

**RRC2 – Rule 3-310 [1.7, 1.8.6, 1.8.7, 1.9, 1.10, 1.11]  
Post-Agenda E-mails, etc. – Revised (February 16, 2016)  
Drafting Team: Martinez (Lead), Cardona, Eaton, Harris, Stout**

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**February 9, 2016 McCurdy Email to Commission, Advisors, Liaisons & Staff:**

Please note the following changes to the February meeting agenda and materials:

1. III.D. Rule 1-400 [7.1 – 7.5]. This agenda item has been withdrawn from the February agenda and is anticipated to be placed on the March/April meeting agenda.
2. III.F. Rule 3-310 [ABA MR 1.7]. The Assignment Document attachment for Rule 3-310 [1.7] that follows the Report & Recommendation has been significantly revised. The materials for Rule 3-310 ATT1 are replaced by the attached document. The cover memo listing these attachments was also updated and is included in the replacement materials. The Report & Recommendation for 3-310 [1.7] remains unchanged.

For those who already printed the materials provided in the combined agenda PDF circulated on 2/5, this new attachment replaces PDF pages 142 – 202. See bookmark entitled “III.F. ATT1 Rule 3-310 [1.7] - Report & Recommendation - DFT1.6 (02-04-16)” and subparts.

An updated combined PDF of the entire agenda materials is also attached for those who have not yet printed this document. Note that this PDF document is over 320 pages.

These updates have been made to the online agenda posting as well.

Attached:

RRC2 - [3-310][1.7] - Report & Recommendation - DFT1.6 (02-04-16)- REVISED Cover Memo & Attachment (02-09-16).pdf

RRC2 - 02-19 & 02-20-16 Meeting Materials - COMBO - REV2 (02-09-16).pdf

**February 12, 2016 OCTC Email to RRC:**

\* \* \*

**D. Rule 3-310 [Avoiding the Representation of Adverse Interests]**

OCTC does not oppose a broad definition of conflicts of interest. “Conflicts of interest broadly embrace all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client, a third person or by his own interests.” (People v. Bonin (1989) 47 Cal.3d 808, 835, citing generally to ABA, Model Rules Prof. Conduct (1983) rule 1.7 and com. thereto.)

The Discussion following rule 3-310 speaks to conflicts where “written consent may not suffice [to waive the conflict] for non-disciplinary purposes.” OCTC does not oppose revisions to the rule that would prohibit the waiver of specific conflicts, such as the representation of multiple clients with adverse interests at trial.

Disciplinary case law holds that an attorney is conclusively presumed to have obtained adverse confidential information from a client or former client when she accepts new employment that is adverse and substantially related to the representation of the client or former client. That is, actual possession of confidential information need not be demonstrated. (See, In the Matter of Lane (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747.) The exception to the presumption arises only where the attorney can show that there was no opportunity for confidential information to be divulged. This case law should not be disturbed. Without the

conclusive presumption, a disciplinary proceeding would require the client or attorney to disclose the communications the rule is intended to protect.

The courts should be permitted to develop the law regarding ethical walls, imputation, and advanced waivers.

**February 14, 2016 Kehr Email re 1.8.6 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

I support this proposal, including your shortening of the first Commission's Comments ... except for an extra comma. We agreed at the last meeting that, when a comma comes shortly after the end of a series, the last two items in the series are not separated by a comma. To be consistent with this style, we should remove the comma that follows the word "charged" -

before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule.

**February 14, 2016 Kehr Email re 1.8.7 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Here are my thoughts on this proposal ---

- 1) Current rule 3-310(D) and proposed Rule 1.8.7 share a drafting flaw in speaking in terms of a lawyer entering into a settlement agreement. The lawyer does not b/c the lawyer is a party. This an instance in which the MR has it right: "A lawyer who represents two or more clients shall not participate in making an aggregate settlement ...."
- 2) The proposed Comment should be part of the Rule b/c it defines rather than explains when the Rule applies. There are several ways to do this, but I suggest making the current proposal paragraph (a) and labeling the proposed Comment as paragraph (b).
- 3) I think it is important to clarify in a Comment which settlements come within the scope of this Rule: "An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters." More could be said, but I think this is the bare minimum.
- 4) Some of the first Commission's Comments could be replaced with this: "Also see Rules 1.2(a) (concerning client's decision making authority) and 1.4 (concerning a lawyer's duty to communicate with a client).

