumeration of the relationships is intended to clarify the types of current relationships which require written disclosure no matter how *de minimus* in nature.

New subparagraph (B)(2) would prohibit a member from accepting or continuing representation of a client without providing written disclosure to the client where the member knows or reasonably should know that: 1) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and 2) that such previous relationship would substantially affect the member's representation. The phrase "knows or reasonably should know" is 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 recognizes that a past relationship may have no substantial effect on the member's representation and therefore need not be disclosed.

New subparagraph (B)(3) would prohibit a member from accepting or continuing representation of a client without providing written disclosure where 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. As such a relationship could affect the member's zealous and impartial representation of the client to the detriment of the client, such relationship should be disclosed to the client.

New subparagraph (B)(4) would prohibit a member from accepting or continuing representation of a client without providing written disclosure where 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 of the client to the detriment of the client, such interest should be disclosed to the client. An example of such an interest would be a member's ownership of stock in a corporation which the member's client is suing or a member's membership in a professional organization which is entering into lease negotiations with the member's client.

New subparagraphs (C)(1) and (C)(2) would combine and continue the concepts found within current paragraph (B) and paragraph two of the Discussion section regarding the representation of multiple clients in a single action or transaction. Subparagraph (C)(1) addresses multiple representation situations where the clients' interests potentially conflict; subparagraph (C)(2) addresses multiple representation situations where the clients' interests actually conflict. This distinction is addressed in current paragraph two of the Discussion section; the rule amendment makes this distinction express within the rule itself. No substantive change is intended.

Proposed subparagraph (C)(3) is entirely new and addresses the situation where a member represents Client A verses Party B and at the same time wishes to represent Party B verses Party C. Here, the rule would require that the member obtain the written consent (after disclosure) of both Client A and Party B to be able to represent Party B.

New paragraph (D) is identical to current paragraph (C) except that "informed written consent" would become "written consent...after disclosure." No substantive change is intended.

New paragraph (E) is identical to current paragraph (D) except that "informed written consent" would become "written consent...after disclosure." No substantive change is intended.

Proposed amendment to subparagraph (F)(3) would create a stricter standard than found in current subparagraph (E)(3) by requiring the member to obtain the client's consent in writing following disclosure. The proposed amendment would make the consent requirement consistent throughout the rule.

Proposed amendment to subparagraph (F)(3)(b) would delete the words "members of." No substantive change is intended.

Proposed paragraph two of the Discussion section is entirely new and is intended to provide notice to members that, in some instances, a client's identity or nature of representation may be a client confidence.

Proposed paragraph three of the Discussion section is entirely new and would clarify that amended paragraph (B) is 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).

Proposed paragraphs four and five of the Discussion section are entirely new and are intended to clarify the relationship between amended paragraphs (B) and (E).

Proposed paragraph six of the Discussion section is entirely new and makes clear that rule 3-310(B) is not intended to apply to situations in which a member 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 member is aware of such relationship or interest.

Proposed paragraph seven of the Discussion section is entirely new and makes clear that rule 3-310(C) is intended to apply to representations of clients in both litigation and transactional matters.

Proposed amendment to paragraph eight of the Discussion section (current paragraph two) would conform it to the relettering of the paragraphs of the text. No substantive change is intended.

Proposed paragraph nine of the Discussion section is entirely new and is intended to provide notice to members that written conflict waivers pursuant to this rule may not suffice for non-disciplinary purposes, such as motions for disqualification. Case authority is provided in support of the stated proposition.

Proposed paragraph ten of the Discussion section is entirely new and would clarify that amended paragraph (C) is not intended to apply to class action settlements subject to court approval. In this situation, it is believed that clients' interests are protected by the court.

Proposed amendment to paragraph eleven of the Discussion section (current paragraph 3) would conform it to the relettering of the paragraphs of the text. No substantive change is intended.[9]

Paragraph (C)(4)

[9] See Supreme Court file no. S024408, "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 1991, at pages 13-17.

In addition to the aforementioned amendments submitted for approval by the Court, the Rules Revision Commission considered but ultimately did not recommend adoption of a fourth subparagraph in paragraph (C) of the rule. Subparagraph (C)(4) would have provided:

> (C) A member shall not, without the informed written consent of each client:
>
> * * *
>
> (4) Accept employment in a matter by one client adverse to another party being represented by the member or the member's law firm in another matter, whether or not the matters are related.[10]

The Commission explained why it did not recommend subparagraph (C)(4):

> [T]he Commission determined not to recommend this new rule subparagraph to the Board Committee on Admissions and Competence for adoption at this time. This determination was based upon the following factors: 1) the Commission believed that such amendment represented a major last minute change to the rule; 2) this amendment was not proposed in response to public comment received by the Commission on this rule; and 3) Bar members had not had the opportunity to comment upon this proposed revision to the rule.
>
> While determining not to recommend this rule amendment for adoption at this time, the Commission unanimously agreed that the amendment be forwarded for consideration to the Board Committee and the Board. It is noted that this amendment would expand the recommended amended rule (as presented above) to apply expressly to law firms. It would prohibit a member from accepting employment in a matter by one client adverse to another party being represented by the member or the member's law firm in another matter, whether or not the matters are related. That is, where two clients were being represented separately by the same firm on either litigation or transactional matters, should either client approach a member of the firm requesting representation in a suit against the other client or in a transaction involving the other client, such representation would not be allowed without obtaining the informed written consent of both firm clients. This requirement would apply regardless of whether the original or subsequent matters were related or whether there existed any relevant

[10] See Supreme Court file no. S024408, "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 1991, at Enclosure 5 (July 1, 1991 Memorandum from Rules Revision Commission to Board Committee on Admissions and Competence), page 8.

> confidences particular to either client. In short, a law firm could not represent one current client against another current client without both current client's informed written consent.
>
> The Commission supports such amendment of the rule, but recognizes that without further consideration of the impact of such amendment on the overall rule, recommending this amendment at the present time is imprudent.[11]

The Supreme Court approved the proposed amendments to rule 3-310, operative September 14, 1992. No further amendments have been made to the black letter of rule 3-310 since that time.

E. 2003 Amendments

Although no further changes have been made to the rule proper, in 2002, the State Bar requested that the Supreme Court approve the addition of new Discussion paragraph 9, which provided:

> 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 the action.

The proposed Discussion paragraph was the product of a Joint Task Force composed of representatives of the plaintiffs and defense bars (consumer rights lawyers and insurance defense counsel), clients (insurance companies), members of the State Bar Committee on Professional Responsibility and Conduct, and representatives of the Judicial Council.[12] The Joint Task Force was formed to address concerns that the *State*

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[11] Id., at pages 8-9.

[12] The Joint Task Force was formed pursuant to Business and Professions Code section 6068.11(b), which provides in relevant part:

> (b) The board in consultation with representatives of associations representing the defense bar, the plaintiffs bar, the insurance industry and the Judicial Council, shall conduct a study concerning the legal and professional responsibility issues that may arise as a result of the relationship between an attorney and an insurer when the attorney is retained by the insurer to represent an insured, and subsequently, the attorney is retained to represent a party against another party insured by the insurer. The board shall prepare a report that identifies and analyzes the issues and, if appropriate, provides

Farm opinion contained an overbroad interpretation of the duty of loyalty expressed in current rule 3-310(C)(3). The State Bar explained the proposed Discussion paragraph:

> The first sentence of the proposed new Discussion section paragraph is intended to make clear that the *State Farm* holding on subparagraph (C)(3) of rule 3-310 occurred in a specific and narrow fact setting. Specially, it identifies that the fact setting involved a member's direct action against an insurer client without having first obtained the insurer's informed consent. Nothing in the State Bar's proposal is intended to suggest that *State Farm* was wrongly decided given the specific facts of the case.
>
> The second sentence of the proposed new Discussion section paragraph is intended to clarify that the rationale of the *State Farm* holding should not be construed to mean that subparagraph (C)(3) of rule 3-310 is violated in an identified fact setting that is similar but not identical to the fact setting in *State Farm*. Specifically, that fact setting is one where there is no direct action against an insurer client and the insurer client's only interest is that of an indemnity provider.
>
> Finally, it should be noted that current rule 3-310 includes Discussion language that clarifies the application of the rule to an insurance defense setting. That language is the last paragraph of the Discussion section which, in part, states: "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." Like the State Bar's present proposal, this language addresses a specific relationship in the insurance defense context and clarifies the intended limited applicability of the rule. Thus, there is precedent for the State Bar's instant proposal to amend the rule 3-310 Discussion section.[13]

The Supreme Court approved the Discussion paragraph, operative March 3, 2003. No further changes have been made to current rule 3-310.

IV. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

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recommendations for changes to the Rules of Professional Conduct and relevant statutes.

[13] See Supreme Court file no. S107918, "Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, Rule 3-310, And Memorandum And Supporting Documents In Explanation," June 2002, pages 22 - 23.

A. **2016 Comments**. In a _____, 2016 memorandum from OCTC, OCTC provided the following comment on rule 3-310:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. **2010 Comments**. In a June 15, 2010 memorandum from OCTC, OCTC provided the following comment on proposed rule 1.7:

Rule 1.7. [Conflict of Interest: Current Clients].

1. OCTC believes this rule is an improvement from the original proposal, but still has significant concerns about the rule and especially its 38 comments. There are too many comments and many are too long and incorporate other rules and comments, making this rule overly complicated and confusing. This rule is simple: an attorney shall not without informed written consent represent a client when to do so will involve a conflict of interest with another current client or the lawyer's personal interests (or other fiduciary duties). The proposal and its comments, however, make complex this simple proposition.
2. The proposed rule's use of the term 'directly adverse" is vague, ambiguous, and potentially too limiting and confusing. We believe that the term "directly adverse" will be subject to a great deal of interpretation and, therefore, litigation. The use of the modifier "directly" may pose problems for the lawyer trying to comply with the rule. Lawyers may not understand the distinction between an "adverse" as opposed to "directly adverse" interest and may, therefore, fail to seek the appropriate client consent. The use of the term "directly" may also pose problems for OCTC, the State Bar Court, and the Supreme Court as they attempt to evaluate possible violations on the proposed rule. Using the term "adverse" without the modifier "directly" may be clearer, less ambiguous and more appropriate.
3. OCTC recognizes that the Commission has tried to explain the term "directly adverse" in Comments 6 and 7. (It has reserved Comment 5.) However, those Comments may not provide adequate guidance in distinguishing the difference, if any, between "adverse" and "directly adverse" interests and may, instead, add to the problems with enforcement of the rule. If the word "directly" is stricken from proposed rule 1.7, then Comments 6 and 7 should also be deleted.
4. Comment 6 defines an attorney's cross-examination of his or her own client, even if the client is not a party to the particular action, as directly adverse. OCTC understands that the cross-examination of one's own client is an example of an adverse situation, but, contrary to this Comment, it does not seem directly adverse where the cross-examination does not affect the client in the representation for which the client hired the

attorney. If a client is not a party to the action, then one must examine the client's reasonable expectations, as well as the impact of such cross-examination on the client's interests and on the attorney's duty of loyalty and confidentiality to the client. Such analysis is necessary regardless of whether the modifier "directly" is included in the proposed rule.

