

AGENDA ITEM

DATE: January 25, 2017

TO: Members, Regulation and Discipline Committee

FROM: Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct
Randall Difuntorum, Director, Professional Competence

SUBJECT: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Return from Public Comment and Request for Release for Additional Public Comment

EXECUTIVE SUMMARY

The Board of Trustees (“Board”) has assigned the Commission for the Revision of the Rules of Professional Conduct (“Commission”) to conduct a study of the Rules of Professional Conduct of the State Bar of California and to recommend comprehensive amendments. At the Board’s November 17, 2016 meeting, 36 proposed rules were adopted and 34 proposed rules were authorized for an additional 45-day public comment period. The 45-day public comment period ended on January 9, 2017 and following review, the Commission made substantive amendments to proposed Rule 1.7 (“Conflicts of Interests: Current Clients”). This item requests that the Regulation and Discipline Committee authorize circulation of proposed Rule 1.7¹ for a 30-day public comment period.

Members with questions about this agenda item may contact Randall Difuntorum: (415) 538-2161 or State Bar of California, 180 Howard Street, San Francisco, CA 94105.

BACKGROUND

The Rules of Professional Conduct of the State Bar of California are attorney conduct rules, the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval.²

¹ The text of proposed Rule 1.7 as recommended for additional public comment is provided as Attachment A.

² Business and Professions Code section 6076 provides: “With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the bar of this state.” Business and Professions Code section 6077, in part, provides: “The rules of professional conduct adopted by the Board, when approved by the Supreme Court, are binding upon all members of the State Bar.”

At the Board's November 2014 meeting, the Board authorized the State Bar President's appointment of the Commission and directed the Commission to conduct a study of the rules with the goal of proposing comprehensive amendments for final Board action in early 2017. (See Board Open Session Agenda Item 123, November 7, 2014.) General information about the Commission is found online at the Commission's page on the State Bar website: <http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx>. The Commission has conducted twenty-six meeting days beginning with its first meeting held on March 27, 2015.³ The Commission's final report is anticipated to be considered by the Board at the Board's March 10, 2017 meeting. The State Bar must submit the proposed rules to the Supreme Court of California by March 31, 2017.

After two rounds of public comment, the Commission finalized the drafts of all but one of the proposed rules. Proposed Rule 1.7 was revised by the Commission at its last meeting and requires additional public comment.⁴

DISCUSSION

The 45-day Public Comment Period

Five written comments were received on proposed Rule 1.7.⁵ Each of the five commenters recommended further revisions to the rule. In response, the Commission revised the proposed rule as set forth below.

Rule 1.7 [3-310] Conflict of Interest: Current Clients (Commission's Proposed Rule Adopted on January 20, 2017 – Redline to 45-day Public Comment Draft Version)

- (a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.
- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written*

³ The Commission last met on January 20, 2017 in San Francisco. The next meeting of the Commission is scheduled for February 2-3, 2017 in Los Angeles.

⁴ The Rules of Professional Conduct are rules of the State Bar and the procedures for considering amendments to rules of the State Bar require publication for public comment. (Board Book, Tab 12, Title 1, Division 2, Rule 1.10.)

⁵ A public comment synopsis table, including the Commission's response to each comment is provided as Attachment B. The full text of the public comments is provided as Attachment C.

disclosure of the relationship to the client and compliance with paragraph (d) 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 or responsibility to a party or witness in the same matter; or
 - (2) the lawyer knows* or reasonably should know* that 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 another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.
- (d) Representation is permitted under this Rule only if the lawyer complies with paragraphs (a), (b), and (c), and:
- (1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) 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.

Comment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) occurs can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; ~~or~~ (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* or organization who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm*. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] For purposes of this Rule, “matter” includes any judicial or other proceeding, application, request for a ruling or other determination, contract, [transaction](#), claim, controversy, [investigation, charge, accusation, arrest](#), or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons.*

[3] Paragraphs (a) and (b) 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 a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[4] 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 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*, ~~paragraphs~~[paragraph](#) (a) ~~and (b) do~~[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.

[5] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer’s obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it 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 each client. The risk that the lawyer’s representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer’s firm*, with a party, a witness, or another person* who may be affected substantially* by the resolution of the matter.

[6] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially

limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[7] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. ~~That~~ ~~advocating~~ Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter ~~does~~ is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, 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.

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. 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.

[9] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* 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].)

[10] This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably*

understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[11] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, 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).

[12] For special rules governing membership in a legal service organization, see Rule 6.3; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

Summary of Amendments

The complete executive summary of proposed Rule 1.7 is provided as Attachment D. Provided below is a summary of the revisions prompting the current request for an additional public comment circulation.

Paragraph (d): 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 when a conflict of interest cannot be cured by client consent or disclosure. The Commission has revised paragraph (d) to emphasize the interrelationship among these paragraphs. The Office of the Chief Trial Counsel submitted a comment stating that this was not clear and might lead to confusion about whether consent or disclosure, standing alone, can cure a conflict.

Comment [1]: This comment explains how to apply the concept of "direct adversity" by providing non-exclusive examples. The Commission revised the comment to expressly state that the identified situations are non-exclusive examples of direct adversity conflicts, and added 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.

Comment [2]: This comment clarifies that a "matter" giving rise to a conflict of interest is not limited to litigation but might involve a variety of client representations. The Commission has revised the comment to recognize that a matter might also be a "transaction," "investigation," "charge," "accusation" or an "arrest." The Commission agreed with the United States Department of Justice, which submitted a comment recommending broader language. The State Bar Standing Committee on Professional Responsibility and Conduct also submitted a comment recommending broader language.

Comment [4]: This comment 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). Attorney Stanley Lampert submitted a comment recommending this revision.

Comment [7]: In part, this comment 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 has revised the second sentence of Comment [7] by using a simpler sentence structure and the phrase "sufficient, standing alone" to avoid the comment from being potentially overbroad. The State Bar Standing Committee on Professional Responsibility and Conduct submitted a comment recommending clarifying changes to this sentence.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

This agenda item requests authorization for a 30-day public comment period on a proposed Rule of Professional Conduct. Board action to adopt this rule would occur only after the public comment process. Rule of Professional Conduct amendments adopted by the Board do not become binding and operative unless and until they are approved by the Supreme Court of California. It is anticipated that the adoption of this rule will be considered by the Board at its March 10, 2017.

BOARD BOOK IMPACT

None.

BOARD COMMITTEE RECOMMENDATION

The Commission recommends that the Regulation and Discipline Committee authorize staff to circulate for a 30-day period of public comment, proposed Rule 1.7 of the Rules of Professional Conduct, as set forth in Attachment A.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Regulation and Discipline Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Regulation and Discipline Committee authorizes staff to make available, for public comment for a period of 30-days, proposed Rule 1.7 of the Rules of Professional Conduct, as set forth in Attachment A; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

ATTACHMENT(S) LIST

Attachment A: Clean Version of Proposed Rule 1.7

Attachment B: Commission's Proposed Rule 1.7 Public Comment Synopsis Table

Attachment C: Full Text of the Public Comments

Attachment D: Executive Summary of Proposed Rule 1.7