

Lee, Mimi

From: Kevin Mohr <kejmoehr@gmail.com>
Sent: Wednesday, March 23, 2016 9:37 AM
To: Martinez, Raul; Cardona, George S. (USACAC); Eaton, Danny; Lee S. Harris; 'dean.stout@inyocourt.ca.gov'
Cc: Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi
Subject: Re: RRC2 - 3-310 [1.7] - Rule - DFT2.3 (3/23/16)
Attachments: RRC2 - [3-310][1.7] - Rule - DFT2.3 (03-23-16) - Cf. to DFT2.pdf; RRC2 - [3-310][1.7] - Rule - DFT2.3 (03-23-16) - Cf. to DFT2.docx

Greetings:

I've attached draft 2.3 (3/23/16) of proposed Rule 1.7, redline, compared to the black letter of the rule as approved by the Commission during the February 2016 meeting [draft 2 dated 2/20/16] and the comments as proposed in the February 2016 meeting draft [draft 1.6 dated 2/4/16].

Rule text

Paragraphs (a) through (d) of the blackletter of proposed Rule 1.7 constitute the blackletter rule as approved by the Commission during the February 19-20, 2016 meeting.

As discussed during the teleconferences over the last week, the drafting team has proposed paragraph (e) concerning advance consents for the Commission's consideration at the March 31-April 1, 2016 meeting.

Comments

Following approval of the black letter at the February 2016 meeting, the drafting team was directed to review the proposed comments and make any revisions necessary to conform the comments to the approved rule. The redline comparison in the comments is to the comments proposed in the February meeting draft of Rule 1.7, draft 1.6 (2/4/16).

Please let me know if you have any questions. Thanks,

Kevin

Attached:

RRC2 - [3-310][1.7] - Rule - DFT2.3 (03-23-16) - Cf. to DFT2.pdf
RRC2 - [3-310][1.7] - Rule - DFT2.3 (03-23-16) - Cf. to DFT2.docx

Rule 1.7 Conflict of Interest: Current Clients¹

- (a) A lawyer shall not, without informed written consent from each client, 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, 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 the lawyer's own interests, including when:
 - (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:
 - (i) knows the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
 - (ii) knows or reasonably should know the previous relationship will materially limit 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 lawyer knows or reasonably should know will 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 personal interest in the subject matter of the representation that the lawyer knows or reasonably should know will materially limit the lawyer's representation; or
 - (5) the lawyer knows or reasonably should know that there is a reasonable likelihood that the interests of clients being represented by the lawyer in the same matter will conflict.
- (c) 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 lawyer, unless the lawyer informs the client in writing of the relationship.
- (d) Representation is permitted under this Rule only if:

¹ Paragraphs (a) through (d) of the blackletter of proposed Rule 1.7 constitute the rule as approved by the Commission during the February 19-20, 2016 meeting.

The drafting team has proposed paragraph (e) concerning advance consents for the Commission's consideration at the March 31-April 1, 2016 meeting.

RRC2 – Rule 1.7 [3-310]
Draft 2.3 (3/23/2016) – COMPARED TO DFT2 (2/20/16)
Following March 18 & 22, 2016 Tel Conferences
For March 31/April 1, 2016 Meeting

- (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.

(e) A lawyer may seek advance informed written consent to conflicts that might arise under paragraphs (a) and (b) in the future. A lawyer's disclosures in seeking advance informed written consent must include:

- (1) the explanation of relevant circumstances and material risks required by Rule 1.0.1(e);
- (2) an explanation that the lawyer is requesting the client to consent to possible future conflicts that would involve future facts and circumstances that cannot be fully known at the time the consent is requested;
- (3) whether the consent permits the lawyer to be adverse to the client on any matter, including any current or future litigation, in the future; and
- (4) whether there are any limits on the scope of the consent, and, if so, an explanation of those limits.

Continued representation pursuant to advance informed written consent remains subject to paragraph (d).

Comment²

~~[1] — This Rule does not apply to a lawyer~~^[1] 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]. Similarly, a directly adverse conflict under paragraph (a) occurs 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. 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

² Following approval of the black letter at the February 2016 meeting, the drafting team was directed to review the proposed comments and make any revisions necessary to conform the comments to the approved rule. The redline comparison in the comments is to the comments proposed in the February meeting draft of Rule 1.7.

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] Paragraph (a) does not prohibit a lawyer from representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless ~~representation-the interests~~ of any of the clients would be adversely affected by the resolution of the legal question. Factors relevant in determining whether the ~~representation-the interests~~ of one or more of the clients would be adversely affected, thus requiring that the clients ~~be advised of the risk~~provide informed written consent under paragraph (a), 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.

[23] Paragraphs (a)(1) and (b)(1) 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 ~~was originally obtained on the basis of potential adversity as required under paragraph (b), should the potential and circumstances later develop indicating that direct~~ adversity become actual exists between the clients, the lawyer must obtain further informed written consent ~~on the basis of the actual adversity of the clients under paragraph (a)~~.

[34] ~~Notwithstanding~~ In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], ~~in which~~ the court held that subparagraph (C)(3) of predecessor rule 3-310 [paragraph (a)(3)] 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, } ~~paragraph (a)(2)~~ Notwithstanding State Farm, paragraph (a) 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.

~~[4] Because paragraph (b) concerns relationships or interests that could have a substantial adverse effect on the lawyer's representation, the informed written consent of each affected client is required. See Rule 1.0.1(e). Paragraph (c), on the other hand, concerns other relationships or interests, and so requires only that the lawyer provide the client with written disclosure of those relationships and interests.~~

[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 or interests. 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.

[6] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent or provide the ~~written disclosure~~information required to permit representation under this Rule. (See, e.g., Business and Professions 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.

[67] Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or ~~written disclosure is provided~~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].)

[8] The effectiveness of advanced informed written consent to future conflicts 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 of those representations, the greater the likelihood that the client will have the requisite understanding. For example, whether an advance consent complies with this Rule can depend on factors such as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen that the lawyer has the ability timely and effectively to institute and fully maintain; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education, language skills, and the client's familiarity with the particular type of conflict that is the subject of the consent. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, depending upon the extent to which the other enumerated factors set forth above are present, even a general and open-ended advance consent can be in compliance when: the consent was given by an experienced user of the type of legal services involved; and the client was independently represented regarding the consent or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice. In any case, an advance consent cannot be effective if the circumstances that materialize in the future are such as would 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.

~~[7] — Unforeseeable developments might create conflicts in the midst of a representation. Depending~~[9] 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).