5. OCTC recommends striking the second sentence of Comment 6 because, if a client is adversely affected by an attorney's work on matter, even if the client is not a party to the matter, it may still raise the issue of whether the attorney adhered to his or her duty of undivided loyalty and, if not, create a direct conflict of interest. OCTC recommends striking the modifier directly before adverse in Comment 7.
6. Comment 8 is too long and confusing. OCTC recommends striking sentences 2-4. Sentence 5 is placing in a Comment an expanded version of the current version of 3-310 (C). If the Commission wants to state that this rule is not intended to change the current rule, it should just state that. If it believes the language in the Comment is preferable to the language in the proposed rule, it should adopt the language in the Comment as the rule. It, however, should not attempt to do so by a Comment.
7. Comment 9 appears unnecessary in light of proposed rule 1.9 and the language in proposed rule 1.7(a)(2). If the Commission is concerned about a conflict of interest created by an attorney's other fiduciary duties (such as when he or she is acting as trustee, executor or corporate director), it should include in 1.7(a)(2) after the words "representation of one or more clients" words such as "or the attorney's duties as a fiduciary to others."
8. OCTC believes Comment 10 is unnecessary in light of proposed rule 1.7(a)(2). Comment 12 is unnecessary in light of proposed rule 1.8.10. Comment 13 is unnecessary in light of proposed rule 1.8.6. Comment 34 seems unnecessary in light of proposed rule 1.13(a). Comment 38 seems unnecessary in light of proposed rules 6.3 and 6.4.
9. Comments 14-17A could be reduced and the language tightened. Comments 23-25 are too long and confusing. The same is true for Comments 26-27, 29-29A and 32-33. Many of these comments seem unnecessary or duplicative of other comments. They should be reduced and tightened up
10. Comment 19 is confusing and could send the wrong signal to attorneys that they may fail to make the disclosure necessary to obtain consent. If the attorney cannot make the disclosure necessary to obtain consent, the attorney should not represent the client. Further, if the drafters reduce and tighten the language in Comments [14]-[17A], then the reference to Comments [14] –[17A] in Comment 19 could be stricken.
11. OCTC recommends striking the first sentence of Comment 20, but supports the rest of the Comment. Comment 1 lists the duties the conflict

rules are concerned with. It could be understood to suggest that, if one concern exists and another does not, there may or may not be a conflict. It should be amended to explain whether any one of these factors require finding a conflict. In addition, it cites several conflict rules, including 1.8. This could be confusing because technically there is no rule 1.8, but several separate rules under the 1.8 category. (See rules 1.8.1 through 1.8.11.)

12. With respect to Comment 30, OCTC believes this is an improvement and concurs that rule 1.4 requires the attorney to advise the clients of the potential adverse consequences of joint representation. However, Comment 30 does not specifically require this in order to have informed consent.

    Comment 22 is too long and confusing. It discusses advanced waivers. There are no reported disciplinary cases on advanced waivers. Some civil courts have held that an attorney may have an advanced conflict waiver, but those have been in very limited situations. OCTC is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. Under these circumstances, an advanced waiver could easily be abused. Furthermore, even the attorney cannot fully understand or be able to adequately explain the ramifications of a potential conflict. For these reasons, OCTC recommends that advanced conflict waivers be prohibited.

Rule 1.8.6. [Payments Not From Client].

1. OCTC supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client and even with such designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.
2. Comments 1 and 2 could be tightened. Comment 3 should be in the rule.

Rule 1.8.7. [Aggregate Settlements].

1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments somewhat confusing, especially Comment 4, which is not in the ABA Model Rules. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement that should be stated in the rule, not a comment.
2. OCTC thanks the commission for defining aggregate package deals in criminal cases in comment 1. Again, there are too many comments and

they are too long. The ABA has only one comment on this subject, while these proposed rules have five comments. Comment 2 seems unnecessary in light of proposed rule 1.4. Comment 3 is too long and could be tightened.

Rule 1.9. [Duties To Former Clients].

1. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules, neither the subparagraph nor proposed rule 1.0 clarifies what that means and why the lawyer, not the client, should decide whether it is material. Further, it creates uncertainty for lawyers and makes it more difficult to prosecute a violation. OCTC supports the Commission's inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2) and thanks them for making that change.
2. OCTC is concerned with the use of the term "knowingly" in subparagraph (b). This appears to sanction a lack of conflict procedures regarding an attorney's former clients at another firm and is inconsistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." Although negligence is not a basis for discipline, gross negligence or recklessness is. OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the conflict is the result of excusable negligence or gross negligence. Further, by using the term "knowingly" the Commission may inadvertently also affect disqualification rulings in civil and criminal cases.
3. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit ... or when the information has become generally known" in subparagraph (c)(l). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See In the Matter of Johnson (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not "generally known."

4. Paragraph (c)(2) applies some exceptions to revealing information of former clients "with respect to current clients." Like paragraph (c)(l), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(l), paragraph (c)(2) does not include the language "or when the information is generally known." Although this proposed language is also in the Model Rules version, OCTC is not sure when subparagraph (c)(l) applies or when subparagraph(c)(2) applies.

5. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states that the substantial relationship test applies in disqualification cases, but "might not be necessary" in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney's former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to established State Bar decisional law. In In the Matter of Lane (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: "Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)" (Id at 747.)

   If there is to be a change in the law, it should be in the rule, not a comment. The Comment does not even advise or address the Lane decision. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or civil litigation the new client may not be present and so the attorney can·provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

   Moreover, the courts have held that the conclusive presumption is a "rule of necessity." Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. Global Van Lines Inc v. Superior Court (1983) 144 Cal.App.3d 483, 489; Western Continental Operating Co v. Natural Gas Co. (1989) 212 Cal.App.3d 752, 759.) Excluding the presumption in disciplinary and civil cases would force OCTC and the other party/former client to try to prove what was provided

to the attorney and what is in the attorney's mind. It would force the State Bar and parties to civil litigation to obtain and reveal confidential information. It would create numerous disputes as to what the client really told the lawyer. OCTC's experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See In the Matter of Lane, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

The presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (City National Bank v. Adams (2002) 96 Cal.App.4th 315, 328.) It also springs from the common sense notion that clients necessarily provide confidential information material to their lawyers. Thus, the duty of confidentiality compliments the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See In the Matter of Johnson, supra, 4 Cal. State Bar Ct. Rptr. at 189-190; In re Jordan (1972) 7 Cal.3d 930, 940-941.)

Having such a presumption is not unusual in discipline cases. As previously discussed, under rule 3-300 (proposed rule 1.8.1) the attorney has the burden of showing that the transaction is fair and reasonable and fully known and understood by the client. While the primary purpose of the presumption under proposed rule 1.9 is to protect client confidences, the presumption also exists to preserve the attorney's duty ofloyalty to the client. (See City National Bank v. Adam, supra, Cal.App.4th at 328; In rel Successor Corp (Bkrtcy S.D.N.Y. 2005) 312 B.R. 640, 656.)

Any concern about tangential matters being covered by this presumption is already addressed in the presumption. There is a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (City National Bank v. Adams, supra, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases or civil cases since the basis for the disqualification is the same as the

basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See People ex rel Department of Corporations v. Speedee Oil Change Systems (1999) 20 Cal.4t 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the conflict rule. (See Woods v. Superior Court (1983) 149 Cal.App.3d 931, 934.) While Woods addresses a disqualification motion, its holding is equally applicable in discipline and civil cases. Further, as previously discussed, the presumption is already in the disciplinary case law. OCTC requests that that portion of Comment 5 implying that the presumption does not apply to discipline cases be stricken.

6. If the Commission adopts OCTC's position that knowingly should be stricken from subparagraph (b) then Comments 8-9 should be stricken.
7. Again, there are too many comments and they are more appropriate for treatises, law review articles, and ethics opinions, especially comments 1-4 and 7. Comment 10 belongs in proposed rule 1.6, not this rule. The first sentence of Comment 11 is unnecessary. Comment 11 refers to subparagraph (c) of proposed rule 1.9. OCTC is concerned that, like in proposed subparagraph (c) itself, what is meant by "generally known information" and this Comment appears inconsistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. OCTC opposes any change to the requirement that precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.
8. As previously discussed regarding other conflict rules, OCTC opposes advanced waivers. (See OCTC's discussion to rule 1.7.) It recommends that the second sentence of this Comment be stricken. The commission should also consider whether the rest of the Comment is necessary in light of the rules cited in the Comment.

Rule 1.10. [Imputation of Conflicts of Interest: General Rule].

1. OCTC is concerned with the use of the term "knowingly" in subparagraph (a). This appears to sanction the lack of conflict procedures regarding clients of other members of the firm and is inconsistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." The same should apply here. Although negligence is not a basis for discipline, gross negligence or recklessness is. Thus, what conflict procedures, if any, exist should be an important factor in determining if the attorney violated this rule and should be disciplined. Also, by using the term "knowingly," the Commission may inadvertently affect disqualification rulings in civil and criminal cases.

2. Again, there are too many comments and many are too long and seem more appropriate for treatises, law review articles, and ethics opinions. OCTC is concerned that Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. However, neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC suggests either Comment 3 be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 needs more clarification or should be stricken.

Rule 1.11. [Special Conflicts of Interest for Former and Current Government Officers and Employees].

1. OCTC thanks the Commission for adding Business & Professions Code section 6131 to the Comments, but we still are concerned that subparagraph (a) is incomplete. OCTC believes it should state: Except as law may otherwise expressly permit or prohibit. The same is true of subparagraphs (c) and (d).
2. Subparagraph (b) of the rule prohibits an attorney in a firm from knowingly undertaking or continuing representation in such a matter unless the conflicted attorney is timely and effectively screened and is apportioned no part of the fee and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of the Rule. OCTC agrees with the minority of the Commission who objected to the use of the term "knowingly" because it would immunize attorneys who do not bother to check for conflicts of interest. Disciplinary law has long recognized that gross negligence can constitute misconduct. That would be appropriate here. Further, it would be consistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule."
3. OCTC does not object to the concept contained in subparagraph (c), but did find it a little confusing as written. It would suggest that the Commission might want to tighten the language.
4. OCTC is concerned that subparagraph (d)(2)(ii) prohibiting government officers and employees from negotiating for private employment might be too broad. It would appear to prohibit any criminal prosecutor from negotiating with the public defender's office for a job.
5. The comments are too many and most seem more appropriate for treatises, law review articles, and ethics opinions.

C. **2001 Comments**. In a September 27, 2001 Memo to the first Commission, OCTC provided the following comment on rule 3-310:

18. Rule 3-310. ~~Avoiding interests Adverse to a Client~~ *Avoiding Conflicts of Interest with Clients*.

OCTC's recommends clarifying and simplifying the application of this rule regarding conflicts of interest. OCTC also recommends changing the title of the rule for the purpose of clarity.

Revise the rule and discussion section as follows:

Rule 3-310. ~~Avoiding interests Adverse to a Client~~ *Avoiding Conflicts of Interest with Clients.*

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of *adequate information and an explanation of* the relevant circumstances, ~~and~~ of the actual and reasonably foreseeable adverse consequences *and material risks* to the client or former client, *and providing the client or former client with reasonable available alternatives to the proposed course of action*;

(2) "informed written consent" means the client or former client's written agreement to the representation following written disclosure *and adequate time to make an intelligent reasoned decision to give the consent;*

(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.~~

(*B) Except as provided in paragraph (c) a member or law firm shall not accept representation or continue to represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest embraces all situations in which an attorney's loyalty to, or efforts on behalf of a client are threatened or a reasonable client would believe could be threatened by the member's responsibilities or relationship to another client, to a third person, or by the member's own interests. This will include, but not be limited to:*

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

(2) there is a significant risk that the representation of one or more clients will be materially limited by the member's responsibilities or relationship to another client, a former client, a third person, or by a personal interest of the lawyer.

