

**Rule 1.7 [3-310] Conflict of Interest: Current Clients**  
**(Commission's Proposed Rule Adopted on March 31 – April 1, 2016**  
**– Clean Version)**

- (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) the lawyer reasonably believes\* that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law; and
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

## **Comment**

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.\* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person\* the lawyer represents in some other matter, even when the matters are wholly unrelated. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. A directly adverse conflict under paragraph (a) occurs 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 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 the interests of any of the clients would be adversely affected by the resolution of the legal question. Factors relevant in determining whether the interests of one or more of the clients would be adversely affected, thus requiring that the clients 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.

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners\* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer

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

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, 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.

[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 information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

[7] Paragraph (d) imposes conditions that must be satisfied even if informed written consent\* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing\* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent\* may not suffice to permit representation. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[8] This Rule does not preclude an informed written consent\* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably\* understands the material risks that the consent entails. The more comprehensive the explanation of the

types of future representations that might arise and the actual and reasonably\* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[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).

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

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**Synopsis of Public Comments**

**TOTAL = XX**    **A = X**  
**D = X**  
**M = X**  
**NI = X**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
2016-32d	Law Professors (Zitrin)	Yes	M	(b), (c)	<p>Generally agree with the Commission's decision to recommend adoption generally of the ABA's approach to current client conflicts and requiring informed written consent concerning paragraph (b) [3-310(B)] conflict situations.</p> <p>However, suggests two changes:</p> <p><u>Paragraph (b)</u>: Proposed rule 1.7(b)(3) states in pertinent part that a lawyer may not represent a client without informed consent where the lawyer has a relationship with someone known to "be affected substantially by resolution of the matter." Use of the word "resolution" is a vestige of the current 3-310(b). It is, however, too limited a term. This subsection should more simply require informed written consent should the person "be affected substantially by the matter," whether it is the matter's resolution or some other interlocutory issue. Moreover, some matters, such as wills and trust modifications, are never truly "resolved," or finally completed.</p>	<p>No response required.</p> <p><u>Rule 1.7(b)</u> states the general rule that there is a conflict if the lawyer's responsibilities to another will "materially limit" the lawyer's ability to represent the client. The provisions of 1.7(b)(1)-(5) then provide non-exclusive examples, using 3-110 as a basis. In this context, 1.7(b)(3) carries over from rule 3-110 and uses as an example the situation where a person with whom the lawyer has a relationship will be affected substantially by resolution of the matter. As an example, the Commission continues to believe it appropriate to highlight, as does 3-110, that lawyers need to consider the effect of resolutions of matters. This does not limit the</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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	<b>D = X</b>
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					<p>Paragraph (c): by adding MR 1.7(c), the commission has folded in another existing rule, Rule 3-320, into the basic conflicts rule. However, this rule, which deals with conflicts relating to a lawyer's family or "intimate" relationships, only requires "inform[ing] the client in writing." This level of disclosure is insufficient and poorly defined. This paragraph should be moved and included as a sub-part of Rule 1.7(b), requiring informed consent.</p>	<p>application of the general principle of 1.7(b), but serves as a useful example that provides guidance.</p> <p><u>Rule 1.7(c).</u> The Commission continues to believe that 1.7(c) appropriately carries over the current requirement of 3-320 for only the more limited inform in writing (as opposed to informed written consent). Given the nature of the conflicts addressed, the Commission believes this more limited standard remains appropriate.</p>