

**RRC2 – Rule 3-310 [1.7, 1.8.6, 1.8.7, 1.9, 1.10, 1.11, 1.12]
E-mails, etc. – Revised (May 3, 2016)
Drafting Team: Martinez (Lead), Cardona, Eaton, Harris, Stout**

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March 25, 2016 OCTC Email to RRC2:

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E. Rule 3-310 [Conflicts of Interest]

Please see OCTC's comment of February 12, 2016.

OCTC further notes that ABA Model Rules 1.7 and 1.9 prohibit only "directly" adverse representations. The modifier "directly" should not be adopted. The modifier is subject to interpretation and would arguably permit adverse representation that is significant as long as it is indirect.

April 27, 2016 McCurdy Email to Drafting Team, cc Difuntorum, Mohr & Marlaud:

We have received the attached letter from Richard Zitrin with comments concerning Rule 1.7. Please review it in preparation for the upcoming meeting. We will include it as a separate attachment in the additional agenda materials posted prior to the meeting.

Attached:

RRC2 - [3-310][1.7][3-300][1.8.1] - 04-26-16 Zitrin Letter - 2016-059(I).pdf

April 26, 2016 Zitrin Letter to Chair & RRC2, cc McCurdy:

I am writing this letter for two reasons. First, thank you, Madam Chair especially, and all the Commission members, for your kind consideration of my presentation of the position of the ethics professors who cosigned the recent letter about rule 1.7. You granted me patience, ears focused on listening, and healthy discussion.

Second, I want to make some brief observations about the (generally excellent) modifications to Rule 1.7 and also to remind this commission of the ethics professors' position on rule 1.8.1. I have not polled the ethics professors in this regard because such polling is difficult and intrusive, and because I have their stated positions already. Thus, I write on my own behalf, though I believe these thoughts accurately reflect the professors' stated positions.

As to Rule 1.7, by and large the changes you have made are excellent and conform to our suggestions. There are two matters at variance and of concern. First, the "menu" of items in section (b), drawn essentially from former Rule 3-310(b), should make it clear that these items are not exclusive. This could be done by saying, in section (b), "including *but not limited to*" Second, the phrase in (c), "informs the client in writing," does not conform to the usual language of disclosure and consent. I believe that the Commission should reconsider this language before sending it out for public comment.

As to Rule 1.8.1, there are more serious concerns that the ethics professors have previously expressed. It is simply bad for clients to allow lawyers to change their fee agreements without requiring the client to have the opportunity and time to seek independent counsel. And the fact that a client may already have counsel — for instance, a business lawyer whose understanding of fee agreements is non-existent — is of no moment. As currently drafted, this is a rule that is designed to protect lawyers, not clients.

Here in its entirety is the comment of the 55 ethics professors in their letter to the Supreme Court of March 3, 2014 — the same comment previously sent the State Bar board. It was the longest and most detailed of all the comments in that letter:

1. Rule 1.8.1— Doing business with a client

This analysis tracks the comment in the *June 2008 Ethics Profs. Letter* joined by 13 California ethics professors. The current Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients, and also be at odds with California case law on fiduciary duty. Despite widespread criticism, the Commission has improvidently insisted on a clearly anti-client rule that serves only the interests of lawyers wishing to change their fee structure in the middle of a representation.

A. The current and proposed rules

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only after inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any subsequent modification of a fee agreement with a client, however, is done under circumstances where the lawyer has already taken on ongoing fiduciary duties to the client. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

B. Modification of fee contracts excluded

The current draft of Rule 1.8.1 simply eliminates these requirements, and excludes modifications of fee contracts from the rule, under proposed Comment 5. This proposed language adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement.

The only possible justification for this language is lawyers' own self-interest — to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 5 acknowledges that lawyers do have "fiduciary principles [that] might apply" to fee agreements. Formerly, prior to the *June 2008 Ethics Profs. Letter*, the proposed comments also stated that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." While this language has been eliminated, the truth of this statement remains. In essence, then, the Commission's draft sets up a conflict between common law principles of fiduciary duty and the ethics rules themselves. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.

The phrase relating to modifications of fee contracts in Comment ¶ 5 must be stricken.

C. Inappropriate use of independent counsel

The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must

advise the client of the opportunity to seek the advice of independent counsel. The modified rule — with limiting language that is absent from the ABA rule, MR 1.8(a)(2) — states that if the client is already represented by independent counsel, there need be no notice. This, read together with Comments 13 and 14 of the proposed rule, substantially diminishes client protection.

Comments 13 and 14 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction. Moreover, under the ABA's Comment, ¶ 4, written disclosure is still required from one of the involved lawyers. This is not true of the current California comments.

In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction. The ABA rule language in MR 1.8(a)(2) and Comment ¶ 4 should replace the ill-advised Commission language.

Again, thank you for your kind attention

April 27, 2016 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I don't know what will be done with Richard Zitrin's 4/26/16 letter regarding proposed Rule 1.7 as the Rule seems not to be on the agenda for the next meeting, so to be cautious I want to convey my thoughts on his comments.

First, I had understood the word "including" to be inclusive, and not a term of limitation, but I think the right question is whether there is any drafting convention on this for the Rules as a whole. I would agree with Richard's suggestion if it were possible to read "including" as being limited to the examples that follow that word.

Second, I do not agree with his suggestion that the informed written consent standard be added to paragraph (c). That paragraph copies current rule 3-320 exactly (except for changing "member" to "lawyer"). The current rule is not broken and needs no repair, and I think the Commission understood the current rule when it decided to retain it without substantive change.