(C) Notwithstanding the existence of a concurrent conflict of interest under paragraph (B) a member or law firm may represent a client if:

(1) the member or law firm reasonably believes that the member will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

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

(4) each affected client gives informed written consent confirmed in writing after disclosure as that term is defined in paragraph (a) of this rule.

(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 or law firm 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 material relevant 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;

(2) Information relating to representation of the client is protected as required by Business & 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 non-disclosure 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;

(G) A member who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.

(H) A member shall not, unless the former client gives informed written consent, agree to or continue to represent a person in the same or substantially related matter in which the firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interest are materially adverse to that person; and

(2) about whom the lawyer has acquired information protected by Business & Professions Code section 6068, subdivision (e).

(I) A member or firm who formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter must not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known: or

(2) reveal information relating to the representation except as these rules would permit or require with respect to the client.

(J) While members are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from

doing so by these rules unless the prohibition is based on a personal interest of the prohibited lawyer and does not represent a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(K) When a member has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated member and not currently represented by the firm unless:

(1) the matter is the same or substantially related to that in which the formerly associated member represented the client; and

(2) any lawyer remaining in the firm has information protected by Business & Professions Code section 6068, subdivision (e), that is material to the matter.

(L) When a member becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which the lawyer is disqualified under the rules unless:

(1) the personally disqualified lawyer is, when permitted, timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given any affected former client to enable the former client to ascertain compliance with the provisions of the Rule.

Discussion

This rule, although written differently than former rule 3-310, is not intended to change existing law. It merely simplifies and expands the language so that it embraces the Supreme Court's rulings on this issue. However, this rule as rewritten does require informed written consent for all conflicts or potential conflicts, not just some, as was the case in the former rule.

* * *

~~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 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~~ *Paragraphs (B) and (E*) are to apply as complimentary provisions.

. . . ~~Paragraph (B) is intended to apply only to 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.~~

. . .

OCTC COMMENTS:

The current rule is confusing and at times has left gaps that do not address what would appear to be a conflict of interest as defined by case law. OCTC suggests that some of the categories be more like the proposed ABA rules. (See proposed Model Rules 1.7-1.11.) Moreover, as the Supreme Court has held "[c]onflicts 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." (People v. Bonin (1989) 47 Cal.3d 808, 835.) This rule should, therefore, embrace and incorporate that principle in its categories. Although, due to time constraints, we have not done so, the Commission should consider dividing this rule into more than one rule and possibly simplifying the rule even more. Obtaining an interest in subject matter of the litigation still would constitute a conflict of interest. The purpose of the conflicts rules is to protect the client's expectation of loyalty and the duty of the attorney to preserve his or her client's confidences and secrets and not use them for anyone else's advantage, including the attorney's advantage. Anything that reasonably raises questions about a lawyer's impartiality is a conflict.

Furthermore, all conflicts should require informed written consent. This will ensure that consent is fully understood and agreed to and it protects the attorney from accusations by the client later and any argument as to whether the attorney obtained the consent.

The proposed rule uses the term "when permitted" in reference to ethical walls or screens within a law firm. Thus, as written, it does not change the law regarding whether ethical walls or screens should be permitted. However, OCTC suggests that the Commission might want to explore the issue of ethical walls or screening. In California, the law has been that once an attorney in a firm has been found to have a conflict of interest, the conflict extends to the entire firm. (See e.g. *People ex rel Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135.) Generally, screens to avoid conflicts have not been accepted in California, except as to government and former government lawyers. (See e.g. *Henricksen v. Great American Savings and Loan* (1992) 11 Cal. App.4th 109, 115-116.) A recent Ninth Circuit decision has, however, cast doubt on that principle. (See *In re County of Los Angeles* (2000) 223 Fed.3d 990.) That decision may be speculative as to the California Supreme Court's position. Thus, now might be the time to address this issue in the rule. (See proposed Model Rule 1.10

and 1.11) The general principle that ethical screens are not valid makes OCTC's job much easier. But OCTC also recognizes that others may see the need for ethical screens in a time of global firms, larger law firms, and more mobile attorneys. OCTC therefore asks that, if the Commission decides to address ethical walls, that at the very least attorneys be required to inform every client in writing of the conflict and the screening and that everything is done to protect a client's confidences and secrets.

V. Potential Deficiencies in the Current Rule:

A. **Introduction**. At the time of writing, OCTC had not yet submitted current comments concerning rule 3-310. Such comments are anticipated.

However, in 2001, OCTC submitted a proposed revised rule that incorporated language from the Model Rule counterparts to current rule 3-310 (Model Rules 1.7, 1.9, and 1.10, as well as select provisions from Model Rule 1.8), together with specific recommendations concerning the general approach that a conflicts rule (or rules) should take.

In 2010, OCTC submitted extensive comments, reproduced above, directed at RRC1's proposed conflicts rules that were counterparts to current rule 3-310 provisions. Although the 2010 comments were not directed at perceived deficiencies in the current rule, concerns that OCTC might have had regarding the current rule can be inferred and are presented in section IV.B, below.

B. See above **2001 input from OCTC**. Specifically, OCTC suggested a number of changes to current rule 3-310 to remedy perceived deficiencies:

1. As currently structured as a single rule, current rule 3-310 is confusing and should be separated into different rules similar to the ABA Model Rules.[14]

2. The disclosure required under rule 3-310(A)(1) should be expanded as in the Model Rules.[15]

[14] Although OCTC did not separate out the different type of conflict situations into different rules (e.g., current client conflicts, former client conflicts, etc.), OCTC did recommend adding several new paragraphs to its mockup of a proposed rule 3-310 that largely tracked the provisions in several different Model Rules.

For example, proposed paragraphs (G), (H) and (I) are taken nearly verbatim from Model Rule 1.9 (Duties to Former Clients), paragraphs (a), (b) and (c), respectively. OCTC, however, also retained current rule 3-310(E), which is generally considered the counterpart to Model Rule 1.9. See also note 18, below.

3. The current rule leaves **gaps in coverage**. The rule (or rules) should be drafted to capture the concept that "[c]onflicts 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." (*People v. Bonin* (1989) 47 Cal.3d 808, 835.)[16]

4. Current rule 3-310(B) only requires that the lawyer provide **written disclosure** of one of the enumerated conflicts to the client. All conflicts of interest should require the client's informed written *consent*.[17]

5. The current rule does not address the concept of **imputation of conflicts** within a law firm. (Cf. Model Rule 1.10).[18]

6. Current rule 3-310 does not address the issue of **ethical screening**. Including that concept in a rule should be explored.[19]

7. The current rule does not prohibit a lawyer from **obtaining an interest in the subject matter** of the litigation. (Compare Model Rule 1.8(i).)[20]

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[15] As can be seen from OCTC's proposed 2001 paragraph (A), it closely tracked the required disclosure in current Model Rule 1.0(e), "informed consent." The definitions in current rule 3-310(A) are currently under consideration by the 1.0.1 drafting team (global terminology rule).

[16] With respect to this concern raised in 2001, OCTC proposed deleting paragraphs (B) and (C) of current rule 3-310 and substituting new paragraphs (B) and (C), which are nearly verbatim versions of Model Rule 1.7(a) and (b), but also incorporating the quoted concept in the text. The apparent rationale of this recommendation was to go beyond current rule 3-310's checklist approach in paragraphs (B) and (C) and incorporate a more general standard.

In addition, by requiring "informed written consent" for all conflicts, OCTC eliminated the less stringent requirement of requiring only "written disclosure" for the enumerated conflicts in current rule 3-310(B).

[17] See note 16.

[18] Although OCTC did not separate out the different types of conflict concepts into different rules, OCTC did recommend adding several new paragraphs to its mockup of a proposed rule 3-310.

For example, proposed paragraphs (J) and (K) are taken nearly verbatim from ***then*** Model Rule 1.10 (Imputation of Conflicts of Interest: General Rule), paragraphs (a) and (b), respectively (Model Rule 1.10(a) was revised extensively in 2009 to permit non-consensual ethical screening in certain situations).

[19] OCTC suggested a possible ethical screening provision in its proposed paragraph (L). OCTC noted that at a minimum, such a provision should require that a lawyer be required "to inform every client in writing of the conflict and the screening and that everything is done to protect a client's confidences and secrets."

[20] Model Rule 1.8(i) provides:

> (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

C. See above **2010 input from OCTC**. Although the 2010 OCTC comments are directed at the RRC1 proposed conflicts rules, staff has been able to infer from those comments several possible deficiencies in the current rule about which OCTC was concerned.

1. The current rule might not sufficiently clarify that if a lawyer is **unable** to make a **sufficient disclosure** to a client because of the lawyer's duty of confidentiality owed another client, the lawyer **may not accept or continue** the conflicted representation. (See 2010 OCTC Comments re proposed Rule 1.7, #10.)

2. Current rule **3-310(F)** [third-party payor] does not require or recommend, in the black letter or Discussion, that lawyers **advise** in writing both the client and the paying non-client that the **lawyer's duty only requires him or her to communicate with the client** and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client and even with such designation the lawyer must preserve the client's confidences and secrets. OCTC's experience is that the paying non-client often complains because they do not understand that the lawyer cannot communicate with them. (See 2010 OCTC Comments re proposed Rule 1.8.6, #1.)

3. Current rule **3-310(D)** [aggregate settlements] does not address aggregate package **plea deals in criminal cases**, nor does it attempt to specify what information should be included in the disclosure. (See 2010 OCTC Comments re proposed Rule 1.8.7, #2.)[21]

4. Current rule 3-310(E) does not resolve whether a lawyer may *use* **information** learned by virtue of representing a former client that is now **generally known**. (See 2010 OCTC Comments re proposed Rule 1.9, #3.)[22]

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(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

[21] RRC1 proposed Rule 1.8.7 provided:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, *or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas*, unless each client gives informed written consent. *The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement*. (Emphasis added).

[22] Compare Model Rule 1.9(c)(1) and RRC1 Rule 1.9(c)(1), the latter of which provided:

> (c) A lawyer who formerly represented a client in a matter or whose present or former law firm has formerly represented a client in a matter shall not thereafter:

5. Current rule 3-310 does not expressly address whether the **substantial relationship test** used in disqualification motions may be used **in disciplinary cases** to establish a violation of the rule. (See 2010 OCTC Comments re proposed Rule 1.9, #5.)[23]

D. **Other Potential Deficiencies**. In addition to the deficiencies noted by OCTC in 2001, other potential deficiencies include:

1. The "legislative history" of current rule 3-310(C) indicates an intent to set a narrow scope **concurrent conflicts of interest** rule, with a (C)(4) as a companion provision that would have covered broader concurrent conflicts such as the duty to refrain from a representation that is directly adverse a current client that is recognized in *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537] (direct adversity in different matters). If the current checklist approach of rule 3-310 is retained, paragraph (C)(4), which was proposed as an addition in 1998, should be considered.[24] A copy of the 1998 public comment proposal is attached. However, one might also argue that the absence of paragraph (C)(4) is not a deficiency given that: (1) the Supreme Court's authority to interpret a rule is not constrained by the State Bar's "legislative history;" and (2) the Supreme Court's 2003 amendment adding a clarifying Discussion paragraph regarding insurer conflicts might be read as an implicit validation of appellate court application of paragraph (C)(3) to broader *Flatt-type* conflicts.