~~[8]~~9] For special rules governing membership in a legal service organization, see Rule 6.3; for
~~participation in law related activities affecting client interests, see Rule 6.4;~~ and for work in
conjunction with certain limited legal services programs, see Rule 6.5.

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-310 [1.7]

Lead Drafter: Martinez
Co-Drafters: Cardona, Eaton, Harris, Stout
Meeting Date: February 19-20, 2016

I. CURRENT CALIFORNIA RULE 3-310

Rule 3-310 Avoiding the Representation of Adverse Interests

- (A) For purposes of this rule:
- (1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
 - (2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure;
 - (3) “Written” means any writing as defined in Evidence Code section 250.
- (B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:
- (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
 - (2) The member knows or reasonably should know that:
 - (a) the member 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 member’s representation; or
 - (3) The member 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 member has or had a legal, business, financial, or professional interest in the subject matter of the representation.
- (C) A member shall not, without the informed written consent of each client:
- (1) Accept 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; or
 - (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the

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client in the first matter.

- (D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.
- (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.
- (F) A member shall not accept compensation for representing a client from one other than the client unless:
 - (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
 - (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
 - (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law; or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients

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of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, 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 an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

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) was violated when a member, 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*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (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].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

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II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 1.7 (CLEAN)

Rule 1.7 Conflict of Interest: Current Clients

- (a) A lawyer shall not, without informed written consent from each affected client, represent a client if the representation of the client is directly adverse to the representation of another current client, including when the representation of the client is:
 - (1) in the same matter as the representation of another current client, and the clients' interests actually conflict; or
 - (2) in a separate matter, and one or more clients' interests in any of the separate matters actually conflict.
- (b) A lawyer shall not, without informed written consent from each affected client, represent a client if there is a 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, including when:
 - (1) the representation of the client is in the same matter as the representation of another current client, and the clients' interests potentially conflict; or
 - (2) the lawyer:
 - (i) has or had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
 - (ii) there is a significant risk the relationship would have a substantial adverse effect on the lawyer's representation.
- (c) A lawyer shall not represent a client without providing written disclosure when the lawyer:
 - (1) has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, professional, or personal relationship with a party or witness in the same matter;
 - (2) has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, professional, or personal relationship with another person or

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- entity that the lawyer knows or reasonably should know could be affected by resolution of the matter;
- (3) 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; or
 - (4) represents a party or witness in the matter who is a spouse, parent or sibling of the lawyer, or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's firm.
- (d) Representation is permitted under this Rule only if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the lawyer reasonably believes 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.
- (e) For purposes of paragraph (c), "written disclosure" means informing the client, in writing, of the lawyer's responsibility or interest and the potential effect of that responsibility or interest on the representation.

Comment

[1] This Rule does not apply to a lawyer representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless representation of any of the clients would be adversely affected. Factors relevant in determining whether the representation of one or more of the clients would be adversely affected, thus requiring that the clients be advised of the risk include: where the different cases are pending, 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

[2] Paragraphs (a)(1) and (b)(1) 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 informed written consent was originally obtained on the basis of potential adversity, should the potential adversity become actual, the lawyer must

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obtain further informed written consent on the basis of the actual adversity.

[3] Notwithstanding *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], [in which the court held that subparagraph (C)(3) of predecessor rule 3-310 [paragraph (a)(3)] 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,] paragraph (a)(2) 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.

[4] Because paragraph (b) concerns relationships or interests that could have a substantial adverse effect on the lawyer's representation, the informed written consent of each affected client is required. See Rule 1.0.1(e). Paragraph (c), on the other hand, concerns other relationships or interests, and so requires only that the lawyer provide the client with written disclosure of those relationships and interests.

[5] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent or provide the written disclosure required to permit representation under this Rule. (See, e.g., Business and Professions 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.

[6] Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or written disclosure is provided 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].)

[7] Unforeseeable developments might create conflicts in the midst of a representation. 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).

[8] For special rules governing membership in a legal service organization, see Rule 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

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IV. PROPOSED RULE 1.7 (REDLINE TO CURRENT RULE 3-310(B), (C), (D))

~~Rule 3-310~~ Rule 1.7 ~~Avoiding The Representation Of Adverse Interests~~ Conflict of Interest: Current Clients

~~(A)~~ For purposes of this rule:

~~(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;~~

~~(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;~~

~~(3) "Written" means any writing as defined in Evidence Code section 250.¹~~

~~(Ga)~~ A ~~member lawyer~~ shall not, without ~~the~~ informed written consent ~~of from~~ each ~~client affected client~~, represent a client if the representation of the client is directly adverse to the representation of another current client, including when the representation of the client is:

~~(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~

~~(2)~~(1) ~~Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or in the same matter as the representation of another current client, and the clients' interests actually conflict; or~~

~~(3)~~(2) ~~Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or in a separate matter, and one or more clients' interests in any of the separate matters actually conflict.~~

(b) A lawyer shall not, without informed written consent from each affected client, represent a client if there is a 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, including when:

~~(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~ the representation of the client is in the same matter as the representation of another current client, and the clients' interests potentially conflict; or

¹ The concepts in rule 3-310(A) have been moved to the global terminology rule, Rule 1.0.1.

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- (2) ~~The member knows or reasonably should know that:~~ the lawyer:
- ~~(a)(i)~~ has or had, a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
 - ~~(b)(ii)~~ there is a significant risk the relationship would have a substantial adverse effect on the lawyer's representation.
- ~~(B)(c)~~ A member lawyer shall not accept or continued representation of represent a client without providing written disclosure to the client when the lawyer:
- (1) ~~the member previously had~~ has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, professional, or personal relationship with a party or witness in the same matter;
 - ~~(2) — The member knows or reasonably should know that:~~
 - ~~(a) — the member 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 member's representation; or~~
 - ~~(32)~~ The member has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, professional, or personal relationship with another person or entity that the ~~member~~ lawyer knows or reasonably should know ~~would~~ could be affected ~~substantially~~ by resolution of the matter; ~~or~~
 - ~~(43)~~ The member 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; ~~or~~
 - ~~(4)~~ represents a party or witness in the matter who is a spouse, parent or sibling of the lawyer, or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's firm.
- ~~(d)~~ Representation is permitted under this Rule only if:
- ~~(1)~~ the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - ~~(2)~~ the lawyer reasonably believes 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

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proceeding before a tribunal.

~~(D) — A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.²~~

~~(E) — A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.³~~

(e) For purposes of paragraph (c), “written disclosure” means informing the client, in writing, of the lawyer’s responsibility or interest and the potential effect of that responsibility or interest on the representation.

