

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

EXECUTIVE SUMMARY

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

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

- (1) the Model Rules’ framework of having separate rules that regulate different conflicts interest situations: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and
- (2) proposed Rule 1.7 (conflicts of interest: current clients), which regulates conflicts situations that are currently regulated under rule 3-310(B) and (C). Proposed rule 1.7 largely tracks the ABA approach to current client conflicts of stating general rules regarding “direct adversity” conflicts between clients of a lawyer (addressed incompletely in current rule 3-310(C)(2) and (C)(3)) and “material limitation” conflicts (e.g., a joint representation conflict), which are currently addressed in current rule 3-310(C)(1) and 3-310(B).

Proposed rule 1.7 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

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

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

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

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

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

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

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

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

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

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

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

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

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

1st Round 90-day Public Comment Period

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2nd Round 45-day Public Comment Period

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

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

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

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

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

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