April 27, 2016 Martinez Email to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:

With regard to Rule 1.7, I would think the Prof. Zitrin's comments are more appropriate for consideration during the public comment period.

I agree that the word "including" is sufficient and that adding "without limitation" would not change the meaning. "The term 'includes' is ordinarily a word of enlargement and not of limitation. [Citation.] The statutory definition of a thing as 'including' certain things does not necessarily place thereon a meaning limited to the inclusions." (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 639, 268 P.2d 723.) "[W]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope." (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011-1012, 9 Cal.Rptr.2d 358, 831 P.2d 798.)

With respect to paragraph (c), the intent of current Rule 3-320, as in the present draft, was that the categories not provide for the recusal of the attorney. The idea was that the client should be informed in writing about the relationship but without forcing disqualification by declining consent.

However, I do think there is a potential overlap, and possible inconsistency, between (b) and (c) in that both address relationships with third persons, but only (b) requires consent. I think this is a consequence of the revisions made during the Commission meeting where the rule was approved (i.e., the risks of drafting on the fly).

April 28, 2016 OCTC Memo to RRC2:

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K. ABA Model Rule 1.10 [Imputation of conflicts of Interest: General Rule]

Please see OCTC's comments of February 12, 2016 and March 25, 2016 as to rule 3-310. California law includes the substance of Model Rule 1.10.

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

Please see OCTC's comments of February 12, 2016 and March 25, 2016 as to rule 3-310. California law includes the substance of Model Rule 1.11.

M. ABA Model Rule 1.12 [Former Judge, Arbitrator, Mediator or Other Third-Party Neutral]

Please see OCTC's comments of February 12, 2016 and March 25, 2016 as to rule 3-310. California law includes the substance of Model Rule 1.12.

N. ABA Model Rule 1.18 [Duties to Prospective Clients]

Please see OCTC's comments of February 12, 2016 and March 25, 2016 as to rule 3-310. California law includes the substance of Model Rule 1.18.

February 12, 2016 OCTC Email to RRC2:

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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.

March 25, 2016 OCTC Email to RRC2:

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E. Rule 3-310 [Conflicts of Interest]

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OCTC further notes that ABA Model Rules 1.7 and 1.9 prohibit only “directly” adverse representations. The modifier “directly” should not be adopted. The modifier is subject to interpretation and would arguably permit adverse representation that is significant as long as it is indirect.

April 29, 2016 Tuft Email re 1.9 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

Understanding that the Commission voted to accept the black letter of Rule 1.9 at the last meeting, I point out several ambiguities in paragraph (c) that are not cured by the comments we will be taking up at our next meeting. These ambiguities create uncertainty on how the rule will be applied by courts and practitioners who are not part of the rule drafting process.

1. Paragraph (c) (1) and (2) deal with use and disclosure of information protected by §6068(e) and rule 1.6 while paragraph (c)(3) deals with confidential information obtained by reason of the former representation without reference to either §6068(e) or Rule 1.6. What is the intended difference, if any, and how will the rule be interpreted?
2. What is the intended difference between representing 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 (paragraph (a)) and accepting representation “adverse” to the former client when the lawyer has obtained confidential information that is “material” to the representation? According to Model Rule 1.9, Cmt [3] a “substantially related matter” includes a matter where there is a substantial risk that confidential information normally obtained in the prior matter would materially advance the client’s position in the subsequent matter. Do we intend a different meaning between paragraphs (a) and (c)(3)?

3. What is the intended difference between acquiring information protected by §6068(e) and Rule 1.6 “by virtue of” the representation of the former client (paragraph (c)(1) and (2)) and confidential information “obtained” “by reason of the representation” of the former client (paragraph (c)(3))? The rule in the 49 jurisdictions that have adopted Rule 1.9(c) refer to information “relating to the representation” (a phrase that is also used in §6068(e)(2)). The drafting team’s report states the phrase “by virtue of” comes from *Wutchumna* and is intended to narrow the scope of information protected by the rule. Yet, the phrase does not have an analog in the rules or in §6068(e). How are lawyers and courts expected to understand this distinction?

May 2, 2016 Kehr Email re 1.9 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I largely support your suggested edits to the Comments but have these suggestions ---

- 1) At line 4 on p. 2 of 3, Comment [1], I would replace the semicolon between the two citations with "and".
- 2) There are two inserted sentences following those citations. If the Commission decides to keep these sentences, I would collapse them into one sentence: For As examples, : (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client; and (ii). Nor may a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same matter.
- 3) I don't understand the reason for changing "does" to "may" in what now is Comment [3]. That change implies that the fact that information is in a public record might by that fact alone be generally known. I believe the proper reading of Matter of Johnson is the opposite.
- 4) In the first sentence of what now is Comment [4], I would change "waiver" to "consent", the latter being the term defined in Rule 1.0.1(e) and (e-1) and the term used in the conflict rules.

May 2, 2016 Kehr Email re 1.10 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I want to point out for the Commission's consideration that it would be possible to have Rule 1.10 without having it address the screening issue. The first Commission found it important to have an imputation Rule but concluded that screening should be left to case development, and as a result it recommended the following version of the Rule ---

Rule 1.10 Imputation of Conflicts of Interest: General Rule

- (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 the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
- (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 as 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 Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.
- (d) The imputation of a conflict of interest to lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.