2. Current rule 3-310 does not address whether a lawyer may obtain from a client an **advance consent** to a future conflict of interest. (Compare Model Rule 1.7, cmt. [22]; RRC1 Rule 1.7, cmt. [22]. See also *In re Shared Memory Graphics LLC*, 659 F.3d 1336 (Fed. Cir. 2011) (applying California law)

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(1) use information relating to a former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known; * * *

See also *In the Matter of Johnson* (Rev.Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190 (Lawyer may not disclose information relating to a representation that is public record.)

[23] See also *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747.

[24] The 1998 proposed revisions to rule 3-310 provided for the revision of rule 3-310(C)(3) and addition of (C)(4) as follows:

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

* * *

(3) accept representation of a person or entity the lawyer knows or reasonably should know is an opposing party to a client in a separate matter in which the lawyer or the lawyer's law firm currently represents the client.

(4) accept representation of a person or entity in a litigation matter in which the lawyer knows or reasonably should know an opposing party is a client of the lawyer or the lawyer's law firm, except as otherwise permitted or required by law.

(permitted); *UMG Recordings, Inc. v. MySpace, Inc.*, 526 F.Supp.2d 1046 (C.D.Cal. 2008) (permitted); *Concat LP v. Unilever, PLC*, 350 F.Supp.2d 796 (N.D.Cal.2004) (not permitted); *Visa U.S.A., Inc. v. First Data Corporation*, 241 F.Supp.2d 1100 (N.D.Cal.2003) (permitted); *Zador Corp. v. Kwan*, 31 Cal.App.4th 1285, 37 Cal.Rptr.2d 754 (1995) (permitted); *Celgene Corp. v. KV Pharmaceutical Co.*, 2008 WL 2937415 (D.N.J. 7/29/08) (not permitted).

3. Current rule 3-310 does not address **"thrust-upon" (or "unforeseeable") conflicts** of interest, e.g., when a conflict is created by the merger of client entities or the acquisition of one client by another. (See, e.g., *Gould v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio 1990) (Lawyer may continue to represent one of the clients). Compare D.C. Rule 1.7(d) (Lawyer may continue to represent both clients. See also Model Rule 1.7, cmt. [5].)[25]

4. Current rule 3-310 does not address the special considerations involved in conflicts involving current or former **government** employee lawyers. (Compare Model Rule 1.11).

5. Current rule 3-310 does not address the special considerations involved in conflicts involving **former judges** or judicial personnel. (Compare Model Rule 1.12).

6. Current rule 3-310 does not address how the rule should be applied to **related entities within the same corporate family**, i.e., parent-subsidiary

[25] D.C. Rule 1.7(d) provides:

> (d) If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

Subparagraphs (2) to (4) of D.C. Rule 1.7(b)(2) – (4) identify specific prohibited representations, similar to current rule 3-310(B):

> (b) Except as permitted by paragraph (c) [informed consent of both clients] below, a lawyer shall not represent a client with respect to a matter if:
>
> (1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;
>
> (2) Such representation will be or is likely to be adversely affected by representation of another client;
>
> (3) Representation of another client will be or is likely to be adversely affected by such representation;
>
> (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

conflicts issues. (Compare *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223 with *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248. See also Model Rule 1.7, cmt. [34].)

7. Current rule 3-310 does not **define** the term "**conflict of interest**." (See 2001 OCTC Comments on Rule 3-310, #3 & note 16.)

8. Current rule 3-310 does not adequately distinguish between "party adversity" and "interest adversity." (Compare Model Rule 1.7, cmts. [6] – [8], with MR 1.7, cmts. [10] – [12].

9. Current rule 3-310 is silent on the issue of **positional conflicts**. (Compare Model Rule 1.7, cmt. [24].)

10. Aside from a reference in Discussion ¶. 11, current rule 3-310 does not address **conflicts** in a **class action** setting. (Compare Model Rule 1.7, cmt. [25].)

11. Current rule 3-310 does not address its application in a **limited scope representation** context.

12. Current rule 3-310, Discussion ¶. 9 (concerning *State Farm Mutual Automobile Insurance Co. v. Federal Insurance Co*.) refers to current paragraph (C)(3), a narrowly drawn provision. However, if proposed paragraph (C)(4) were to be added, (see paragraph 1, above), the references should be to the broader paragraph (C)(4).

13. Notwithstanding Discussion ¶. 9, current rule 3-310 inadequately addresses the rule's application in the **insured-insurer context**. (See also Discussion ¶. 12.)

14. The current rule does not adequately identify what are referred to as **"unwaivable" or "unconsentable" conflicts** of interest or "prohibited representations." (See Rule 3-310, Discussion ¶¶. 2, 10. Compare Model Rule 1.7(b) & Comments [14] to [17].)

VI. California Context:

A. **General Overview of Conflicts**.

The following cases provide good general overviews of the case law on conflicts of interest:

- *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), review denied (6/23/2010).

- *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839.
- *People ex rel Dept. of Corp. v. Speedee Oil Change Sys.*, Inc., 20 Cal.4th 1135, 1151-1152 (1999).
- *Flatt v. Superior Court* (1994) 9 Cal.4th 275.

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

"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." *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284 (representation directly adverse to current client).

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

C. **Conflicts Involving Former Clients (3-310(E))**.

"Where the potential conflict is one that arises from the successive representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality." *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.

Unlike Model Rule 1.9(a) or (b), rule 3-310(E) does not expressly state that the former matter in the lawyer represented an adverse party must be the same as, or substantially related to the current matter to result in a prohibition against a lawyer representing a current client against the adverse party. Instead, the rule identifies the unethical conduct that is proscribed, which in the case of opposing a former client who is now adverse to a current client, is a lawyer representing the new client when the lawyer is in possession of confidential information of the former client that is material to the new matter.

1. 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.*, 229 Cal.App.3d 1445, 280 Cal.Rptr. 614 (1991) (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*., 86 Cal.App.4th 1324, 104 Cal.Rptr.2d 116 (2001); *City National Bank v. Adams*, 96 Cal.App.4th 315, 117 Cal.Rptr.2d 125 (Cal.App. 2002). 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.*, 3 Cal.Rptr.3d 877, 884-885 (Cal.App. 2003), 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.*, 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618 (2004) (Figure 17); *Brand v. 20th Century Ins. Co.,* 124 Cal.App.4th 594, 21 Cal.Rptr.3d 380 (2004) (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*, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006) (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)

2. Modified Substantial Relationship Test.

Model Rule 1.9(a) applies only if the lawyer whose prohibition or disqualification is sought actually represented the former client.[26] Similarly, California apply the substantial relationship test only if the lawyer had actually been involved in representing the client

[26] Model Rule 1.9(a) provides:

> (a) A lawyer *who has formerly represented a client in a matter* shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. (Emphasis added).

in the previous matter. Both the Ahmanson (the extent of the lawyer's involvement in the cases) and Jessen ("the relationship between the attorney and the former client with respect to the legal problem involved in the former representation") versions of the test demonstrate this. When lawyers are in the same firm, however, there is a presumption that every lawyer in a firm discusses his or her client matters with every other lawyer in the law firm. (See, e.g., Model Rule 1.6, cmt. [5].) This is sometimes referred to as the "water cooler" effect.

Model Rule 1.9(b) addresses this assumption regarding lawyers practicing together in a law firm and provides that even if a lawyer did not previously represent the former client, the lawyer may nevertheless have acquired a former firm client's confidential information that is material to the present matter.[27] In *Adams v. Aerojet-General Corp.*, 86 Cal.App.4th 1324 (2001), the court adopted the concept in Model Rule 1.9(b), which subsequent courts have referred to as the "modified substantial relationship test." Under that test, there is a rebuttable presumption that a firm-switching lawyer (i.e., a lawyer who moves laterally from one firm to another) has obtained material confidential information when the moving party makes an adequate showing that the firm-switching lawyer was in a position while at the former law firm that the lawyer was likely to have acquired confidential information material to the current representation.[28] If the moving party makes this showing, the firm-switching lawyer and new law firm must make an affirmative and substantive showing that the lawyer had no actual exposure to confidential information relevant to the current action while the lawyer was a member of the former law firm. Subsequent courts have noted that although an affirmative showing by the moving lawyer and the new firm of no exposure to confidential information is required, mere access to, or opportunity to acquire, confidential information does not provide a sufficient basis to find that confidential information material to the current

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[27] Model Rule 1.9(b) provides:

> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter *in which a firm with which the lawyer formerly was associated had previously represented a client*
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
>
> unless the former client gives informed consent, confirmed in writing. (Emphasis added).

[28] Factors relevant to such a showing include: (i) Length of time lawyer worked for former client. (ii) Lawyer's exposure to formulation of strategy and policy. (iii) Geographic location of lawyer relative to other lawyers involved in the previous representation. (iv) Lawyer's management or administrative responsibilities. See *Adams v. Aerojet*, 86 Cal.App.4th at 1340. For example, the lawyer might have been exposed to the strategy contemplated in the new matter during a departmental lunch at which the matter was discussed, or the lawyer might have an office next to the lead lawyer on the new matter with whom the lawyer is known to discuss client matters. See, e.g., *Ochoa v. Fordel*, 146 Cal.App.4th 898 (2007). In addition, the lawyer might be shown to have accessed the electronic file database of the files in the new matter. (*id*.)

representation would normally have been imparted to the attorney during that attorney's tenure at the old law firm. See, e.g., *Ochoa v. Fordel*, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007). See also *Faughn v. Perez*, 145 Cal.App.4th 592 (2006).

3. Other Cases Concerning Duties to Former Clients.

- *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256]
- *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]
- *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454 [280 Cal.Rptr. 614]
- *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 592 [283 Cal.Rptr. 732];
- *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185]
- *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 (duty to protect information in public record that is not easily accessible).
- *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]

D. **Imputation (Vicarious Disqualification) (Model Rule 1.10)**.

1. Model Rule 1.10(a).

Although California does not have a rule similar to Model Rule 1.10(a)[29] concerning imputation of conflicts, there is abundant case law that recognizes that when one lawyer in a law firm is disqualified, that disqualification is extended to every other lawyer in the

[29] Model Rule 1.10(a)provides in part:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
>
> > (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;

Note: MR 1.10(a)(2), which broadly permits ethical screens in private to private lateral movement between firms, is not included.

In addition to the exception in subparagraph (a)(1), California generally does not impute disqualifications when there is a family or other close personal relationship between a disqualified lawyer and an opposing lawyer. See, e.g., *Derivi Construction & Architecture, Inc. v. Wong*, 118 Cal.App.4th 1268, 14 Cal.Rptr.3d 329 (2004); *Addam v. Superior Court*, 116 Cal.App.4th 368, 10 Cal.Rptr.3d 39 (2004); *DCH Health Services Corp. v. Waite*, 95 Cal.App.4th 829, ,115 Cal. Rptr.2d 847 (2002).

firm, i.e., the other lawyers are vicariously disqualified. See, e.g., *Flatt v. Superior Court*, 9 Cal.4th at 283; *People ex rel Dept. of Corp. v. Speedee Oil Change Sys., Inc.*, 20 Cal.4th 1135 (1999); *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010); *Rosenfeld Const. Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 575; *Henriksen v. Great Am. Sav. & Loan* (1992) 11 Cal.App.4th 109, 117. See also State Bar Formal Ethics Op. 1998-152.

