

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.

Rule 1.7 [3-310] Conflict of Interest: Current Clients

- (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 by the lawyer's own interests.
- (c) Whether or not there is a substantial risk the lawyer's representation of the client will be materially limited by the relationship, a lawyer shall not represent a client without providing written* disclosure of the relationship to the client where: ~~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.~~
- ~~(e) A lawyer shall not represent a client in a matter in which~~ (2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another

lawyer in the lawyer's firm*, or has an intimate personal relationship with the lawyer, ~~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.~~

[23] 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).

[34] 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.

[45] 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, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer’s obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer’s representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer’s firm*, with a party, a witness, or another person who may be affected substantially by the resolution of the matter.

[5] Paragraph (c) requires written* disclosure of any of the specified relationships regardless whether there is a material risk it will substantially limit the lawyer’s representation of the client. If the particular circumstances present a material risk the relationship will substantially limit the lawyer’s representation of the client, informed written consent is required under paragraph (b).

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

[76] 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.

[87] 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].)

[98] This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably understands the risks involved in giving consent. -An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a

client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[109] 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).

[1149] 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.



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

August 12, 2016

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.7 Conflict of Interests: Current Clients

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.7 [3-310] Conflict of Interest: Current Clients and offers the following comments.

As an initial matter, COPRAC wishes to record its strong support of the Commission's decision to adopt the basic framework set out in ABA Model Rule 1.7 for the analysis of concurrent client conflicts. This is a major advance. As will appear, our principal criticism of the proposed Rule is that it does not go far enough in adopting the ABA framework, clinging to language from the current California rules that does not fit well with the ABA Model Rules.

Paragraph (a)

COPRAC supports the restriction on direct adversity conflicts contained in paragraph (a) of the Rule and agrees that informed written consent is the appropriate standard for waiving such conflicts.

Paragraph (b)

COPRAC does not support the adoption of proposed Rule 1.7(b) in its current form.

COPRAC strongly supports adoption of the "significant risk of material limitation" ("SRML") conflict concept, which fills a gap in California's current rules and aligns California's conflict law with the national standard set out in Model Rule 1.7(a)(2). COPRAC also agrees that informed written consent is the appropriate standard for waiving such conflicts.

Our concern with paragraph (b) lies in subparagraphs (1) - (5), which purport to provide a non-exhaustive "checklist" of situations covered by the SRML concept. COPRAC agrees that, depending on the specific circumstances, each of the situations described could trigger the rule. But except for that described in subparagraph (5) (reasonable likelihood of conflict between clients being represented in the same matter), none fits squarely into the SRML concept. The

result is that the “checklist” is too broad in some respects, too narrow in others, and potentially misleading as well.

A good example of overbreadth is sub paragraph (b)(1), which states that an SRML conflict exists “whenever a 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.” Although this example clearly covers some cases that would raise a significant risk of material limitation, it just as clearly covers some cases that would not do so. Suppose, for example, that a large firm litigation lawyer knows (a) that her corporate partner has a standard home mortgage with Megabank and (b) that Megabank will be a third party witness in the case she is handling. Under the rule, this “financial relationship” appears to require informed consent—but there would not appear to be a “significant risk of material limitation” to the representation. Accordingly, subparagraph (b)(1) is overbroad.

Subparagraph (b)(3) is similarly overbroad, as it effectively concludes that in any case where “the lawyer has or had, or knows that another lawyer in the firm has or had, a legal, business, financial, or personal relationship with another person or entity the lawyer knows or reasonably should know will be affected substantially by resolution of the matter” automatically means there is a significant risk of material limitation. Yet, as with subparagraph (b)(1), discussed above, it is not difficult to envision situations falling within the subparagraph (particularly involving former relationships) which would not give rise to a significant risk of material limitation.

Subparagraphs (b)(2) and (b)(4) appear to recognize the problem of over-inclusiveness, but the way they attempt to fix it is confusing and can be read as unduly narrowing the rule. Those subsections deal respectively with the lawyer’s former relationship with a party or witness and with the lawyer’s present or former interest in the subject matter. Recognizing that not all such cases involve a significant risk of a material limitation, both subsections contain additional language limiting the obligation to obtain informed written consent to cases where the lawyer “knows or reasonably should know that the conflict will materially limit the lawyer’s representation.” This modification arguably cures the problem of over-inclusiveness, because a conflict that the lawyer “knows or reasonably should know . . . will materially limit” a representation necessarily involves “a significant risk of material limitation.” But it also can be read as implying that for (b)(2) and (b)(4) conflicts, a lawyer may undertake a representation without informed consent even though there is a significant risk of a material limitation, so long as it is not reasonably knowable that the limitation “will” in fact occur. There is no apparent reason, however, why different and more forgiving treatment is warranted for subparagraphs (b)(2) and (b)(4) conflicts that otherwise meet the significant risk of material limitation standard.