~~(F) — A member shall not accept compensation for representing a client from one other than the client unless:~~

~~(1) — There is no interference with the member’s independence of professional judgment or with the client-lawyer relationship; and~~

~~(2) — Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and~~

~~(3) — The member obtains the client’s informed written consent, provided that no disclosure or consent is required if:~~

~~(a) — such nondisclosure is otherwise authorized by law; or~~

~~(b) — the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.⁴~~

DiscussionComment

[1] This Rule 3-310 is not intended to prohibit a member from~~does not apply to a lawyer~~ representing ~~parties~~ multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless representation of ~~either client~~ any of the clients would

² The concept in rule 3-310(D) has been moved to proposed Rule 1.8.7.

³ The concept in rule 3-310(E) as it applies to former clients has been moved to proposed Rule 1.9. The concept as it applies to current clients is found in proposed Rules 1.6 [3-100] and proposed Rule 1.8.2 [Confidential Information of a Current Client].

⁴ The concept in rule 3-310(F) has been moved to proposed Rule 1.8.6.

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be adversely affected. Factors relevant in determining whether the representation of one or more of the clients would be adversely affected, thus requiring that the clients be advised of the risk include: where the different cases are pending, 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.

~~Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)~~

~~Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.⁵~~

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.⁶~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.⁷~~

~~Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.⁸~~

~~[2] Subparagraphs (C)(1) and (C)(2) are intended to apply~~ Paragraphs (a)(1) and (b)(1) apply to

⁵ Rule 3-310, Discussion ¶. 3 has been deleted because the rule it cross-references, rule 3-320, has been imported in proposed Rule 1.7 as paragraph (c)(4).

⁶ Rule 3-310, Discussion ¶.4 has been deleted because the first sentence states the obvious and the second sentence refers to paragraph (E), the concept of which has been moved to proposed Rule 1.9.

⁷ Rule 3-310, Discussion ¶.5 has been deleted because the first sentence simply restates the content of 3-310(B) [now rule 1.7(c)] and the second sentence refers to paragraph (E), the concept of which has been moved to rule 1.9.

⁸ Rule 3-310, Discussion ¶.6 has been deleted because its concept, that the provisions of paragraph (B) apply to other lawyers in the member's law firm, has been incorporated into the relevant black letter subparagraphs of paragraph (c).

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all types of legal ~~employment~~ 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 ~~an ante-nuptial~~ a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an “uncontested” marital dissolution. ~~In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a lawyer must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if~~ If informed written consent was originally obtained on the basis of potential adversity, should the potential adversity ~~should~~ become actual, the lawyer must obtain ~~the~~ further informed written consent ~~of the clients pursuant to subparagraph (C)(2) on the basis of the actual adversity.~~

~~Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.~~

[3] ~~In~~ Notwithstanding *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], [in which the court held that subparagraph (C)(3) of predecessor rule 3-310 [paragraph (a)(3)] 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, subparagraph (C)(3) is not intended to,~~ paragraph (a)(2) 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.

[4] Because paragraph (b) concerns relationships or interests that could have a substantial adverse effect on the lawyer’s representation, the informed written consent of each affected client is required. See Rule 1.0.1(e). Paragraph (c), on the other hand, concerns other relationships or interests, and so requires only that the lawyer provide the client with written disclosure of those relationships and interests.

[5] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent or provide the written disclosure required to permit representation under this Rule. (See, e.g., Business and Professions 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.

[6] Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or written disclosure is provided as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent may not suffice ~~for non-disciplinary purposes 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].)

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[7] Unforeseeable developments might create conflicts in the midst of a representation. 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).

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

~~Paragraph (D) is not intended to apply to class action settlements subject to court approval.⁹~~

~~Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)¹⁰~~

V. PROPOSED RULE 1.7 (REDLINE TO MODEL RULE 1.7)

Rule 1.7 Conflict of Interest: Current Clients

- ~~(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:~~
- ~~(1)(a) the representation of one client will be directly adverse to another client; or~~ A lawyer shall not, without informed written consent from each affected client, represent a client if the representation of the client is directly adverse to the representation of another current client, including when the representation of the client is:
- (1) in the same matter as the representation of another current client, and the clients' interests actually conflict; or
- (2) in a separate matter, and one or more clients' interests in any of the separate matters actually conflict.
- ~~(2)(b) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person~~

⁹ Rule 3-310, Discussion ¶.11 has been deleted because paragraph (D) is now proposed Rule 1.8.7.

¹⁰ Rule 3-310, Discussion ¶.12 has been deleted because paragraph (F) is now proposed Rule 1.8.6.

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~~or by a personal interest of the lawyer.~~ A lawyer shall not, without informed written consent from each affected client, represent a client if there is a 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, including when:

(1) the representation of the client is in the same matter as the representation of another current client, and the clients' interests potentially conflict; or

(2) the lawyer:

(i) has or had, a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(ii) there is a significant risk the relationship would have a substantial adverse effect on the lawyer's representation.

(c) A lawyer shall not represent a client without providing written disclosure when the lawyer:

(1) has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, professional, or personal relationship with a party or witness in the same matter;

(2) has or had, or knows that another lawyer in the lawyer's firm has or had, a legal, business, financial, professional, or personal relationship with another person or entity that the lawyer knows or reasonably should know could be affected by resolution of the matter;

(3) 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; or

(4) represents a party or witness in the matter who is a spouse, parent or sibling of the lawyer, or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's firm.

~~(b)(d) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if~~ Representation is permitted under this Rule only if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the lawyer reasonably believes the representation is not prohibited by law; and

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(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; ~~and.~~

~~(4) each affected client gives informed consent, confirmed in writing.~~

(e) For purposes of paragraph (c), “written disclosure” means informing the client, in writing, of the lawyer’s responsibility or interest and the potential effect of that responsibility or interest on the representation.

Comment

[1] This Rule does not apply to a lawyer representing multiple clients having antagonistic positions on the same legal question that has arisen in different cases, unless representation of any of the clients would be adversely affected. Factors relevant in determining whether the representation of one or more of the clients would be adversely affected, thus requiring that the clients be advised of the risk include: where the different cases are pending, 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

[2] Paragraphs (a)(1) and (b)(1) 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 informed written consent was originally obtained on the basis of potential adversity, should the potential adversity become actual, the lawyer must obtain further informed written consent on the basis of the actual adversity.

[3] Notwithstanding *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], [in which the court held that subparagraph (C)(3) of predecessor rule 3-310 [paragraph (a)(3)] 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,] paragraph (a)(2) 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.