**February 14, 2016 Kehr Email re 1.9 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Here are my thoughts on this proposal ---

- 1) The pros and cons of proposed paragraph (a)(2) are set out beginning at the foot of p. 18 of 24, but there is another con. While it certainly is correct that the *Wutchumna* line of cases imposes on lawyers a narrow continuing duty of loyalty as well as a continuing duty of confidentiality to former clients, I think it is right to say that, until the recent opinion in *Oasis West Realty v. Goldman*, 51 Cal.4th 811 (2011), all applications of this standard involved a lawyer's subsequent engagement by a new client. This new proposal is an effort to state the

holding of *Oasis West* in rule form, but I don't think the opinion can be captured that neatly. The Court of Appeal had concluded that Goldman had not disclosed confidential information. *Id.* at 819. The Supreme Court reversed, in part because it found it reasonable to infer that Goldman was using confidential information adverse to his client. *Id.* at 822 *passim*. Thus, *Oasis West* is narrower than proposed (a)(2) in that, while referring to the continuing duty of loyalty, it focused on Goldman's possession and presumed use of confidential client information adverse to his former client. That topic is covered by Rule 1.9(c)(1) and needs no restatement in paragraph (a). The issue with (a)(2) is not theoretical but would have practical consequences. The most obvious of these is that it seemingly would prevent a lawyer from suing a former client in any way related to the subject of a former representation, including for unpaid fees. The more subtle concern is that proposed (a)(2) would come into play in situations in which there is no reason to think the lawyer is using a former client's confidential information. I offer this hypothetical: A Law Firm represents Client A in obtaining institutional financing for Client A's acquisition of a company whose sole asset is a patent that Client A intends to commercialize. The Law Firm obtained no confidential information regarding the patent or Client A's manufacturing or marketing plans b/c the nature and value of the patent did not come into play in obtaining institutional financing. After its representation of Client A ends, Law Firm accepts the representation of Client B, and Client B: (i) seeks to attack the validity of the patent; or (ii) seeks to obtain financing for R&D on a technology that threatens to make Client A's patent passé; or (iii) seeks to corner the market on a raw product needed to manufacture under the patent; or (iv) simply is a business competitor of Client (A). It is doubtful whether any of these four situations should be prohibited, but that might well be the result of proposed (a)(2). I think it is better to treat *Oasis West* as a confidential information case, avoid an overstated paragraph (a) that would have unintended and undesirable consequences, and leave to case law the development of the loyalty prong of *Wutchumna*. I would remove (a)(2) and collapse (a) and (a)(1) into a single paragraph.

2) I generally agree with the shortening of the Comments, but I do think we should include a discussion of the meaning of "matter". I suggest including at least the second and third sentences of the first Commission's Comment [4] and the first sentence of its Comment [6]. The first Commission was asked to define "matter" and, while this is not possible, discussion of the concept would provide helpful guidance as the application of the Rule. In addition, this insertion would avoid any attempt to distinguish the continuing duty in a non-litigation matter from the duty in litigation.

The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1].

**February 14, 2016 Martinez Email re 1.9 to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

I think I agree with your concerns about an overly broad reading of *Oasis* and *Wutchumna*. I believe Kevin had similar concerns. We attempted to codify *Wutchumna*, but with limited success (or bit off more than we can chew). I had proposed language to narrow (a)(2) so that it would be more consistent with *Oasis* and the possession of confidential information. See attached. We could remove (a)(2) and collapse (a) and (a)(1), as you suggest, but perhaps there is another way to "safely" capture *Wutchumna* and *Oasis*.

Attached:

**February 4, 2016 Martinez Email re 1.9 to Drafting Team, cc Difuntorum, Mohr, A. Tuft & Andresen:**

Thanks, Andrew. One big concern: The notion under (a)(2) that a lawyer can obtain consent to engage in conduct that will injuriously affect the former client seems incongruous and may not sit well with the Supreme Court or the idea that some adverse conduct is not consentable. At least on its face, (a)(2) suggests that a client could consent to the lawyer harming (“injuriously affect”) the former client. The Supreme Court could view the consent option in (a)(2) as contrary to Wutchumna’s flat prohibition that a lawyer may not do anything to injuriously affect a former client. Or it may view it as going too far, perhaps contrary to Oasis.

One possibility would be to merge parts of 3-310(E) into (a)(2) as follows:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter:
    - (1) 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; or
    - (2) ~~engage in conduct that injuriously affects the former client in any matter in which the lawyer formerly represented the client,~~ engage in conduct adverse to the client in the same or a substantially related matter where, by reason of the representation of the client, the lawyer obtained confidential information material to the representation;
- unless the former client gives informed written consent.