2. Model Rule 1.10(b).

Model Rule 1.10(b) provides that the presumption of shared confidences does not apply once a tainted (prohibited/disqualified) lawyer leaves the firm and there is no evidence that the lawyer shared confidential information with any lawyer remaining in the firm.[30] California has no similar rule but has case law on point. See *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116.

E. **Ethical Screens**.

1. Government Employees/lawyers (Model Rule 1.11).

California has no rule similar to Model Rule 1.11, which permit san ethical screen to rebut the presumption of shared confidences in a law firm when a former government lawyer/employee possesses material confidential information by virtue of his or her former government employment, or when a former private lawyer is employed by the government. However, there is abundant case law that permits ethical screening in such circumstances. See, for example:

- *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839.
- *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17.
- *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 175 Cal.Rptr. 575.
- *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 164 Cal.Rptr. 864.

[30] Model Rule 1.10(b) provides:

> (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
>
> (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

- See also cases discussed in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), review denied (6/23/2010).

2. Former Judges (Model Rule 1.12).

California has no rule similar to Model Rule 1.12, which permits an ethical screen to rebut the presumption of shared confidences in a law firm when a former judge or judicial employee possesses material confidential information by virtue of his or her former government employment. However, there is a California case, *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, which held that an ethical screen could not rebut the presumption of shared confidences, at least where the former judge had obtained confidential client information during a settlement conference:

> No amount of assurances or screening procedures, no "cone of silence," could ever convince the opposing party that the confidences would not be used to its disadvantage. When a litigant has bared its soul in confidential settlement conferences with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm-which is now pressing or defending the lawsuit against that litigant. No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent. 39 Cal.App.4th at 125.

The court did not opine on whether a former judicial officer's law firm should be disqualified because the judge had presided over the same or substantially similar matter now being handled by the law firm but had actually received confidential information of any party as in a settlement conference.[31]

3. Lateral Movement Between Private Law Firms (Model Rule 1.10(a)(2).

As noted in section VII.C, below concerning variations among the states in their adoptions of Model Rule 1.10, 32 jurisdictions permit screening in the private to private firm context to rebut the presumption of shared confidences. California has no rule that permits screening in that context. However, there is case law that indicates an ethical screen may be appropriate in some circumstances involving private to private lateral movement. See, for example:

[31] Compare Model Rule 1.12, cmt. [3]:

> [3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

- *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), review denied (6/23/2010) (excellent summary of the law).

- *People ex rel Dept. of Corp. v. Speedee Oil Change Sys.*, Inc., 20 Cal.4th 1135, 1151-1152 (1999).

- *In re County of Los Angeles*, 223 F.3d 990 (9th Cir. 2000).

But compare:

- *Henriksen v. Great Am. Sav. & Loan* (1992) 11 Cal.App.4th 109,

F. **Third Party Payments (3-310(F))**.

- *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494

- State Bar Formal Ethics Op. 2013-187 (Third Party Payors), available at: http://ethics.calbar.ca.gov/Portals/9/documents/Opinions/CAL%202013-187%20%2803-08-13%29.pdf

- State Bar Formal Ethics Op. 1995-139 (Insurance Defense Counsel), available at: http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=ifOj7p_6nns%3d&tabid839

G. **Conflicts Involving Corporate Affiliates**.

- *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223.

- *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248.

H. **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

I. **Advance Consents to Conflicts**.

- *In re Shared Memory Graphics LLC*, 659 F.3d 1336 (Fed. Cir. 2011) (applying California law) (permitted).

- *UMG Recordings, Inc. v. MySpace, Inc.*, 526 F.Supp.2d 1046 (C.D.Cal. 2008) (permitted).

- *Concat LP v. Unilever, PLC*, 350 F.Supp.2d 796 (N.D.Cal.2004) (not permitted).

- *Visa U.S.A., Inc. v. First Data Corporation*, 241 F.Supp.2d 1100 (N.D.Cal.2003) (permitted).

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

VII. Approach In Other Jurisdictions (National Backdrop):

A. Model Rule 1.7 & State Counterparts

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 May 13, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7.pdf [Last visited 12/28/15]

- Nineteen jurisdictions have adopted Model Rule 1.7 verbatim.[32] Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.7.[33] Ten jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.7."[34]

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]

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[32] 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.

[33] 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.

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

- Thirty jurisdictions have adopted Model Rule 1.7, Comment [34] verbatim.[35] Three jurisdictions have adopted a modified version of Model Rule 1.7, Comment [34].[36] Thirteen jurisdictions have not adopted a version of the Comment."[37]

B. **Model Rule 1.9 & State Counterparts**

Model Rule 1.9. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.9: Duties to Former Client," revised May 13, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_9.pdf [Last visited 1/16/16]

- Twenty-two jurisdictions have adopted Model Rule 1.9 verbatim.[38] Twenty-seven jurisdictions have adopted a slightly modified version of Model Rule 1.9.[39] Two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.9."[40]

C. **Model Rule 1.10 & State Counterparts**

Model Rule 1.10. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.10: Imputation of Conflicts of Interest: General Rule," revised January 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_10.pdf [Last visited 1/16/16]

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[35] 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.

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

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

[38] The twenty-two jurisdictions are: Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and Washington.

[39] The twenty-seven jurisdictions are: Alabama, Alaska, Arizona, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin, West Virginia, and Wyoming.

[40] The two jurisdictions are: California and Texas.

- Every jurisdiction but California and Texas[41] has adopted some version of Model Rule 1.10. Only four jurisdictions have adopted a rule that is identical to Model Rule 1.10 in all respects, i.e., they have adopted the Model Rule ethical screening provisions verbatim.[42] As discussed below, a total of 32 jurisdictions (including the aforementioned four) have adopted a provision that expressly permits ethical screening of a lawyer laterally moving between private firms. Aside from the Model Rule's screening provision (1.10(a)(2)), every jurisdiction except for California and Texas has adopted some version of Model Rule 1.10(a), (b) and (c), and a substantial majority of jurisdictions has adopted some version of Model Rule 1.10(d).

Ethical Screening Provisions. The ABA State Adoption Chart, entitled "State Adoption of Lateral Screening Rule," revised January 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.pdf [Last visited 1/16/16][43]

- In February and August of 2009, the ABA adopted amendments to Model Rule 1.10 that broadly permit non-consensual screening of lawyers who move from one private firm to another private firm. In effect, the Model Rule provision places private lawyers more or less on an equal footing with government lawyers, who are governed under MR 1.11, in their ability to be screened. The rule allows such screening even if the screened lawyer had a substantial and direct involvement in the former client's case, and even if the former and current clients' cases were "substantially related." The rule, in effect, changes the presumption that a laterally-moving lawyer would share confidential information with his or her new firm.

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[41] Although Texas has not adopted a separate rule governing imputation, it includes an imputation provision in its Rule 1.06 [counterpart to Model Rule 1.7] and its Rule 1.09 [counterpart to Model Rule 1.9].

Texas Rule 1.06(f) provides:

> (f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Texas Rule 1.09(b) provides:

> (b) Except to the extent authorized by Rule 1.10 [Successive Government and Private Employment], when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

[42] The four jurisdictions are Connecticut, Idaho, Iowa and Wyoming. See discussion in "Ethical Screening Provisions," below.

[43] The ABA Chart is inaccurate. Staff has reviewed the rules in the various jurisdictions to confirm the accuracy of the description in the text (as of 1/16/16).

Only four jurisdiction have adopted the Model Rule 1.10(a)(2) screening provisions verbatim: Connecticut, Idaho, Iowa and Wyoming.

Nevertheless, there are 14 other jurisdictions that have adopted screening provisions that ***broadly*** permit screening of private lawyers similar to the Model Rule: Arizona, Delaware, D.C., Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah and Washington.

In addition, another 14 jurisdictions permit screening in ***limited*** situations, i.e., the jurisdiction's provision permits screening only if a lawyer did not "substantially participate," or was not "substantially involved," did not have a "substantial role," did not have "primary responsibility," etc., in the former client's matter, or when any confidential information that the lawyer might have obtained is deemed not material to the current representation (e.g., Mass.) or "is not likely to be significant" (e.g., Minn.) Jurisdictions that permit screening in such limited situations are: Colorado, Hawaii, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin. In summary, a total of 32 jurisdictions have a rule that expressly permits non-consensual screening of lawyers moving laterally between private firms.[44]

D. **Model Rule 1.11 & State Counterparts**

Model Rule 1.11. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.11: Special Conflicts Of Interest For Former And Current Government Officers and Employees," revised January 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_11.authcheckdam.pdf [Last visited 1/16/16]

Every jurisdiction except California has adopted some version of Model Rule 1.11. Twenty-two jurisdictions have adopted Model Rule 1.11 verbatim.[45] Most of the remaining jurisdictions largely track the Model Rule language, with only non-substantive changes. However, there are ten jurisdictions that have departed

[44] In addition to the foregoing jurisdictions, South Carolina has a rule that expressly permits screening of lawyers who move to or from a public defender, legal services or similar non-profit organization. See S.C. Rule 1.10(3).

[45] The jurisdictions are Connecticut, Delaware, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

substantially from the language of the Model Rule,[46] including jurisdictions that address the issue of part-time government employment.[47]

E. **Model Rule 1.12 & State Counterparts**

Model Rule 1.12. The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.11: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral," revised January 5, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_12.authcheckdam.pdf [Last visited 1/16/16]

Every jurisdiction except California has adopted some version of Model Rule 1.12. Sixteen jurisdictions have adopted Model Rule 1.12 verbatim.[48] The remaining jurisdictions largely track the Model Rule language, with only non-substantive changes.

VIII. Public Comment Received by the First Commission:

A. The clean text of proposed Rules 1.7, 1.8.6, 1.8.7, 1.9, 1.10 and 1.11 drafted by the first Commission and adopted by the Board to replace rule 3-310 are enclosed with this assignment, together with the synopsis of public comments received on that proposed rules and the full text of those comments. Although the proposed rules differ from current rule 3-310, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of each of the proposed rules showing changes to rule 3-310 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

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[46] The jurisdictions are: Arizona, District of Columbia, Georgia, Missouri, New Jersey, New York, Oregon, Tennessee, Texas, and Virginia.

[47] See, e.g., Missouri Rule 1.11(e).

[48] The jurisdictions are Arizona, Delaware, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, and Vermont.

IX. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

Overarching Issues

1. Whether to recommend expanding current rule 3-310 into several different rules to track the ABA Model Rule framework for conflicts rules: 3-310(B) & (C) [1.7] [current client conflicts]; 3-310(F) [1.8.6] [payments not from client]; 3-310(D) [1.8.7] [aggregate settlements]; 3-310(E) [1.9] [duties to former clients].

2. Whether to recommend retaining current rule 3-310's "checklist" approach in paragraphs (B) and (C) or to recommend adopting Model Rule 1.7's language and more generalized approach to conflicts. (See, e.g., 2001 OCTC Comments and Deficiencies, section V.B.3, above.)

3. Whether the disclosure required under rule 3-310(A)(1) should be expanded as in the Model Rules to require, inter alia, disclosure of "material risks" and "reasonably available alternatives." (See V.B.2, above.) Note that the 1.0.1 drafting is addressing the issue of disclosure required for informed consent more generally.

4. Whether to recommend adoption of the Model Rules' conflicts consent requirements, which in most instances require only the client's "informed consent, confirmed in writing"[49] or retain California's current approach that requires "informed written consent" for most conflicts situations.