[4] Because paragraph (b) concerns relationships or interests that could have a substantial adverse effect on the lawyer’s representation, the informed written consent of each affected client is required. See Rule 1.0.1(e). Paragraph (c), on the other hand, concerns other relationships or interests, and so requires only that the lawyer provide the client with written disclosure of those relationships and interests.

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[5] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent or provide the written disclosure required to permit representation under this Rule. (See, e.g., Business and Professions 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.

[6] Paragraph (d) imposes conditions that must be satisfied even if informed written consent is obtained as required by paragraphs (a) or (b) or written disclosure is provided 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].)

~~[5][7] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation,~~ might create conflicts in the midst of a representation, ~~as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter.~~ 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).

[8] For special rules governing membership in a legal service organization, see Rule 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with certain limited legal services programs, see Rule 6.5.

VI. PUBLIC COMMENTS SUMMARY

1. Law Firm General Counsel Roundtable. Suggests amending rule to allow for different presumptions to apply to the enforceability of conflict waivers depending on the client's sophistication. Highlight consumer protection laws that apply differently to sophisticated consumers, and believe similar treatment with conflict waiver enforceability will protect clients' right to choice of counsel by preventing sophisticated clients from alleging conflicts for tactical purposes:

"(F) A written waiver of a present conflict of interest, or an advance waiver of future conflicts of interest as to matters not substantially related to the matters as to which the lawyer performs services shall be presumed to be informed if: (a) the waiver was signed by an attorney acting for the client, (b) the client was advised by counsel, whether in-house or outside counsel or (c) the client is a corporation or entity that is an experienced user of the legal services to be provided by the lawyer."

2. Orange County Bar Association. Recommends rule or comment on advance conflict waivers (MR 1.7, Comment [22]) consistent with current California case law, to provide guidance to

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attorneys and eliminate differences with the national standard. Recommend adoption of a rule on imputed conflicts and screening (MR 1.10) to provide concise and accessible guidance and a uniform approach across jurisdictions.

3. Margaret Thum. Suggest the rule clarify the responsibility of agency attorneys and outside counsel and prohibit certain types of multiple client representations and the withholding of information by outside counsel.
4. Group of law professors (Drafters: Geoffrey C. Hazard, Deborah L. Rhode and Richard Zitrin). Supports adoption of conflicts rule modeled after MR 1.7. Some signatories oppose adoption of a comment on advanced waivers. Concerned that comments included in former proposed rule 1.7 were not carefully vetted. Suggests careful review of comments to ensure clarity and harmony with the rule. Recommends retention of the broader, more client-protective California definition of “informed written consent” rather than the ABA definition found in MR 1.0(e).
5. Bar Association of San Francisco. Concerned that the current conflicts rule differs significantly from national standards and lacks key components and definitions. Recommends a version of MR 1.7-1.9 rather than modification to the current rule.
6. State Bar Committee on Professional Responsibility and Conduct (COPRAC). Suggest comprehensive set of conflict rules that closely resemble the model rules to cover topics not addressed in the current rules, eliminate the significant differences between California and ABA, and provide greater guidance in the area of conflicts.

VII. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, _____, 2016:**

A comment on current rule 3-310 is anticipated.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

Rule 1.7. [Conflict of Interest: Current Clients].

1. OCTC believes this rule is an improvement from the original proposal, but still has significant concerns about the rule and especially its 38 comments. There are too many comments and many are too long and incorporate other rules and comments, making this rule overly complicated and confusing. This rule is simple: an attorney shall not without informed written consent represent a client when to do so will involve a conflict of interest with another current client or the lawyer’s personal interests (or other fiduciary duties). The proposal and its comments, however, make complex this simple proposition.
2. The proposed rule’s use of the term ‘directly adverse’ is vague, ambiguous, and potentially too limiting and confusing. We believe that the term “directly adverse” will be

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subject to a great deal of interpretation and, therefore, litigation. The use of the modifier “directly” may pose problems for the lawyer trying to comply with the rule. Lawyers may not understand the distinction between an “adverse” as opposed to “directly adverse” interest and may, therefore, fail to seek the appropriate client consent. The use of the term “directly” may also pose problems for OCTC, the State Bar Court, and the Supreme Court as they attempt to evaluate possible violations on the proposed rule. Using the term “adverse” without the modifier “directly” may be clearer, less ambiguous and more appropriate.

3. OCTC recognizes that the Commission has tried to explain the term “directly adverse” in Comments 6 and 7. (It has reserved Comment 5.) However, those Comments may not provide adequate guidance in distinguishing the difference, if any, between “adverse” and “directly adverse” interests and may, instead, add to the problems with enforcement of the rule. If the word “directly” is stricken from proposed rule 1.7, then Comments 6 and 7 should also be deleted.
4. Comment 6 defines an attorney’s cross-examination of his or her own client, even if the client is not a party to the particular action, as directly adverse. OCTC understands that the cross-examination of one’s own client is an example of an adverse situation, but, contrary to this Comment, it does not seem directly adverse where the cross-examination does not affect the client in the representation for which the client hired the attorney. If a client is not a party to the action, then one must examine the client’s reasonable expectations, as well as the impact of such cross-examination on the client’s interests and on the attorney’s duty of loyalty and confidentiality to the client. Such analysis is necessary regardless of whether the modifier “directly” is included in the proposed rule.
5. OCTC recommends striking the second sentence of Comment 6 because, if a client is adversely affected by an attorney’s work on matter, even if the client is not a party to the matter, it may still raise the issue of whether the attorney adhered to his or her duty of undivided loyalty and, if not, create a direct conflict of interest. OCTC recommends striking the modifier directly before adverse in Comment 7.
6. Comment 8 is too long and confusing. OCTC recommends striking sentences 2-4. Sentence 5 is placing in a Comment an expanded version of the current version of 3-310 (C). If the Commission wants to state that this rule is not intended to change the current rule, it should just state that. If it believes the language in the Comment is preferable to the language in the proposed rule, it should adopt the language in the Comment as the rule. It, however, should not attempt to do so by a Comment.
7. Comment 9 appears unnecessary in light of proposed rule 1.9 and the language in proposed rule 1.7(a)(2). If the Commission is concerned about a conflict of interest created by an attorney’s other fiduciary duties (such as when he or she is acting as trustee, executor or corporate director), it should include in 1.7(a)(2) after the words “representation of one or more clients” words such as “or the attorney’s duties as a

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fiduciary to others.”