I believe this approach is more consistent with Oasis and links the duty of loyalty to possession of confidential information. At the same time, the idea would be to avoid making an overly broad pronouncement on the duty of loyalty and to avoid the suggestion that the client can consent to what could otherwise be viewed as a breach of fiduciary duty.

Since Lee and Dean could not be on the last call I believe it’s important to get their take on this before this rule goes out tomorrow.

**February 14, 2016 Martinez Email re 1.8.7 to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

- 1) The reason we did not follow the ABA language was out a concern that “participate in making an aggregate settlement” could be viewed as prohibiting even preliminary discussions leading to the settlement and reach attempted violations of the rule. Also, current rule 3-310(D) uses “enter into an aggregate settlement.” RRC-1 addressed this with a comment stating that the rule “permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients.”
- 2) Agree, it’s an exception to the rule.

- 3) I agree we need a definition of “aggregate settlement.” I’m not sure the RRC-1 definition does the job. In a civil case the clients agree to accept (or pay) one total sum. An aggregate settlement binds the clients collectively. Instead of defining the term, perhaps we can use that as an example.
- 4) The Commission Charter has made us “comment-averse,” but this rule may need more clarification via comments. I think it would help if we adopted something like RRC-1 Comments 1-4.

**February 15, 2016 Kehr Email re 1.7 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Paragraph 3 of the Commission's Charter begins: "The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law ...." Proposed Rule 1.7 would effect multiple substantive changes in California law without any demonstration that our current rules are deficient or fail to protect the public ---

1) Proposed paragraph (a) begins with a formulation that misstates the duty of undivided loyalty by speaking of when a "representation of the client is directly adverse to the representation of another current client ...." This suggests that the lawyer must be representing the second client with respect to the subject of the lawyer's representation of the first client. The correct statement is that the duty of undivided loyalty generally prohibits a lawyer from being adverse to a current client in any matter, even if unrelated to the subject of the current representation of that client. A lawyer who represents a client, directly adverse to another current client, violates the duty of undivided loyalty unless each client provides informed written consent. The highlighted portion of the quoted language would fundamentally alter and narrow the current rule by creating a direct adversity conflict only when a lawyer's work for one client is adverse to the work the lawyer is performing for the other current client.

2) If the first portion of paragraph (a) were corrected, it would be a complete statement of the direct adversity rule. As a drafting matter, I would not include examples of direct adversity b/c doing so would tend to narrow the reader's focus. However, as a substantive matter the subparagraph (1) and (2) examples are incorrect. This is because they introduce a second standard directed to adversity between the clients. Except to the limited extent provided in current rule 3-310(B), it is wholly irrelevant to the lawyer's performance of the duties owed to a client that the client is adverse to another of the client of the lawyer. A lawyer may represent business competitors or litigation adversaries so long as the lawyer does not represent either client in a way that makes the other client the identified target of the lawyer's work. Indeed, if a client were permitted to prevent a lawyer from representing the client's business competitors, much lawyer specialization would be impossible. This obviously would be highly undesirable (and contrary to the spirit of Rule 5.6). Proposed paragraphs (a)(1) and (2) would work a sea change in California conflicts law that would injure lawyers and their clients with no corresponding benefit.

3) In proposed paragraph (a) and throughout the proposal, the draft changes "accept or continue representation of a client" (a phrase used repeatedly in our current rules) to "represent". They presumably mean the same thing, but the phrasing of our current rules recognizes that a representation that presents no potential conflict at the outset later could due to future developments, such as the addition of new parties, new causes of action, or new witnesses. I urge retention of our current language.

4) To summarize the preceding paragraphs, the correct statement of the direct adversity rule is that, except with the informed written consent of each affected client, a lawyer may not accept or continue a representation that is directly adverse to another of the lawyer's current clients.

