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February 16, 2016

Hon. Lee Smalley Edmon, Chair  
and all members  
Second Commission for the Revision of the Rules of Professional Conduct  
State Bar of California  
**BY EMAIL ONLY c/o Lauren.McCurdy@calbar.ca.gov**

Re: Proposed draft of Rule 1.7 (CA 3-310)

Dear Chair Edmon and members of the Rules Revision Commission:

I address the below comments, as well as my statement before the commission this coming weekend, on behalf of California law professors teaching legal ethics or the equivalent at California law schools. These professors were among the 55 signatories of the so-called "ethics professors' letter" sent to the justices of the California Supreme Court in March 2104. Since I learned of this agenda item only a few days ago and did not begin contacting the law professors until yesterday, I do not have a final list of those on whose behalf I will speak, but will provide it to you at the time of my remarks at your meeting. Thus far, however, well over half of those signatories have approved of the position outlined below.

The issues we see with respect to proposed Rule 1.7 as drafted by the drafting committee are as follows:

1. There is redundant, ambiguity-creating language in section (a), beginning with the word "including" and continuing with subsections (1) and (2). This section of the rule should say "directly adverse to another current client" and stop there. This would track ABA MR 1.7(a)(1).
2. The standard in section (b), "a significant risk the lawyer's responsibilities ... will have a substantial adverse effect" is a far less client-protective than the ABA language: "a significant risk that the representation ... will be materially limited by the lawyer's responsibilities...." The more client-protective ABA language should be adopted.
3. Section (b)(1) would apply the standard in (b) only to representation of two clients in the same matter where the interests "potentially conflict." The actual/potential distinction is a vestige of the old, current California rule. Modern thinking about conflicts of interest is that they are most clearly viewed in terms of loyalty. There is thus little if any distinction between actual and potential (but anticipatable) conflicts. Accordingly, section (b)(1) should apply whenever a lawyer represents more than one client in the same matter. (b)(1) therefore should end after the words "another current client." ("Informed written consent" may, of course, be applied to waive this conflict.)

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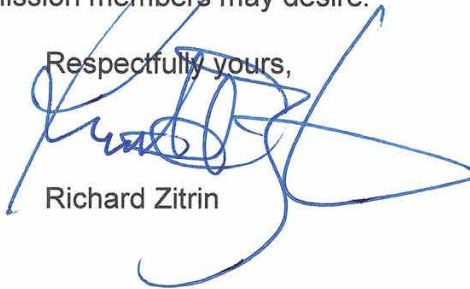
4. Section (b)(2) appears simply to have been misdrafted. The issue of “the same matter” is covered in (b)(1). To use “in the same matter” here is grossly limiting, even more so than in current CA rule 3-310, and also fails to preserve the “interests” language of current Rule 3-310. The issue here is whether the relationship affects the client, not whether it is in the same matter. This could be resolved by removing the words “in the same matter” and inserting instead the words “with an interest in the affected client’s matter.” “Affected client” tracks the language in (b).

Section (b)(2)(ii) is unnecessary, as it is already stated in section (b), although we advise revision of the language used in (b) – see point 2, above.

5. Section (c) of the rule is essentially the old CA Rule 3-310 (B), which for reasons never made clear eventually resulted only in a requirement of written disclosure and not written consent. It is self-evident that disclosure without consent does far less to protect clients and the public. Accordingly, consent should be required, consistent with all modern thinking about loyalty and conflicts of interest, and consistent with ABA MR 1.7.
6. Section (d) leaves out a fourth factor present in ABA MR 1.7(b) – that “each affected client gives informed consent, confirmed in writing.” (Presumably this was not included because section (c) as drafted does not require informed written consent.) This factor – i.e., “should be added

Thank you for the opportunity to present these views to you on behalf of myself and my ethics-professor colleagues. I will be available at the meeting to respond to any inquiries or engage in any dialogue the commission members may desire.

Respectfully yours,



Richard Zitrin

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