8. OCTC believes Comment 10 is unnecessary in light of proposed rule 1.7(a)(2). Comment 12 is unnecessary in light of proposed rule 1.8.10. Comment 13 is unnecessary in light of proposed rule 1.8.6. Comment 34 seems unnecessary in light of proposed rule 1.13(a). Comment 38 seems unnecessary in light of proposed rules 6.3 and 6.4.
9. Comments 14-17A could be reduced and the language tightened. Comments 23-25 are too long and confusing. The same is true for Comments 26-27, 29-29A and 32-33. Many of these comments seem unnecessary or duplicative of other comments. They should be reduced and tightened up
10. Comment 19 is confusing and could send the wrong signal to attorneys that they may fail to make the disclosure necessary to obtain consent. If the attorney cannot make the disclosure necessary to obtain consent, the attorney should not represent the client. Further, if the drafters reduce and tighten the language in Comments [14]-[17A], then the reference to Comments [14] –[17A] in Comment 19 could be stricken.
11. OCTC recommends striking the first sentence of Comment 20, but supports the rest of the Comment. Comment 1 lists the duties the conflict rules are concerned with. It could be understood to suggest that, if one concern exists and another does not, there may or may not be a conflict. It should be amended to explain whether any one of these factors require finding a conflict. In addition, it cites several conflict rules, including 1.8. This could be confusing because technically there is no rule 1.8, but several separate rules under the 1.8 category. (See rules 1.8.1 through 1.8.11.)
12. With respect to Comment 30, OCTC believes this is an improvement and concurs that rule 1.4 requires the attorney to advise the clients of the potential adverse consequences of joint representation. However, Comment 30 does not specifically require this in order to have informed consent.

Comment 22 is too long and confusing. It discusses advanced waivers. There are no reported disciplinary cases on advanced waivers. Some civil courts have held that an attorney may have an advanced conflict waiver, but those have been in very limited situations. OCTC is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. Under these circumstances, an advanced waiver could easily be abused. Furthermore, even the attorney cannot fully understand or be able to adequately explain the ramifications of a potential conflict. For these reasons, OCTC recommends that advanced conflict waivers be prohibited.

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- MIKE NISPEROS, OCTC, 9/27/2001:

18. Rule 3-310. Avoiding interests Adverse to a Client Avoiding Conflicts of Interest with Clients.

OCTC's recommends clarifying and simplifying the application of this rule regarding conflicts of interest. OCTC also recommends changing the title of the rule for the purpose of clarity.

Revise the rule and discussion section as follows:

Rule 3-310. ~~Avoiding interests Adverse to a Client~~ Avoiding Conflicts of Interest with Clients.

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of adequate information and an explanation of the relevant circumstances, ~~and~~ of the actual and reasonably foreseeable adverse consequences and material risks to the client or former client, and providing the client or former client with reasonable available alternatives to the proposed course of action;

(2) "informed written consent" means the client or former client's written agreement to the representation following written disclosure and adequate time to make an intelligent reasoned decision to give the consent;

(3) "Written" means any writing as defined in Evidence Code section 250.

~~(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:~~

~~—(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or~~

~~—(2) The member knows or reasonably should know that:~~

~~—(a) the member 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 member's representation; or~~

~~—(3) The member 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 member has or had a legal, business, financial, or professional interest in the subject matter of the representation.~~

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~~(C) A member shall not, without the informed written consent of each client:~~

~~—(1) Accept 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; or~~

~~—(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.~~

(B) Except as provided in paragraph (c) a member or law firm shall not accept representation or continue to represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest embraces all situations in which an attorney's loyalty to, or efforts on behalf of a client are threatened or a reasonable client would believe could be threatened by the member's responsibilities or relationship to another client, to a third person, or by the member's own interests. This will include, but not be limited to:

(1) when the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the member's responsibilities or relationship to another client, a former client, a third person, or by a personal interest of the lawyer.

(C) Notwithstanding the existence of a concurrent conflict of interest under paragraph (B) a member or law firm may represent a client if:

(1) the member or law firm reasonably believes that the member will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the member in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed written consent confirmed in writing after disclosure as that term is defined in paragraph (a) of this rule.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member or law firm shall not, without the informed written consent of the client or

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former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential material relevant to the employment.

(F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship;

(2) Information relating to representation of the client is protected as required by Business & Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such non-disclosure is otherwise authorized by law; or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public;

(G) A member who has formerly represented a client in a matter shall not thereafter 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 unless the former client gives informed written consent.

(H) A member shall not, unless the former client gives informed written consent, agree to or continue to represent a person in the same or substantially related matter in which the firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interest are materially adverse to that person; and

(2) about whom the lawyer has acquired information protected by Business & Professions Code section 6068, subdivision (e).

(I) A member or firm who formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter must not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known: or

(2) reveal information relating to the representation except as these rules would permit or require with respect to the client.

(J) While members are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by these rules unless

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the prohibition is based on a personal interest of the prohibited lawyer and does not represent a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(K) When a member 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 member and not currently represented by the firm unless:

(1) the matter is the same or substantially related to that in which the formerly associated member represented the client; and

(2) any lawyer remaining in the firm has information protected by Business & Professions Code section 6068, subdivision (e), that is material to the matter.

(L) When a member becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which the lawyer is disqualified under the rules unless:

(1) the personally disqualified lawyer is, when permitted, timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given any affected former client to enable the former client to ascertain compliance with the provisions of the Rule.

Discussion

This rule, although written differently than former rule 3-310, is not intended to change existing law. It merely simplifies and expands the language so that it embraces the Supreme Court's rulings on this issue. However, this rule as rewritten does require informed written consent for all conflicts or potential conflicts, not just some, as was the case in the former rule.

* * *

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present interest in the subject matter of the representation, Paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs Paragraphs (B) and (E) are to apply as complimentary provisions.~~

~~. . . Paragraph (B) is intended to apply only to member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or~~

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~~had a relationship with another party or witness or has or had an interest in the subject matter of the representation.~~

...

OCTC COMMENTS:

The current rule is confusing and at times has left gaps that do not address what would appear to be a conflict of interest as defined by case law. OCTC suggests that some of the categories be more like the proposed ABA rules. (See proposed Model Rules 1.7-1.11.) Moreover, as the Supreme Court has held “[c]onflicts 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 or a third person or by his own interests.” (*People v. Bonin* (1989) 47 Cal.3d 808, 835.) This rule should, therefore, embrace and incorporate that principle in its categories. Although, due to time constraints, we have not done so, the Commission should consider dividing this rule into more than one rule and possibly simplifying the rule even more. Obtaining an interest in subject matter of the litigation still would constitute a conflict of interest. The purpose of the conflicts rules is to protect the client’s expectation of loyalty and the duty of the attorney to preserve his or her client’s confidences and secrets and not use them for anyone else’s advantage, including the attorney’s advantage. Anything that reasonably raises questions about a lawyer’s impartiality is a conflict.