5) Proposed (b) is part of what the Report describes as a hybrid approach, and it is argued (at Report p. 25 of 33) that this drafting method would "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 ...." However:

a. Proposed paragraph (b) would make two material changes in current California law by introducing the concepts of "significant risk" and "substantial adverse effect". The full statement as proposed is: "... 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 ...." These are standards that are unknown in California law and not defined in the proposed Rule or Comments. The proposed language is borrowed from the Model Rules and states in indefinite terms a conceptual framework. The Model Rules attempt to provide substance through 35 often densely written paragraphs that will help only the most detail oriented practitioners understand the application of the concepts stated in the Rule. Adding indefiniteness would not enhance client protection. It also would serve as a new area of risk for lawyers, who would be threatened by unexpected claims regarding the lawyer's duties under these vague standards.

b. The Report language quoted above seems to suggest that the indefinite MR approach would increase client protection by expanding a lawyer's disclosure and consent obligation to the logical extremity of what a conflict might be. However, it is almost impossible to think of a conflict that would not be covered - and covered specifically - by California's current check-list approach.

c. The Report, again on p. 25 of 33, argues that adopting portions of the MR approach will promote a national standard. There are two flaws in this. First, the "significant risk" and "substantial adverse effect" standards have not been universally adopted. For example, neither one is found in D.C. Rule 1.7 or in Texas Rule 1.06 and the latter is not found in N.Y. or Illinois Rule 1.7. There is no national uniformity to be found. Second, even where a particular MR has been widely adopted in its original form, there is no national uniformity b/c the conceptual and aspirational approach of the MRs has led to widely varying interpretations among the states.

6) Instead of attempting to define "significant risk" and "substantial adverse effect" (both impossible tasks), proposed paragraph (b) offers two examples in its subparagraphs. I will discuss the two examples in what follows, but it is important to first focus on the result of having these two new undefined terms. The adoption of these terms would cast California's law on lawyer conduct adrift from the countless California appellate opinions based on the current California Rules of Professional Conduct. Current civil case law uses the RPCs for liability, disqualification and fee purposes, and no lawyer or judge would be certain of how the addition of these new terms changes the applicability of California's extensive case law. The same would be true for disciplinary purposes with California's extensive published disciplinary opinions, and in both situations with the many published advisory ethics opinions of the State Bar and the Los Angeles, San Francisco, and other local bar associations.

7) Turning to the subparagraphs, proposed paragraph (b)(1) carries forward current (C)(1). However, it is worth noting that the current language ("and the interests of the clients potentially

conflict") is understood to refer to the possibility that the joint clients' interests will affect their lawyer's performance of the duties the lawyer owes to each jointly-represented client. The best single explanation of when a joint representation creates a potential conflict of interest for the lawyer is found in Cal. State Bar. Op. 1999-153. This could be explained in a Comment.

8) Proposed paragraph (b)(2) attempts a second example of when there would be a "significant risk" of "substantial adverse effect". For this purpose it selects out current rule 3-310(B)(1) but in the process makes substantive changes in the current rule.

a. Current (B)(1) applies when the lawyer has a current relationship with a party or witness in the same matter, but proposed (b)(2) expands this to include former lawyer-client relationships. Former relationships now are covered by B(2) and (3), but both have knowledge standards that are missing from proposed (b)(2). This proposal would make each lawyer a guarantor of his or her knowledge, not just of former lawyer-client relationships, but also of all legal, business, financial, professional and personal relationships. This would include countless relationships for which no conflicts check is possible. Even if limited to lawyer-client relationships, no lawyer can guaranty complete knowledge of former relationships (in addition to the inherent imperfection of conflicts checks, many lawyer began practicing before there were computerized client records or practiced in other law firms whose records are not available to the lawyer - this is why the knowledge standards of current (B)(2) and (3) are vital.

9) Proposed paragraph (c) to an extent carries forward current rule 3-310(B), however:

a. The extension of what were (B)(1) and (B)(4) to other firm lawyers is consistent with the current rule's Discussion, but this is not true of the proposed extension of (B)(2) or (B)(3). This can be seen from the current Discussion.

b. Proposed (c)(2) both expands and contracts current (B)(3). The expansion is that the proposal: (i) removes the requirement of substantiality from the current "would be affected substantially by resolution of the matter; and (ii) changes "would be affected by resolution of the matter" to the far broader "could be affected substantially". I am unable to locate any explanation in the Report for these heightened requirements, and I have no reason to think the current rule is deficient in these respects.

c. The Report describes proposed (c)(4) as carrying forward current rule 3-320. This is not correct as the proposal differs substantively from the current rule:

i. Current rule 3-320 applies only to the situation in which a lawyer has a personal relationship with another party's lawyer while the proposal instead speaks of a lawyer's relationship with a party or witness and doesn't mention another party's lawyer.

ii. Current rule 3-320 requires only "notice" to the client that the lawyer has one of the described relationships, not "disclosure". Our current rules set out a nuanced gradient of importance to potential conflicts from the notice requirement of 3-320, to the disclosure requirement of 3-310(B), to the informed written consent requirement of 3-310(C) - (F), to the independent counsel requirement of 3-300 and 3-400(B), to the prohibitions of 3-120 and 3-400(A). That scheme is lost by this proposal.

iii. Consistent with the recognition that the rule 3-320 conflicts are the lowest level of concern, the current rule requires notice only with respect to the individual lawyer's personal relationships. The proposed extension of rule 3-320 would materially alter the rule. As is certain from the text of the current rule, it applies only when the individual lawyer has one of the identified personal relationships with adverse counsel, and as can be seen from the current official Discussion, it applies to the single lawyers with an adverse lawyer actively involved in the matter.