[49] Model Rule 1.0(b) provides:

5. Whether to define the term "conflict of interest." (See 2001 OCTC Comments on Rule 3-310, #3 & note 16.)

Rule 3-310 (B) & (C) [1.7]

6. If the "checklist" approach of rule 3-310 is retained, whether the conflict situations identified in current rule 3-310(B) should require the client's informed written consent rather than simply requiring "written disclosure." (See section V.B.4, above.)

7. If the checklist approach in current rule 3-310(C) is retained, whether to include new paragraph (C)(4), as proposed in 1998, to better clarify the duties identified in *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537] (direct adversity in different matters). (See section V.D.1, above.)

8. If rule 3-310's checklist approach in paragraph (C) is retained and new paragraph (C)(4) is recommended, whether to modify Discussion ¶. 9 to refer to the broader (C)(4).

9. Whether current rule 3-310(B) and (C) [1.7] should clarify that if a lawyer is unable to make a sufficient disclosure to a client because of the lawyer's duty of confidentiality owed another client, the lawyer may not accept or continue the conflicted representation. (See 2010 OCTC Comments re proposed Rule 1.7, #10. See also rule 3-310, Discussion ¶.2)

10. Related to item 9, whether to identify with specificity those situations where a conflicted representation would be "unwaivable" ("unconsentable" or "prohibited.) (See Model Rule 1.7(b) and comments [14] – [17]. Compare rule 3-310, Discussion ¶¶. 2, 10.)

11. Whether to include a provision in rule 3-310 or 1.7 that clarifies whether an advance consent to a future conflict is permissible under the Rules. (Cf. Model Rule 1.7, cmt. [22] and RRC1 Rule 1.7, cmt. [22]; see section V.D.2, above.)

12. Whether to include a provision in rule 3-310 or 1.7 that clarifies a lawyer's duties when confronted with an unforeseeable ["thrust upon"] conflict. (Cf. Model Rule 1.7, cmt. [5]. See section V.D.3, above.)

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

13. Whether to expressly address how the rule should be applied to **related entities within the same corporate family**, i.e., parent-subsidiary conflicts issues. (Compare *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223 with *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248. See also Model Rule 1.7, cmt. [34].)

14. Whether to clarify a lawyer's duties when there exists a positional conflict between or among different clients. (See State Bar Formal Ethics Op. 1989-108. Compare Model Rule 1.7, cmt. [24].)

15. Whether to clarify the distinction between "party adversity" and "interest adversity." (Compare Model Rule 1.7, cmts. [6] – [8], with MR 1.7, cmts. [10] – [12].

16. Whether to address in more depth than is done in current rule 3-310 conflicts in a class action setting. (Compare Model Rule 1.7, cmt. [25].)

17. Whether to clarify a lawyer's or law firm's duties as to conflicts in a limited scope representation situation.

18. Whether to better clarify in a rule a lawyer's duties when conflicts might arise when a lawyer represents an insured and is paid by the insurer. (Compare rule 3-310, Discussion ¶. 12).

Rule 3-310(E) [1.9]

19. Whether to include in a rule addressing duties to a former client the language in Model Rule 1.9(a), which refers to the "same or substantially related matter." (See 2010 OCTC Comments re proposed Rule 1.9, #5, above.)

20. Whether to include in a rule addressing duties to a former client the concept in Model Rule 1.9(b), which has been adopted in California as the "modified substantial relationship test." See, e.g., *Adams v. Aerojet-General Corp.*, 86 Cal.App.4th 1324 (2001) (adopting Model Rule 1.9(b)). See also *Ochoa v. Fordel*, 146 Cal.App.4th 898, (2007); *Faughn v. Perez*, 145 Cal.App. 4th 592 (2006).

21. Whether to include a provision that expressly permits the use of "generally known information" in a rule addressing duties to former clients. (Compare Model Rule 1.9(c)(1). See 2010 OCTC Comments re Proposed Rule 1.9, #3).

Model Rule 1.10

22. Whether the concept of "imputation" should be included in the conflict rule or rules. (See section V.B.5, above.)

23. Whether the concept of "ethical screening" should be included in the conflict rule or rules. (See section V.B.6, above.)

Rule 3-310(F) [1.8.6]

24. Whether current rule 3-310(F) [1.8.6] should require or recommend, in the black letter or Discussion, that lawyers advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client and even with such designation the lawyer must preserve the client's confidences and secrets. (See 2010 OCTC Comments re proposed Rule 1.8.6, #1.)

25. Whether to include a timing requirement for obtaining the client's informed written consent under the rule.[50] This Commission has recommended including a similar requirement in proposed Rule 1.5.1 [2-200], concerning division of fees among lawyers.

26. Whether to expand rule 3-310(B)'s prohibition against accepting compensation from a third-party to include a prohibition against entering into an agreement for or charging compensation from a third-party.[51] There is a

[50] RRC1's proposed Rule 1.8.6 provided:

> A lawyer shall not ***enter into an agreement for, charge, or*** accept compensation for representing a client from one other than the client unless:
>
> (a) the client gives informed written consent ***at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable***, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; ***or (ii) is rendering services through a non-profit organization***;
>
> (b) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
>
> (c) information protected by Business and Professions Code section 6068(e) and Rule 1.6 is protected. [Emphasis added].

[51] See note 50.

similar prohibition in current rule 4-200 that this Commission has recommended be carried forward in proposed Rule 1.5.

27. Whether to add a second exception from the client consent requirement in rule 3-310(F) for situations where a lawyer provides legal services through a non-profit organization.[52]

Rule 3-310(D) [1.8.7]

28. Whether rule 3-310(D) [aggregate settlements] should be expanded to address aggregate package plea deals in criminal cases.[53] (See 2010 OCTC Comments re proposed Rule 1.8.7, #2)

29. Whether rule 3-310(D) should specify what information must be included in a disclosure seeking the clients' consent to an aggregate settlement or package deal in a criminal case.[54]

30. Whether to add a comment that explains the requirement of a client's informed written consent can be satisfied by the lawyer's disclosure and the client's consent being recorded on the record in court.[55]

Model Rule 1.11

31. Whether to expressly address the special considerations involved in conflicts involving current or former **government** employee lawyers. (Compare Model Rule 1.11).

Model Rule 1.12

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[52] See note 50.

[53] The first sentence of Model Rule 1.8(g) provides:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client.

RRC1 also included the criminal case concept.

[54] The second sentence of Model Rule 1.8(g) provides:

> The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

RRC1 included a similar sentence.

[55] RRC1's proposed Comment [4], added in response to public comment, provided:

> [4] A lawyer's obligation to make a written disclosure and obtain written consent may be satisfied when the lawyer makes the required disclosure and the clients give consent in court and on the record. See the definition of "written" in Rule 1.0.1(n).

32. Whether to expressly address the special considerations involved in conflicts involving **former judges** or judicial personnel. (Compare Model Rule 1.12).

Other Issues

33. Whether to include a provision similar to Model Rule 1.8(d), which regulates the extent to which a lawyer can acquire a client's media rights as compensation for representing the client. (Compare rule 3-300; *Maxwell v. Superior Court* (1982) 30 Cal.3d 606.)[56]

34. Whether the rule or rules should prohibit a lawyer from obtaining an interest in the subject matter of the litigation. (Compare Model Rule 1.8(i) with current rule 3-400. See section V.B.7, above.)

X. Research Resources:

- *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592]
- *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494
- Business and Professions Code 6068(e)
- CAL 1995-139 (Duties as insurance defense counsel)
- *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285 [37 Cal.Rptr.2d 754] (joint representation, advance waiver)

Current Clients

- *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537] (directly adverse)
- *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232] (responsibilities to former clients or others third persons
- *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)

[56] This issue has been assigned to the drafting team for rule 3-300 (Avoiding Interests Adverse to a Client).

Third-Party Payments

- *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494
- CAL 2013-187 (Third Party Payors)

Former Clients

- *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]
- *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454 [280 Cal.Rptr. 614]
- *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 592 [283 Cal.Rptr. 732]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185]
- *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179
- *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]
- *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256]
- *Farris v. Firemen's Fund Insurance Company* (2004) 119 Cal.App.4th 671 [14 Cal.Rptr.3d 618]
- CAL 1998-152 (Adverse to Former Client)

Rule 1.7 Conflict of Interest: Current Clients[1]

(~~C~~a)[2] A ~~member~~lawyer shall not, without the informed written consent of each client:

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

(2) ~~Accept~~ 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.[3]

(~~B~~b)[4] A ~~member~~lawyer shall not accept or continue representation of a client without providing written disclosure to the client where:

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[1] The concepts in current rule 3-310(A), a definitional section, have been moved to the general terminology rule, proposed Rule 1.0.1.

[2] Current rule 3-310(C), which applies to joint and concurrent representations, where a directly adverse representation is potential [(C)(1)] or actual [(C)(2) and (3)], has been denominated paragraph (a) to correspond to Model Rule 1.7(a)(1), which concerns a representation that is directly adverse to another client. Model Rule 1.7(a)(1) provides that a concurrent conflict exists if "the representation of one client will be directly adverse to another client."

[3] In 1998, the State Bar considered an amendment proposal to rule 3-310(C) that would have added a new paragraph (C)(4) that would have been a codification of *Flatt v. Superior Court* (1994) 9 Cal.4th 275, which recognizes the prohibition on representing a client against another current client in a separate matter in which the second client is being represented. That proposal also recommended that a new paragraph (C)(3) would be included it to conform it to the addition of new paragraph (C)(4). The proposed amendments were never implemented. The two paragraphs provided (this Commission's style conventions have been substituted:

> (3) accept representation of a person or entity the lawyer knows or reasonably should know is an opposing party to a client in a separate matter in which the lawyer or the lawyer's law firm currently represents the client.
>
> (4) accept representation of a person or entity in a litigation matter in which the lawyer knows or reasonably should know an opposing party is a client of the lawyer or the lawyer's law firm, except as otherwise permitted or required by law.

A copy of the 1998 proposal is included with the 3-310 assignment materials.

[4] Current rule 3-310(B), which addresses personal, business and professional relationships or interests of a lawyer that might affect the lawyer's representation of the client, has been denominated paragraph (b) to correspond to Model Rule 1.7(a)(2), which addresses similar limitations on a lawyer's representation in more general language. MR 1.7(a)(2) provides a concurrent conflict exists where: "there is 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."

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

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

(a) the ~~member~~lawyer 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~~lawyer's representation; ~~or~~

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

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

(~~E~~c)[5] A ~~member~~ lawyer shall not, without the informed written consent of the client ~~or former client~~, accept ~~employment~~ representation adverse to the client ~~or former client~~ where, by reason of the representation of the client ~~or former client~~, the ~~member~~ lawyer has obtained confidential information material to the ~~employment~~representation.

~~Discussion:~~Comment

[1] [D1][6] ~~Rule 3-310 is not intended to~~ This Rule does not[7] prohibit a ~~member~~lawyer 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.

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[5] Current rule 3-310(E) has been denominated as paragraph (c), with references to "former client" deleted. A similar provision has been included in the Rule 1.9 mockup, (duties to former clients), but there the references to [current] "client" have been deleted.