Furthermore, all conflicts should require informed written consent. This will ensure that consent is fully understood and agreed to and it protects the attorney from accusations by the client later and any argument as to whether the attorney obtained the consent.

The proposed rule uses the term “when permitted” in reference to ethical walls or screens within a law firm. Thus, as written, it does not change the law regarding whether ethical walls or screens should be permitted. However, OCTC suggests that the Commission might want to explore the issue of ethical walls or screening. In California, the law has been that once an attorney in a firm has been found to have a conflict of interest, the conflict extends to the entire firm. (See e.g. *People ex rel Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135.) Generally, screens to avoid conflicts have not been accepted in California, except as to government and former government lawyers. (See e.g. *Henricksen v. Great American Savings and Loan* (1992) 11 Cal. App.4th 109, 115-116.) A recent Ninth Circuit decision has, however, cast doubt on that principle. (See *In re County of Los Angeles* (2000) 223 Fed.3d 990.) That decision may be speculative as to the California Supreme Court’s position. Thus, now might be the time to address this issue in the rule. (See proposed Model Rule 1.10 and 1.11) The general principle that ethical screens are not valid makes OCTC’s job much easier. But OCTC also recognizes that others may see the need for ethical screens in a time of global firms, larger law firms, and more mobile attorneys. OCTC therefore asks that, if the Commission decides to address ethical walls, that at the very least attorneys be required to inform every client in writing of the conflict and the screening and that everything is done to protect a client’s confidences and secrets.

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- **State Bar Court:** No comments received from State Bar Court.

VIII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Model Rule 1.7.** The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.7: Conflicts of Interest: Current Client,” revised May 13, 2015, is available at:
http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7.pdf [Last visited 12/28/15]
 - Nineteen jurisdictions have adopted Model Rule 1.7 verbatim.¹¹ Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.7.¹² Ten jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.7.¹³
- **Model Rule 1.7, Comment [34] (Parent/Subsidiary Conflicts Situations).** The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct Rule 1.7, Comment [34],” revised October 21, 2010, is available at:
http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7_cmt_34.authcheckdam.pdf [Last visited 12/28/15]
 - Thirty jurisdictions have adopted Model Rule 1.7, Comment [34] verbatim.¹⁴ Three jurisdictions have adopted a modified version of Model Rule 1.7, Comment [34].¹⁵ Thirteen jurisdictions have not adopted a version of the Comment.¹⁶

¹¹ The nineteen jurisdictions are: Arkansas, Colorado, Delaware, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Utah, Vermont, and West Virginia.

¹² The twenty-two jurisdictions are: Alaska, Arizona, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, Washington, Wisconsin, and Wyoming.

¹³ The ten jurisdictions are: Alabama, California, District of Columbia, Florida, Georgia, Michigan, Mississippi, North Dakota, Ohio, and Texas.

¹⁴ The thirty jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

¹⁵ The three jurisdictions are: Alaska, District of Columbia, and New York.

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IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of the ABA Model Rules' approach to have separate rules for different conflicts of interest situations, i.e., Rule 1.7 (current client conflicts), Rule 1.9 (former client duties), Rule 1.8.6 (third-party payor), Rule 1.8.7 (aggregate settlements), rather than amalgamating the provisions in a single rule, current rule 3-310.
 - Pros: Such an approach should facilitate compliance with and enforcement of conflicts of interest principles. 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.
 - Cons: Current rule 3-310 has been applied without any perceived problems for over 25 years. There has been no showing of a compelling need to change the basic structure of the conflicts rules in California.
2. Recommend adoption of a "hybrid" approach to the current conflicts rule provisions by merging the "checklist approach" to regulating conflicts involving current clients, (i.e., as is done 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.
 - Pros: **First**, as explained more fully below, a hybrid rule will facilitate compliance with enforcement of the current client conflicts rule provisions by incorporating more clearly-stated general conflicts principles, (see introductory clauses to proposed paragraphs (a) and (b)), while providing specific examples ("checklist items") within each category that carry over the current California Rule requirements which clarify how situations that violate those principles might be recognized in practice.

Second, this hybrid 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 the current rule (Compare current rule 3-310(B) and (C)).

Third, by incorporating the generally-stated principles in Model Rule 1.7(a)(1) and (2) into the introductory clauses of 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

¹⁶ The thirteen jurisdictions are: Alabama, California, Florida, Louisiana, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, and Virginia.

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unconsentable conflicts into proposed paragraph (d), the proposed rule will move this important concept into the blackletter rather than relegate it to two separate Discussion paragraphs (see rule 3-310, Discussion paragraphs 2 and 10).

Fifth, by retaining a written disclosure requirement that broadly applies to a much broader category of potential personal conflicts of a lawyer, (see current rule 3-310(B) and proposed paragraph (c)), the rule will continue to increase client protection and promote confidence in the legal profession and administration of justice by requiring written disclosure of even those relationships or interests that do not rise to the level of presenting a significant risk they will have a substantial effect on the lawyer's representation of the client.

- **Cons:** The hybrid approach of the proposed Rule is more complex than either the current rule provisions or Model Rule 1.7. The proposed Rule's complexity may confuse lawyers as to their duties and risks weakening both compliance with and enforcement of basic conflicts principles. The Rule's combination of approaches is not found in any other jurisdiction and maintains California's departure from a national standard. A current conflicts rule should adhere to either the current rule's approach or adopt the Model Rule's approach.
- 3. Retain the current California Rules' standard for obtaining a client's consent to most conflicted representations, "informed written consent," rather than the Model Rules' less robust standard, "consent, confirmed in writing."
 - **Pros:** This standard is more client-protective because written disclosure is required, a consent being informed only to the extent that the disclosure is sufficient. Retaining the standard carries forward long-standing California policy. There is no evidence the requirement does not work in practice or is ignored.
 - **Cons:** None identified.
- 4. Retain the current California Rules' less stringent standard of requiring only "written disclosure for most conflicts based on a lawyer's relationships or personal interests. (See proposed paragraph (c)).
 - **Pros:** Carries forward long-standing California policy intended to ensure that a client is made aware of a much broader set of lawyer relationship and interests that would not otherwise be disclosed under the Model Rule's "significant risk that a lawyer's representation will be materially limited" standard in MR 1.7(a)(2), thus avoiding the under-regulation of that standard. There is no evidence that California's approach is broken. Moreover, the perceived under-regulation problem of current rule 3-310(B), i.e., that serious relationship or personal interest conflicts do not require informed consent, is obviated by the recommended adoption of paragraph (b).
 - **Cons:** The justification for requiring only written disclosure, to increase the breadth of relationships and interests that are disclosed, is attractive in theory but it is only when a client is confronted with signing a disclosure document that the client will take the time to consider whether the relationship or interest is sufficiently inconsequential and proceed with the lawyer's representation. There is also a reasonable likelihood that if a consent is not required, lawyers will honor the rule primarily by its breach.