10) Proposed paragraph (d)(1) would add a standard of the lawyer's belief in his or her ability to provide competent representation. This is inadvisable b/c:

a. The lawyer's belief is irrelevant b/c the lawyer's obligation to provide competent advice is absolute and not to any extent measured by the lawyer's confidence. See current rule 3-400(A), *Ismael v. Millington*, 241 Cal. App.2d 520, 527 (1966) (saying that a lawyer "may not set a shallow limit on the depth to which he will represent the [client]."), and Cal. State Bar Op. 1989-115 (saying in substance, among other things, that the duty of competence cannot be waived in advance). The belief standard comes from the Model Rules, and rule 3-400(A) is substantively different from MR 1.8(h).

b. Adding the consent standard will mislead lawyers into thinking that their confidence in their own ability is a green light to proceed, and this will result in additional client injury and disciplinary and civil consequences for lawyers.

c. Our current conflict rules have no competence reference, and none is needed. If the Commission decides to mention the obvious, that a lawyer is obligated to provide competent representation, this could be done by a cross-reference Comment (such as: "A lawyer who has made a disclosure or obtained informed written consent as required by this Rule nevertheless has a duty of competence. See Rule 1.8.8."). I would skip the Comment.

11) Proposed paragraph (d)(2) is taken from MR 1.7(b)(2). I don't know what it is intended to add to the definition of conflicts and their handling in this Rule. Although there are 35 paragraphs of Comments to MR 1.7, none of them refer to this paragraph, and the Annotated Model Rules also do not explain this paragraph. I believe it adds nothing and should be removed.

12) Proposed paragraph (d)(3) is correct as far as it goes. The same point now is handled by a rule 3-310 Discussion paragraph that refers to *Woods, Klemm, and Ishmael*. *Klemm* does stand for the (d)(3) rule, but *Woods* and *Ishmael* do not involve a lawyer on both sides of a litigation. This means that the current Discussion is broader than (d)(3). I would remove (d)(3) and leave it to a Comment, and that Comment is included and would seem to make (d)(3) unnecessary.

13) Proposed paragraph (f) provides a definition of "disclosure" that is not consistent with the definition implicit in Rule 1.0.1(e) or with current rule 3-310(A) and appears to be a diluted form of both. I see no reason to use a weakened version of the disclosure requirement and would copy the more rigorous Rule 1.0.1 version ("the lawyer has communicated and explained (i) the relevant circumstances and (ii) the actual and reasonably foreseeable adverse consequences and material risks of the proposed conduct and the reasonably available alternatives to the proposed conduct").

14) The concept of "direct adversity" - in the sense of a lawyer being directly adverse to a client, not in the incorrect sense stated in proposed paragraph (a) - already is part of California law. However, the exact phrase is not found in our current rules. The use of that phrase therefore will cause confusion and suggest a change in the scope of a lawyer's duty of loyalty. This makes it essential to include in the Comment an explanation of what is meant by direct adversity.

15) The first sentence of Comment [1] is incorrect. The Rule does apply when a lawyer represents different clients who have antagonistic positions on the same legal question, but in that situation the lawyer in representing one client normally is not directly adverse to another client who takes a different position on the same issue in a different matter. The balance of Comment [1] is one aspect of the explanation of direct adversity but without making that connection.

16) Proposed Comment [4] merely repeats the Rule and is unnecessary, but if kept it should refer to paragraph (a).

17) The first sentence of proposed Comment [7] is wrong in referring to unforeseeable developments (it makes no difference whether the development is foreseeable or not), and the consequence of a change is not limited to the creation of a new conflict (a material change triggers the obligation to make a new disclosure and, where applicable, obtain a new written consent).