This paragraph has been inserted to be faithful to this exercise, which is an attempt to carry forward the concepts and language of current rule 3-310 in several different rules that correspond to rule 3-310's Model Rule counterparts. However, it should be noted that the substance of 3-310(E), at least as it relates to current clients, is already covered by this Commission's proposed Rules 1.6 (duty not to disclose information protected by B&P Code § 6068(e)(1)) and 1.8.2 (duty not to use a client's information protected by § 6068(e)(1) to the client's disadvantage.) See also Comment [7]. Historically, however, the predecessor to rule 3-310(E) is former rule 4-101 and like the current rule, former rule 4-101 addressed both current and former client conflicts. Former rule 4-101 was applied by the State Bar Court in at least one disciplinary matter involving a concurrent client, as opposed to former client, conflict of interest (see In the Matter of Lane (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747). Accordingly, the current client component of rule 3-310(E) should not be summarily dismissed as extraneous.

[6] References to "[D1]," "[D2]," etc. are to the Discussion paragraph number in current rule 3-310. Discussion paragraphs 11 and 12, which provide guidance on 3-310(D) and (F), have been

[Moved] ~~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, subdivsion (e).)~~

[2] [D7] ~~Subparagraphs~~ Paragraphs (~~C~~a)(1) and (~~C~~a)(2) ~~are intended to~~ 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~~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 lawyer 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 ~~sub~~paragraph (~~C~~a)(1). Moreover, if the potential adversity should become actual, the lawyer must obtain the further informed written consent of the clients pursuant to ~~sub~~paragraph (~~C~~a)(2).

[3] [D8] ~~Subparagraph~~ Paragraph (~~C~~a)(3) ~~is intended to apply~~ applies to representations of clients in both litigation and transactional matters.

[4] [D9] 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 [paragraph (a)(3)] 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*, subparagraph (~~C~~a)(3) ~~is not intended to~~ 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.

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moved to the Rule 1.8.7 [3-310(D)] [aggregate settlements] and 1.8.6 [3-310(F)] [payments not by client], respectively.

[7] The Commission has largely eliminated the 1989-1992 Rules grammatical convention, "X rule is not intended to prohibit [or apply, etc.]" and substituted in its place a statement "X rule does not prohibit …."

However, in some instances, it would probably be appropriate to retain that structure, e.g., where the rule states: "X rule is not intended to abrogate …," for example, current rule 3-310, Discussion ¶. 12, which provides:

> 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. [Citation omitted].

In this latter situation, it might be possible for a court to conclude that the rule does indeed "abrogate" the relationship even if it was not the drafters' intention. The rule should not dictate to the courts a rule's legal effect, as opposed to providing guidance on how the rule should be interpreted and applied.

[5] [D3] Paragraph (~~B~~b) ~~is not intended to~~ does not apply to the relationship of a ~~member~~lawyer to another party's lawyer. Such relationships are governed by ~~rule~~ [Rule 3-320].[8]

[6] [D4] Paragraph (~~B~~b) ~~is not intended to~~ does not 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)~~ Rule 1.9 applies.

[7][9] [D5] While paragraph (~~B~~b) deals with the issues of adequate disclosure to the ~~present~~ current client or clients of the ~~member~~lawyer's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, ~~paragraph (E)~~Business and Professions Code § 6068(e)(1) and Rules 1.6 and 1.8.2 protect the confidential information of a current client, and Rule 1.9 ~~is intended to~~ protects the ~~confidences~~ confidential information of ~~another present or~~ a former client. These ~~two paragraphs~~provisions are to apply as complementary provisions.

[8] [D6] Paragraph (~~B~~b) ~~is intended to apply~~ applies only to a ~~member~~lawyer's own relationships or interests, unless the ~~member~~lawyer knows that a partner or associate in the

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[8] Note that RRC1 did not carry forward Rule 3-320 as a standalone rule but instead merged the concept into its proposed Rule 1.7, which tracked Model Rule 1.7. Specifically, the rule 3-320, concerning relationships with an opposing party's lawyer, falls within RRC1 Rule 1.7(a)(2), which prohibited a lawyer from engaging in a concurrent conflict, which exists if:

> (2) there is 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.

RRC1 specifically addressed the rule 3-320 concept in Comment [8] to its proposed Rule, which provided in part:

> Depending on the circumstances, various relationships a lawyer has may likewise create a significant risk that the lawyer's representation will be materially limited, for example, where * * * (5) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.

If the Commission were to take the current rule 3-310 "checklist" approach to conflicts, however, it might be better to retain rule 3-320 a standalone rule and give it a number in the 1.8 series of rules.

[9] See note 5, above. If the Commission were to recommend retaining current 3-310(E) as proposed in paragraph (c), then this comment would need to be revised as follows:

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

same firm as the ~~member~~lawyer has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.[10]

[Moved] ~~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).~~

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

[Moved] ~~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~~

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[10] Given the current Commission charge to minimize comments and not expand the rule in a comment, the concept in this comment should probably be included in the blackletter. It might be inserted in paragraph (b) as follows:

(b) A lawyer shall not accept or continue representation of a client without providing written disclosure to the client 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 a party or witness in the same matter;

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

(a) the lawyer or another lawyer in the lawyer's firm 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 lawyer's representation;

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

(4) The lawyer has or had, or knows that another lawyer in the lawyer's firm has or had a legal, business, financial, or professional interest in the subject matter of the representation.

~~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.~~

[9] [D10] 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].)

[10] [D2] Other rules and laws may preclude making adequate disclosure under ~~this rule~~Rule [1.0.1(e)]. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code ~~section~~ § 6068~~, subdivision~~ (e)(1) and Rule 1.6.)

Rule 1.8.6 Payments Not From Client

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

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

(~~2~~b) ~~Information~~ information ~~relating to representation of the client is~~ protected ~~as required~~ by Business and Professions Code ~~section~~ § 6068~~, subdivision~~ (e)(1) and Rule 1.6 is protected; and

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

(~~a~~1) such nondisclosure is otherwise authorized by law; or

(~~b~~2) the ~~member~~lawyer is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

~~**Discussion:**~~**Comment**

~~Paragraph (F)~~ This Rule 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].)[1]

[1] This comment is Discussion ¶. 12 of current rule 3-310.

Rule 1.8.7 Aggregate Settlements

~~(D)~~ A ~~member~~ lawyer 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.

Discussion~~:~~Comment

~~Paragraph (D) is not intended to~~ This Rule does not apply to class action settlements subject to court approval.[1]

[1] This comment is Discussion ¶. 11 to current rule 3-310.

Rule 1.9 Duties To Former Clients

~~(E~~a)[1] A ~~member~~ lawyer shall not, without the informed written consent of the ~~client or~~ former client, accept ~~employment~~ representation adverse to ~~the client or~~ a former client where, by reason of the representation of the ~~client or~~ former client, the ~~member~~ lawyer has obtained ~~confidential information~~ information protected by Business and Professions Code § 6068(e)(1) material to the ~~employment~~representation.

(b)[2] A lawyer shall not, without the informed written consent of the former client, knowingly[3] accept representation adverse to a former client of the lawyer's former firm where, by reason of the lawyer's association with the former firm, the lawyer has obtained information protected by Business and Professions Code § 6068(e)(1) material to the representation.

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[1] Paragraph (a) is derived from current rule 3-310(E), with several modifications:

First, references to "client," i.e., a current client, have been deleted because current client conflicts would be the subject of Rule 1.7 and protection of current client confidential information would be the subject of B&P Code § 6068(e)(1), Rule 1.6, and Rule 1.8.2.

Second, the term "representation" is substituted for "employment," the latter term apparently being a relic of the 1975 California Rules, which incorporated the term "employment" from the ABA Model Code of Professional Responsibility.

Third, the term "information protected by Business and Professions Code § 6068(e)(1) has been substituted for "confidential information." The former term is used in other rules concerning the confidentiality duty, i.e., Rule 1.6 and 1.8.2.

[2] Paragraph (b) would be a codification of the "modified substantial relationship test" as recognized in California case law. See, e.g., *Adams v. Aerojet-General Corp*., 86 Cal.App.4th 1324 (2001) (adopting Model Rule 1.9(b)). See also *Ochoa v. Fordel*, 146 Cal.App.4th 898, (2007); *Faughn v. Perez*, 145 Cal.App. 4th 592 (2006).

Compare Model Rule 1.9(b), which provides:

> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a law firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer, while at the former law firm, had acquired information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;
>
> unless the former client gives informed written consent.

The language in paragraph (b) is an attempt to track the language of current rule 3-310(E) rather than track the language of Model Rule 1.9(b).

[3] The term "knowingly" is taken from MR 1.9(b). RRC1 included the same term in its proposed Rule 1.9(b).

(c)[4] A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a client, or when the information has become generally known; or

(2) reveal information of a former client that is protected by Business and Professions Code § 6068(e)(1) except as these Rules or the State Bar Act would permit with respect to a client.

[4] Paragraph (c) is derived from Model Rule 1.9(c), modified to conform to style conventions the Commission has adopted. RRC1 included a similar provision.

ATTACHMENT 2

PLEASE NOTE: Publication for public comment is not, and shall not, be construed as a recommendation or approval by the Board of Governors of the materials published.

SUBJECT: Proposed Amendment to Rule 3-310 (Avoiding the Representation of Adverse Interests) of the California Rules of Professional Conduct.

PROPOSAL: The proposed amendment to rule 3-310 adds new subparagraph (C)(4) which would prohibit a member from accepting representation of a person or entity in a litigation matter in which the member knows or reasonably should know an opposing party is a client of the member or the member's law firm, unless the member obtains informed written consent of both of the member's clients. Expressly excepted from the prohibition is a situation where the member is permitted or required by law to bring such an action. The proposed amendment to the Discussion section includes language clarifying that: (1) an "opposing party" is a person or entity whose interest as a party in a matter is actually adverse to the interest of the member's or member's law firm's client; and (2) the term "litigation matter" includes arbitration and adjudicatory proceedings in any court or other tribunal, and preparation in anticipation of litigation.

This proposed amendment also includes proposed conforming amendments to current rule 3-310(C)(3). The amendments are intended to make the language of current rule 3-310(C)(3) correspond to the language proposed for new rule 3-310(C)(4). The concern is that deviations in the language of the two rules may create confusion and inconsistencies in interpretation of the two rules.

RATIONALE: The proposed addition of new rule 3-310(C)(4) is intended to address an inconsistency between what the Supreme Court has identified as a conflict of interest and what is found in current rule 3-310. (See Flatt v. Superior Court (1994) 9 Cal.4th 275 [36 Cal.Rptr. 373].) Under the Rules of Professional Conduct presently, when a lawyer accepts employment in a litigation matter in which an opposing party is the lawyer's current client, the lawyer is required to obtain the current client's consent only when the lawyer has acquired material confidential information by virtue of representing that client. (See Rule 3-310(E).) There is no rule that requires the client's consent when the lawyer has not acquired material confidential information. The proposed rule provides guidance to members on an important and difficult issue. The current proposal is a redraft in response to public comment received on a prior proposal.

SOURCE: State Bar of California Board Committee on Regulation and Discipline.

COMMENT DEADLINE: 5 p.m., Friday, March 20, 1998.

DIRECT COMMENTS TO:

Randall Difuntorum
Office of Professional Competence, Planning and Development
State Bar of California
100 Van Ness Avenue, 28th Floor
San Francisco, CA 94102-5238
(415) 241-2161

ATTACHMENTS:

1. Proposed new rule 3-310(C)(4) and proposed amended rule 3-310(C)(3) of the California Rules of Professional Conduct.

2. Background Materials prepared by the State Bar Office of Professional Competence, Planning and Development

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ATTACHMENT 1

Proposed New Rule 3-310(C)(4) and Proposed Amended Rule 3-310(C)(3) of the California Rules of Professional Conduct in Legislative Style
(underline shows additions, strikeout shows deletions)

Rule 3-310. Avoiding the Representation of Adverse Interests.