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5. Recommend adoption of paragraph (a), which incorporates the general concept of direct adversity found in Model Rule 1.7(a)(1) while at the same time carrying forward current rule 3-310(C)(2) and (C)(3), with the latter provision expanded in paragraph (a)(2) to capture the broader concept of direct adversity that was identified in *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].
 - Pros: A criticism of current rule 3-310(C) has been that it does not capture this broader concept of direct adversity. See also discussion of Pros of the “hybrid” approach in paragraph 2 above.
 - Cons: There is no need to broaden rule 3-310(C)(3) as the broader concept of direct adversity is already recognized in case law, i.e., the *Flatt* case. Further, the Supreme Court has already interpreted current rule 3-310(C)(3) to encompass the *Flatt* standard when it adopted rule 3-310, Discussion ¶. 9, concerning conflicts in the insurance defense context. See also discussion of Cons of the “hybrid” approach in paragraph 2 above.
6. Recommend adoption of paragraph (b), which incorporates Model Rule 1.7(a)(2)’s general concept of a lawyer’s ability to represent a client being compromised by responsibilities owed another client or third person, or by the lawyer’s personal interests, but at the same time provide concrete examples of the concept from current rule 3-310(C)(1) and 3-310(B)(2).
 - Pros: See Pros in paragraph 2, above. Of special note is the drafting team’s recommendation that the heightened requirement of “informed written consent” be applied to current rule 3-310(B)(2). Rule 3-310(B)(2) requires only “written disclosure” when the lawyer “knows or reasonably should know” of a former legal, business, etc. relationship with a party or witness that “would substantially affect the member’s representation.” The drafting team believes that if the relationship would have a *substantial effect* on the lawyer’s representation of the current client, the heightened “informed written consent” requirement should be applied. As to current rule 3-310(C)(1), which addresses a “potential” conflict in a joint client representation, rule 3-310 currently requires informed written consent.
 - Cons: See Cons in paragraph 2, above, as to the recommendation to adopt a hybrid approach. Concerning the transfer of paragraph (B)(2) to proposed paragraph (b)(2) and imposing the heightened “informed written consent” requirement, no cons identified.
7. Recommend adoption of paragraph (c), which largely carries forward current rule 3-310(B) intact, but (1) broadens its application to relationships or personal interests of other lawyers in the law firm that the lawyer “knows” exist; and (2) adds the concept in current rule 3-320 regarding a lawyer’s relationship with another party’s lawyer.
 - Pros: See discussion of Pros of the “hybrid” approach in paragraph 2 above. With respect to extending to relationships and interests of other lawyers in the firm, increases client protection while not over-reaching because of the requirement that the lawyer know if these relationships and interests. With respect to incorporating 3-320, brings into a single rule all of the relationship and interest conflicts, increasing likelihood that lawyers from other jurisdictions

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- practicing in California will be able to find them.
- Cons: See discussion of Cons of the “hybrid” approach in paragraph 2 above. With respect to extending to relationships and interest of other lawyers in the firm, reflects a form of implicit imputation that should be addressed in a separate rule. With respect to incorporating 3-320, risks confusion by removing a separate California rule that has been in place with no indication that it is not working in this form.
8. Recommend adoption of paragraph (d), which incorporates the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts of interest.
- Pros: Proposed paragraph (d) moves the important concept of unconsentable conflicts into the blackletter rather than relegate it to two separate Discussion paragraphs (see rule 3-310, Discussion paragraphs 2 and 10). A provision that in effect provides an insurmountable obstacle to obtaining a client’s consent to a conflicted representation belongs in the black letter of the Rule.
 - Cons: There is no evidence that including the concept only in the Discussion section of rule 3-310 has caused any lack of awareness of the concept.
9. Recommend adoption of paragraph (e), which provides a definition of “written disclosure” for purposes of this Rule.
- Pros: Provides a definition that explains the scope of disclosure required under paragraph (d). This is a necessary addition to the Rule because, while informed consent” and “informed written consent” are defined in the global terminology rule (proposed Rule 1.0.1), neither “disclosure” nor “written disclosure” is. It would be both confusing and redundant to place either of those definitions in Rule 1.0.1 because the definition of “informed written consent” already describes the disclosure that is required to obtain such consent.
 - Cons: None identified.
10. Recommend adoption of Comment [1], which carries forward current rule 3-310, Discussion ¶. 1, concerning positional conflicts that might arise in representing different clients in separate matters. (See, e.g., State Bar Formal Ethics Op. 1989-108.)
- Pros: Provides meaningful and useful guidance on application of the rule to a particular situation likely to occur. Current discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or unhelpful.
 - Cons: None identified.
11. Recommend adoption of Comment [2], which carries forward current rule 3-310, Discussion ¶. 7, concerning joint client conflicts in a single matter.
- Pros: Provides meaningful and useful guidance on application of the rule to particular situations likely to occur. Current discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or unhelpful.
 - Cons: None identified.
12. Recommend adoption of Comment [3], which carries forward current rule 3-310, Discussion ¶. 9, concerning conflicts that might arise in the insurance defense context.
- Pros: Provides meaningful and useful guidance on a particular situation likely to occur to which the rule is not applicable. Current discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or