The introduction of MR concepts that are unknown in California's history of appellate opinions on the duties of lawyers to their clients will call into question the continuing validity of our legal history, be inconsistent with the Supreme Court's direction that we adhere to California's tradition of rules written narrowly for disciplinary purposes, and leave California lawyers, courts, and disciplinary authorities without the guidance they now enjoy. If it were intended to not alter California's current standards, the only way of being certain to accomplish this would be to keep them. If, on the other hand, it were intended to change California's standards, we all are entitled to know in exactly what respects.

B/c of the number and detail of my comments, I have attached a revised draft that might assist in following my concerns. Because I don't know the direction the Commission will take, I have not spent the time needed to propose Comments.

Attached:  
RRC2 - [3-310][1.7] - Rule - DFT2 (02-13-16)RLK.docx

**February 15, 2016 Tuft Email re 1.7 to Drafting Team, cc Difuntorum, Mohr, A. Tuft & McCurdy:**

Please see the attached memo on Rule 1.7.

***February 15, 2016 Tuft Memo re 1.7 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:***

I offer the following comments on the conflict concepts in the draft of Rule 1.7

1. I am concerned that the proposed "hybrid" approach will not enhance public protection and instead would create greater confusion than already exists between the generally accepted formulation of current client conflicts and California's unparalleled conflicts rule. Long before there were lawyer codes, the law identified the two conflict situations in Model Rule 1.7(a)(1)

and (2) that risk impairment of a lawyer's duty of loyalty and independent judgment in representing current clients.<sup>1</sup> California case law has historically affirmed these concepts.<sup>2</sup> Public protection is best achieved by having a rule that defines a concurrent client conflict consistent with the standard in Model Rule 1.7 and the Restatement of the Law Governing Lawyers. We should use the same common vocabulary as other states in defining what constitutes a concurrent conflict of interest. Doing so would not amount to a significant change in the law; instead, it would conform the rule to the law. Nor would adopting the Model Rule framework require extensive comments. There are many treatises and other resources that provide guidance on the meaning and application of the definitional standard.<sup>3</sup>

2. The two parts of the definitional standard work together rather than independently. As discussed in various treatises and text books, rarely does a situation arise that does not require a lawyer to analyze conflicts under both 1.7(a)(1) and (a)(2). There is often overlap between the two depending on the situation. This is frequently the case, for example, in representing multiple clients in the same matter. Even if the clients' interests are aligned and there is no "potential" conflict,<sup>4</sup> the lawyer's responsibilities to joint clients is likely to limit the lawyer's duties of undivided loyalty and independent judgment to each. Lawyers are required to consider both elements of the rule in analyzing current client conflicts.

3. California's rules historically recognized both types of current client conflicts. The 1975 rules and the 1989 rules required the clients' written consent when the lawyer had a relationship with another party interested in the representation, or if the lawyer had an interest in the subject matter, and when the lawyer represented clients with conflicting interests.<sup>5</sup> The rule changed in 1992, mainly at the behest of large law firms who argued that it was too disruptive and unnecessary to require written consent based on a lawyer's relationships. The current rule is under-inclusive and lacks public protection by not requiring client consent in situations where the lawyer's responsibilities to third persons, former clients and as a result of the lawyer's own interests create a significant risk of impairing loyalty and professional judgment. It has also proven to be unworkable because it requires written disclosure of relationships that pose no risk of impairment of the lawyer's function and there is no plausible conflict of interest.<sup>6</sup> Current

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<sup>1</sup> Rest. §121, Reporter's Notes; See *Williams v. Reed*, 3 Mason 405, 418 (1824) (Justice Story) "[w]hen a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment or endanger his fidelity." See also *Developments in the Law – Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244 (1981).

<sup>2</sup> See, e.g. *Anderson v. Eaton*, 211 Cal. 113, 116 (1930); *Flatt v. Superior Court*, 9 Cal 4<sup>th</sup> 275, 282 (1994); *Havasu Lakeshore Investments, LLC v. Fleming*, 217 Cal. App. 4<sup>th</sup> 770, 778 (2013); *Sharp v. Next Entertainment, Inc.*, 163 Cal. App. 4<sup>th</sup> 410, 426 (2008).

<sup>3</sup> RRC-1's proposed rule 1.7 contained many comments as guidance that are not consistent with RRC-2's charge and are not necessary. There are many resources for researching conflict of interest issues. One commonly used on-line resource is Freivogel on Conflicts. [www.freivogelonconflicts.com](http://www.freivogelonconflicts.com).

<sup>4</sup> See, e.g. *Havasu*, supra – a hypothetical conflict does not trigger Rule 3-310(C)(1).