. . . .
. . . .

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

. . . .
. . . .

(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.~~ Accept representation of a person or entity the member knows or reasonably should know is an opposing party to a client in a separate matter in which the member or the member's law firm currently represents the client.

(4) Accept representation of a person or entity in a litigation matter in which the member knows or reasonably should know an opposing party is a client of the member or the member's law firm, except as otherwise permitted or required by law.

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Discussion

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ATTACHMENT 2

As used in subparagraphs (C)(3) and (C)(4) an "opposing party" is a person or entity whose interest as a party in a matter is actually adverse to the interest of the member's or the member's law firm's client as a party in that matter. The term "litigation matter" is intended to include arbitration, adjudicatory proceedings in any court or other tribunal, and preparation in anticipation of litigation. In the context of preparation in anticipation of litigation, the term "opposing party" is intended to include a person or entity the member knows or reasonably should know would be an opposing party in the litigation. (See Flatt v. Superior Court (1994) 9 Cal.4th 275 [36 Cal.Rptr. 373].)

Subparagraph (C)(3) is intended to apply when a member or a member's law firm represents Client A in a matter in which B, a non-client, is an opposing party, and while the member or the member's law firm is representing Client A in that matter, the member accepts B as a client in a separate matter. In the foregoing example, subparagraph (C)(3) is intended to apply when the member knows or reasonably should know (1) that B is an opposing party to A in a matter and (2) that the member or member's law firm represents A in that matter.

Subparagraph (C)(4) is intended to apply when a member accepts representation of X in a litigation matter in which Y, a current client of the member or the member's law firm, is an opposing party. In the foregoing example, subparagraph (C)(4) is intended to apply when the member knows or reasonably should know that Y is a current client of the member or the member's law firm.

Subparagraph (C)(4) addresses a situation that involves a member's duty of loyalty to a client. (See Flatt v. Superior Court (1994) 9 Cal.4th 275, 284-289 [36 Cal.Rptr. 373]; Truck Insurance Exchange v. Fireman's Fund (1992) 6 Cal.App.4th 1050 [8 Cal.Rptr.2d 228]; Jeffry v. Pounds (1977) 67 Cal.App.3d 6, [136 Cal.Rptr. 373].) The scope of subparagraph (C)(4) is expressly limited to litigation matters as defined in this Discussion. Subparagraph (C)(4) is not intended to create, augment, diminish, or eliminate other civil or fiduciary duties, including the duty of loyalty, that may exist in non-litigation matters or the non-disciplinary consequences of violating such duties. (See rule 1-100(A).)

As used in subparagraph (C)(4) "except as otherwise permitted or required by law" is intended to exclude from the rule, but is not limited to, (1) when the member brings a lawsuit against one or more clients, such as an interpleader, to have a court determination of competing claims to funds or property in the member's possession, (2) when, as a matter of public policy, a member is permitted to bring a lawsuit against a client (See Santa Clara County Counsel Attnys Assn. v. Woodside (1994) 7 Cal.4th 525 [28 Cal.Rptr.2d 617]), and (3) when a court order or ruling permits or requires the representation in the litigation matter.

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ATTACHMENT 2

BACKGROUND ON PROPOSED NEW RULE 3-310(C)(4) AND PROPOSED AMENDED RULE 3-310(C)(3) OF THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT

SUMMARY

On May 30, 1997, the Board Committee on Regulation and Discipline ("Board Committee") published two proposed amendments to rule 3-310 (Avoiding the Representation of Adverse Interests) for a 90-day public comment period: (1) a proposal to add new subparagraph (C)(4) with conforming amendments to existing subparagraph (C)(3) and related Discussion section amendments; and (2) a proposal to add new subparagraph (B)(4). Following review of the public comment received and upon the recommendation of COPRAC, the Board Committee did not recommend adoption of proposed new rule 3-310(B)(4) and ceased further consideration of that matter; and published for a 90-day public comment period the current revised proposal for a new rule 3-310(C)(4) and amended rule 3-310(C)(3).

BACKGROUND

On May 30, 1997, the Board Committee on Regulation and Discipline ("Board Committee") considered and published for 90-day public comment two independent proposed amendments to rule 3-310 (Avoiding the Representation of Adverse Interests): (1) a proposal to add new subparagraph (B)(4); and (2) a proposal to add new subparagraph (C)(4) with conforming amendments to existing subparagraph (C)(3) and related Discussion section amendments. These two proposals were prepared by the Committee on Professional Responsibility and Conduct ("COPRAC") following evaluation of an initial proposed amendment to rule 3-310 that was published by the Board Committee for public comment on April 19, 1996.

The proposed amendments to rule 3-310, contained in these public comment proposals, were developed to address the conflict of interest issue presented when a lawyer represents a client in a matter that is directly adverse to a current client of the lawyer where the matters are completely unrelated and pose no threat of improper disclosure of confidential information. This amendment process dates back to 1991 and is intended to complete an unfinished recommendation of the State Bar's Commission for the Revision of the Rules of Professional Conduct concerning rule 3-310. The Commission for the Revision of the Rules of Professional Conduct was the entity responsible for developing the global amendments to the California Rules of Professional Conduct that became operative in 1989 and 1992.

DISCUSSION

I. Purpose of Proposed New Rule 3-310(C)(4)

As was the case with the prior proposals circulated for public comment, the current proposal is intended to address an inconsistency between what the Supreme Court has identified as a conflict of interest and what is found in current rule 3-310. Under the California Rules of Professional Conduct presently, when a lawyer accepts employment in a litigated matter in which an opposing party is the lawyer's current client, the lawyer is required to obtain the current client's consent only when the lawyer has acquired material confidential information by virtue of representing that client. (See Rule 3-310(E).)[1] There is no rule that requires the client's consent when the lawyer has not acquired material confidential information.[2]

The overarching concept that a lawyer cannot accept employment adverse to a client currently represented by the lawyer has long been part of the California Rules of Professional Conduct. Former rules 3-310(B), 5-102(B) and 7 prohibited lawyers from concurrently representing clients whose interests are adverse (in the case of former rule 3-310(B)), adverse interests (in the case of former rule 5-102(B)), or conflicting interests (in the case of former Rule 7) without informed written consent. California courts have held that these rules applied when a lawyer represents one client against another. (See Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal.App.4th 1050, 1056 [8 Cal.Rptr.2d 228]; Jeffry v. Pounds (1977) 67 Cal.App.3d 6, 10 [136 Cal.Rptr. 373]; Civil Service Com. v. Superior Court (1984) 163 Cal.App.3d 70, 78 [209 Cal.Rptr. 159].) However, these rules were not limited to representations that were adverse to a client the lawyer represented in other matters. These rules also applied when a lawyer represented multiple clients in the same matter whose interests conflicted. (See, e.g., Buehler v. Sbardellati (1995) 34 Cal.App.4th 1527, mod. at 35 Cal.App.4th 1212 [41 Cal.Rptr.2d 104].) They also applied when a lawyer represents a client against an adverse party and the lawyer accepts the representation of the adverse party while the representation of the preexisting client is still pending. (Day v. Rosenthal (1985) 170 Cal.App.3d 1125 [217 Cal.Rptr. 89].)

When rule 3-310 was revised in 1991, former rule 3-310(B) was deleted and replaced by rule 3-310(C)(2) and rule 3-310(C)(3). Rule 3-310(C)(2) requires informed written consent when a member represents two or more clients in the same matter whose interests actually conflict.[3] Rule 3-310(C)(3) requires informed written consent when a member represents client A in a matter adverse to non-client B and B seeks to retain the lawyer in another matter while the representation of A against B is still pending. Although both of these rules are derived from principles embodied in former rule 3-310(B), neither addresses the representation of one client against a client represented by the lawyer in another matter.

Recognizing that its revision of former rule 3-310(B) had resulted in the gap noted above, the Commission for the Revision of the Rules of Professional Conduct ("Commission") developed a version of proposed rule 3-310(C)(4) when it revised the rest of rule 3-310 in 1991. The proposed rule was developed late in the process and was not circulated for public comment. As a result, the Commission determined that it was imprudent to recommend the rule for approval at the time the rest of rule 3-310 was forwarded to the Board of Governors. However, in its report to the Board of Governors, the Commission stated its support for such an amendment to the rules.

The absence of a rule has lead some to question whether the rules now condone representations adverse to an existing client when no confidential information in involved. This confusion has been augmented by Flatt v. Superior Court (1994) 9 Cal.4th 275, in which the Supreme Court reaffirmed the general rule that even when confidential information is not involved, a lawyer is prohibited from assuming a representation adverse to an existing client without consent. In so doing, the Court emphasized that when a lawyer represents one client against another, the primary value at stake is the lawyer's fundamental duty of loyalty to the client, rather than merely the protection of confidential information. (Ibid.)

As a result, there is now an inconsistency between what the Supreme Court has affirmed as a lawyer's ethical duty and what is found in rule 3-310. In addition, some authorities have strained the interpretation of rule 3-310(C) looking for a general rule regarding representations adverse to a client on the assumption that such a principle must be there. Indeed, in Flatt, the Supreme Court majority and minority both struggled with rule 3310(C) in seeking to apply it. (See Flatt v. Superior Court, supra, 9 Cal.4th at pp. 282 and 296, fn. 4.)

In the case of litigation matters, proposed rule 3-310(C)(4) would bring rule 3-310 into conformity with the principles enunciated in Elatt and the other case law in this area. It would resolve the confusion that has resulted from the absence of a rule and would address the Commission's concern that the State Bar promulgate a rule in this area.

II. The Current Proposal

There are two main differences between the current proposal and the prior public comment drafts, both of which have been instituted in response to concerns raised in the public comment. The first change is that the current proposal moves the scienter language section into the text of both proposed new rule 3-310(C)(4) and proposed amended rule 3-310(C)(3). In the prior proposal, the text of the rule was silent on the issue of a member's scienter and the scienter issue was instead addressed only in the rule Discussion section. COPRAC believes that this change improves the rule because it places the substantive scienter concept in the rule text where it properly belongs.

The second main difference is that the current proposal attempts to use clearer and simpler language in stating the rule standards. Several commentators called for greater clarity. COPRAC carefully reviewed all suggested revision language and redrafted both proposed new rule 3-310(C)(4) and proposed amended rule 3-310(C)(3) to incorporate a clearer and simpler statement of the rule standards contained therein.

In addition to these two main differences, the proposed Discussion section language has been modified to provide enhanced clarity. For example, the Discussion language addressing the definition of "an opposing party" has been refined and consolidated into one paragraph.

An issue that was addressed in much of the public comment but has not been changed in the current proposal is that the scope of proposed new rule 3-310(C)(4) extends to litigation matters (including arbitration, adjudicatory proceedings in any court or other tribunal, and preparation in anticipation of litigation) only, while proposed amended rule 3-310(C)(3) continues to apply to both litigation and transactional matters.

Individuals with questions regarding this matter may contact State Bar of California employees David Bell at (415) 241-2154 or Randall Difuntorum at (415) 241-2161.

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[1] No consent is required from the client the lawyer is representing in the matter; although written disclosure of the lawyer's relationship with the adverse client is required under rule 3-310(B)(1).

[2] However, written disclosure to the new client being represented in the matter is still required under rule 3-310(B)(1).

[3] Rule 3-310(C)(1) requires consent when representing two or more clients in a matter whose interests potentially conflict.