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- unhelpful.
- Cons: None identified.
 - [Note: The drafting team is tentatively proposing a modification of the comment to omit the detailed description of the holding of the cited case contained in the bracketed language. Favoring this is the general principle that comments should be shortened, and the belief that the detailed description of the holding is unnecessary given the significant time that has passed since the decision and the now general acceptance of the principle of the decision reflected in the balance of the comment. Against this is the recognition that the comment as a whole was the subject of extensive drafting debate at the time it was created, and that it appears to have served its purpose for many years.]
13. Recommend adoption of Comment [4], which is new, and explains the rationale for the different disclosure and consent regimes in paragraph (b) ["informed written consent"] and paragraph (c) ["written disclosure"].
- Pros: By explaining the rationale for the different approaches to relationship and personal interest conflicts in paragraphs (b) and (c), the comment provides interpretive guidance on when one or the other of the paragraphs might apply in situations not expressly identified in a subparagraph of either paragraph.
 - Cons: None identified.
14. Recommend adoption of Comment [5], which carries forward current rule 3-310, Discussion ¶. 2, which explains that when disclosure is precluded by rules protecting the confidentiality of another client's information, representation in situations covered by paragraphs (a) through (c) is prohibited.
- Pros: Maintains a current comment that emphasizes the overarching duty to protect confidential client information. Provides meaningful guidance to alert lawyers that an inability to disclose confidential client information may preclude compliance with the disclosure requirements of the conflict rule. Current discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or unhelpful.
 - Cons: None identified.
15. Recommend adoption of Comment [6], which carries forward current rule 3-310, Discussion ¶. 10 concerning unconsentable conflicts, and notes that paragraph (d) is the blackletter manifestation of the concept.
- Pros: Provides an important explanation that paragraph (d) describes conflicts when consent cannot be obtained or written disclosure will not suffice, thereby trumping the other provisions of the Rule (paragraphs (a) through (c).)
 - Cons: None identified.
16. Recommend adoption of Comment [7], derived from Model Rule 1.7, cmt. [5], which addresses the concept of "thrust-upon" or "unforeseeable" conflicts of interest.
- Pros: The comment provides guidance to a lawyer regarding the lawyer's responsibilities in a relatively uncommon but recurring situation where, for example, a conflict is created by the merger of a client with an entity that is adverse to another client in a matter where the lawyer represents the other client.

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- Cons: The comment does not provide guidance on interpreting or applying the rule in a disciplinary context, but simply provides practice guidance on what a lawyer might be able to do in a disqualification context.
- 17. Recommend adoption of Comment [8], which provides cross-references to two proposed Rules, recommended for adoption by this Commission, which permit otherwise conflicted representations or provide exceptions for imputation under certain conditions.
 - Pros: Both referenced rules, proposed Rules 6.3 and 6.5, promote lawyer conduct that promotes confidence in the legal profession or the administration of justice, or would increase the access to justice, or both. Lawyers should be made aware that the principles set forth in proposed Rule 1.7 are not intended to prevent such conduct.
 - Cons: None identified.
- 18. Delete discussion paragraphs 3 through 6, 8, 11, and 12 of current rule 3-310.
 - Pros: As noted in the redline comparison of the proposed Rule to current rule 3-310 in Section IV, above (see notes 5 to 10), each of these paragraphs have not been carried forward because the proposed revisions to the 3-310 provisions which they are intended to explain have been deleted, moved to another rule, incorporated in the black letter of this rule, or rendered irrelevant because a cross-referenced rule has been imported into the proposed Rule.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Retain the current “checklist” approach in current California rule 3-310 (B) and (C), without incorporating general principle concepts from Model Rule 1.7.
 - Pros: The rule has been in existence for over 25 years. There is no evidence that lawyers cannot understand their duties as stated in the rule, or that compliance with it, or discipline under it, is impaired. See also Cons in paragraph A.2 above.
 - Cons: See Pros in paragraph A.2, above.
2. Recommend adoption of the ABA Model Rule approach in Rule 1.7.
 - Pros: The ABA’s explicit conflicts standards set forth in paragraph (a) of MR 1.7 are a clear and straightforward statement – in two subparagraphs – of the kinds of conflicts that involve a current client. Paragraph (b) explicitly identifies those conflict situations that are not consentable in three subparagraphs. The Model Rule is more comprehensive in its scope of coverage and would be more protective of a client’s interests. Nearly every jurisdiction in the country has adopted the Model Rule either verbatim or a very close approximation. California should similarly adopt the basic framework and language of Model Rule 1.7 and contribute to the establishment of a national standard.
 - Cons: The Model Rule may appear to be straightforward but the devil is in the details, which the Model Rule addresses by including 35 comments, many of them lengthy. RRC1 also used the Model Rule structure and language, and inserted 41 comments of explanation. The number of comments accompanying

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both versions of the Model Rule approach would appear to belie a claim that the rule is straightforward. Straight adoption of the ABA Model Rule approach would completely forego the current California Rule approach, which has proved workable and useful.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. The introductory clause in paragraph (a) is a substantive change only because it describes subparagraphs (a)(1) and (a)(2) [corresponding to current rule 3-310(C)(2) and (C)(3)] as situations involving direct adversity.
2. Paragraph (a)(2) is a substantive change because it broadens the scope of current rule 3-310(C)(3) to include direct adversity situations as contemplated by *Flatt*.
3. Paragraph (b)(2) is a substantive change because it now requires “informed written consent” of the client, while the corresponding provision in current rule 3-310(B)(2), requires only “written disclosure.”
4. The addition of the clause “or knows that another lawyer in the lawyer’s firm has or had” in paragraphs (c)(2) and (c)(3) is substantive change in that the concept has been moved from a Discussion paragraph in rule 3-310 to the black letter of the proposed Rule.
5. Paragraph (d) is a substantive change because it moves the description of unconsentable conflicts into the black letter of the Rule.
6. Paragraph (e) is a substantive change in defining “written disclosure” specifically in relation to the situations described in paragraph (c), which corresponds to current rule 3-310(B). Current rule 3-310 does not include a definition specifically addressing the standard in paragraph (B).

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member.”
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to

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the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Paragraph (a)’s substitution of “representation” for “accept or continue the representation” in current rule 3-310(C)(2) and (3) is not a substantive change.
 4. The addition of paragraph (c)(4) is not a substantive change because the concept is now in the black letter of current rule 3-320.

E. Alternatives Considered:

1. In addition to the alternatives discussed in “Concepts Rejected” above, the drafting team also considered simply carrying forward the various provisions in current rule 3-310 as separate standalone rules, with 3-310’s provisions amended to incorporate the global changes the Commission has agreed to (“lawyer” for “member,” etc.) and the separate standalone rules corresponding to the ABA numbering. The drafting team abandoned that approach at an early stage of its deliberations. A copy of the rules considered under this approach is attached.

X. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) Should the bracketed language in proposed Comment 3 be deleted (the tentative recommendation of the drafting team) or retained? [See discussion in paragraph IX(A)(12).

(2) Should an additional comment be added to discuss application of the relationship and interest provisions to a lawyer’s professional relationship with a particular expert witness arising from the lawyer’s repeated retention of that expert witness in other cases?

XI. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

None

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-310 [1.7]

Lead Drafter: Martinez
Co-Drafters: Cardona, Eaton, Harris, Stout
Meeting Date: February 19-20, 2016

XII. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-310 [1.7] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-310 [1.7] in the form attached to this Report and Recommendation.

XIII. DISSENTING POSITION(S)

None.

XIV. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)