<sup>5</sup> Rules 5-102(A) and (B) (1975); Rule 3-310(A) and (B) (1989).

<sup>6</sup> Restatement §121, Comment c(1) – "Unless there is risk that the lawyer's representation will be affected 'adversely,' there is no conflict of interest."

paragraph (B) has received minimal disciplinary enforcement and very limited application in civil courts.

4. A national consensus has developed on the definition of a concurrent client conflict. The Restatement of the Law Governing Lawyers (ALI 2000) defines a concurrent client conflict in §121 and explains the application of the standard in §§125 – 135. Model Rule 1.7 was amended in 2002 to provide a concise definition and an enforceable disciplinary standard. In the past 15 years, virtually every jurisdiction has adopted the same or a substantially similar definition of a concurrent conflict of interest.<sup>7</sup> Adhering to the common vocabulary and framework in California will foster compliance and enhance public protection.

5. The subject of attorney conflicts of interest has dramatically increased since the current rule was amended in 1992. Conflicts is probably the most litigated issue of professional responsibility and is the subject about which lawyers most frequently seek ethics advice. Conflicts analysis has become an integral part of lawyering and the consequences to the lawyer and the client of not having the right response most often occurs in the civil and not the disciplinary system. Law schools generally teach conflicts of interest based on the Model Rules and the Restatement. Applicants for admission to the State Bar are tested on the national standard. Lawyers and firms frequently use treatises and ethics opinions based on the national standard to identify and resolve conflicts.<sup>8</sup> It does not serve the public to have different rules on conflicts, one for discipline and another for the every day practice of law.

6. The terms used in defining “materially limited” conflicts are clear and understandable. “Significant risk” requires a probability calculation. Similar propositions exist in other rules of professional conduct.<sup>9</sup> The mere possibility of a conflict does not trigger the rule, but a genuine likelihood does. Such calculations require ongoing attention by lawyers and law firms. “Directly adverse” conflicts emphasize the relationship of adversity between clients. In “materially limited” conflicts, the emphasis is on how a lawyer’s judgment, work product and advice is affected by the lawyer’s interests and duties to others. The determination is based on an objective standard and is not subjective. The critical question is whether the lawyer’s interests and responsibilities “will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.”<sup>10</sup> Independent judgment is central in Rules 2.1, 1.8(f) and 5.4. It should also be an important public protection feature of the current client conflicts rule.

7. The goal in regulating conflicts of interest is avoiding the threat of impairment of the lawyer’s function. Paragraph (a) should, therefore, be triggered if the representation of a client “will be” (instead of “is”) directly adverse to the representation of another current client.

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<sup>7</sup> 41 jurisdictions has adopted Model Rule 1.7 verbatim or a slightly modified version. The rule in all but a few of the remaining states also regulate “direct adversity” and “material limitation” conflicts (Alabama, Florida, Ohio, Michigan and Mississippi). Georgia’s rule is a variation of Rest §121. D.C., Texas and North Dakota employ a different standard. Texas permits a law firm to sue a present client on an unrelated matter. However, the 5<sup>th</sup> Circuit does not apply the rule in federal cases.

<sup>8</sup> COPRAC opinions also frequently cite the Model Rules in analyzing conflict issue for California lawyers.

<sup>9</sup> E.g., Rule 3-100(B), Rule 4-400 and proposed Rule 1.14. See also current Rule 3-310(B)(3).

<sup>10</sup> Model Rule 1.7, Comment [8]. This comment is important and should be included in the rule.

8. The phrase “written consent from each affected client” should be changed to “written consent of each client.”

9. It is not practical, nor is it necessary, to have a “checklist” approach to current client conflicts. Conflict problems are pervasive in every area of practice and can arise at any point during the representation in an endless variety and widely disparate factual settings. Paragraph (a) states the prohibition succinctly without the two examples. It may be useful, however, to point out in a comment that paragraph (a) applies if the representation involves the same matter, a related matter or an unrelated matter as the representation of another current client.

10. A more concise alternative to subparagraphs (a)(1) and (2) would be to end paragraph (a) with the following phrase:

“regardless whether the representation of the client is in the same or a separate matter.”

11. The use of “directly adverse” in paragraph (a) in conjunction with “actual conflict” in subparagraphs (1) and (2) creates unnecessary confusion. The “actual” vs. “potential” distinction is difficult to draw in many factual settings and the terms are no longer used to describe conflicts in most jurisdictions. The “directly adverse” test requires actual adversity to trigger the rule. Therefore, the phrase “and the clients' interests actually conflict” seems redundant and should be deleted.

12. Paragraph (b) should include the lawyer's responsibilities to a former client.

13. The phrase “will have a substantial adverse effect” in paragraph (b) appears to harken back to the ABA Model Code.<sup>11</sup> The report does not explain the intended distinction between this standard and the definitional standard in the Model Rules and the rule adopted in most states. Using different vocabulary to define the same type of conflict may tend to confuse lawyers.

14. Referring to interests that “potentially conflict” in paragraph (b)(2) perpetuates the confusion between “potential” and “actual” conflicts.

15. Attempting to parse current paragraph (B) (1) – (4) between paragraphs (b) and (c) raised a number of issues. To being, paragraphs (B)(2) and (C)(1) appear to be redundant in a conflict of interest rule. Either the lawyer has a conflict of interest based on the lawyer's relationship with a party or witness or not. An insignificant relationship with a party or witness that poses no risk or threat to the lawyer's function is not a conflict of interest. The failure to comply with the written disclosure protocol in the conflicts rule should not expose a lawyer to discipline. If the relationship poses a significant risk of impairing the lawyer's function, it should fall under paragraph (b). If the relationship is something a client would like to know in selecting or changing lawyers, it should fall under Rule 1.4 or not at all.

16. The focus in most states is on the lawyer's responsibilities and not the lawyer's relationships. There is good reason for the distinction. The lawyer's duties to others and the lawyer's own interests are likely to threaten impairment of professional judgment and client loyalty. Material limitation conflicts based on a lawyer's responsibilities arise in an incalculable number of ways: A lawyer has a fiduciary relationship with another person (as a partner, officer, director, trustee, executor, etc.); opposing counsel or opposing counsel's law firm is a client of

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<sup>11</sup> ABA Model Code Definition (1). North Dakota continues to employ this standard.

the lawyer or the lawyer's law firm; a lawyer is a client of the opposing counsel's firm; a lawyer seeks employment with another party or the party's law firm; a lawyer is hired as an expert witness; a lawyer serves as a public official or part-time in a public office; a lawyer serves as escrow in the transaction. Material limitation conflicts are apt to arise frequently in certain practice areas such patent and IP matters.

17. The situations in paragraph (c) have received limited interpretation or enforcement. There is a lack of consensus among lawyers, law professors and commentators, for example, on what “could be affected by resolution of a matter” in paragraph (c)(2) means and why the focus is on the third person and not on the lawyer's function. Similarly, it is unclear what “professional interest” in the subject matter of the representation in paragraph (c)(4) means since every lawyer has a professional interest in a client's matter. There hasn't been a satisfactory explanation why the drafters did not include “personal interest” in current paragraph (B)(4).<sup>12</sup>

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<sup>12</sup> Compare Model Rule 1.7(a)(2); Rest. §125, comment “b” – “Personal interests of a lawyer that are inconsistent with those of the client might significantly limit the lawyer's ability to pursue the client's interests” See, e.g. *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4<sup>th</sup> 811,822 (2011) – when read as a whole, paragraph (b) requires a lawyer to disclose any personal relationship or personal interest that the lawyer knows or reasonable should know could substantially affect the exercise of the lawyer's professional judgment.

**Rule 1.7 Conflict of Interest: Current Clients**

- (a) **Representation directly adverse to current client.** A lawyer shall not, without informed written consent from each client, accept or continue the representation of a client if the representation is directly adverse to another client the lawyer currently represents in another matter.
- (b) **Representation of multiple clients in one matter.** A lawyer shall not, without the informed written consent of each client:
  - (1) Accept or continue 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.
- (c) **Representing a client's adversary.** A lawyer shall not, while representing a client in a first matter, accept in a second matter the representation of a person or organization who is directly adverse to the lawyer's current client in the first matter, without the informed written consent of each client.
- (d) **Disclosure of relationships and interests.** 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; or
  - (2) The lawyer knows or reasonably should know that:
    - (a) the 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 lawyer's representation; or
  - (3) The lawyer 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 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.
  - (5) The term "disclosure" for purposes of paragraph (d) means the communication and explanation of: (i) the relevant circumstances; (ii) the actual and reasonably foreseeable adverse consequences and material risks of the proposed conduct; and (iii) the reasonably available alternatives to the proposed conduct.
- (e) **Relationship with Other Party's Lawyer.** A lawyer shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or has an intimate personal relationship with the member, unless the lawyer informs the client in writing of the relationship.