None of the other states that have adopted Model Rule 1.7 have included examples of SRML conflicts in the text of the Rule. To the extent that practicing lawyers need to be reminded that SRML conflicts can arise from their own personal interest in the subject matter, or from their past or present relationships with parties, witnesses and other affected persons, that can and should be done in the Comment to the Rule.

Our suggestion for addressing these issues would be to eliminate subparagraphs (1) - (5). Everything that is worth saving in the five subsections can be captured by including additional language in the Comment making clear that the SRML standard should be applied in analyzing conflicts arising from personal interests or present or former relationships. This approach, which harmonizes the Rule with Model Rule 1.7, is reflected in the attached redline.

Paragraph (c)

Rule 1.7(c) covers the situation where the opposing lawyer is a close personal relative, client, or intimate of the lawyer. The Model Rules treat those conflicts as covered by the SRML construct, and not addressing them in their own subsection. The draft section, however, follows prior California law by treating them as a special category of conflict and requiring only written disclosure rather than informed written consent.

The Committee agrees that for the protection of the public the situations described in Rule 1.7 (c) always require at least written disclosure. We are concerned, however, that as currently drafted the Rule could be read as eliminating any further requirement of informed written consent in cases where a relationship covered by the rule gives rise to an SRML conflict. While some lawyer to lawyer relationships may not give rise to a significant risk of material limitation, surely many will do so. Logically there is no reason to treat these potential conflicts differently from the other ones discussed above. If, in fact, the relationship between the lawyer and the opposing lawyer is such as to give rise to a significant risk of material limitation, then Rule 1.7 (b) should be triggered, and informed written consent should be required. Our proposed new Comment [5] would make that clear.

Paragraph (d)

COPRAC supports the adoption of proposed Rule 1.7(d).

Proposed Changes to the Comment

In addition to the revisions to the Comment required by the amendments to the rule proposed above, COPRAC has specific suggestions for the revision of two other comments. Both are reflected in the attached redline.

Comment [2] deals with positional conflicts based on advocating a position on an issue of law for one client that is inconsistent with another client's position on the same issue. It states that "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." We have several concerns with the language of this proposed Comment.

First, the national authorities recognize that the vast majority of positional conflicts are not direct adversity conflicts, but rather SRML conflicts. ABA Formal Opinion 93-377 n. 4. Suggesting that such conflicts should be analyzed principally or exclusively under part (a) of the Rule is therefore misleading.

Second, the proposed comment is open to an interpretation that substantially broadens the concept of positional conflict. Comment [24] of the ABA Model Rule is focused on a lawyer taking inconsistent legal positions on behalf of different clients in different matters—in short, on the lawyer actively advocating for both positions. The language of Comment [2] is potentially broader, since it focuses on the client's positions and does not expressly state that it applies only when the lawyer is advocating both those positions. When coupled with the Comment's further suggestion that the Rule is violated whenever one of the clients is "adversely affected," the comment is open to potentially unfortunate interpretations. Suppose, for example, that litigators at a large firm with a transactional practice representing issuers of tax free bonds have been asked to represent, on a pro bono basis, a civil rights plaintiff in a suit against a non-client

municipality. The case presents an important issue concerning the liability of municipalities under federal civil rights law. The firm knows that its municipal bond clients have an “antagonistic” position on the issue, and that a decision against the non-client municipality will set an adverse precedent for its municipal bond clients—which would seem to be an “adverse effect.” Yet treating this as a “direct adversity” conflict under paragraph (a) would seem to allow the bond clients to intervene to disqualify the firm from representing the civil rights plaintiff, sue the firm for malpractice and perhaps to seek forfeiture of attorney fees. The Committee is not aware of any authority that would support that outcome. Moreover, there is reason to believe that such a sweeping definition of positional conflicts would have a severe effect on clients’ choice of counsel, and particularly on firms’ willingness to undertake pro bono representation. Cf. Norman Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 Stan.L.Rev. 1395 (1998).

To address these issues, COPRAC proposes a rewrite, based in substantial part on Comment [24] to the Model Rules, to avoid the current comment’s potentially overbroad definition of positional conflicts, its misleading focus on direct adversity conflicts, and to focus on the more common and more important question of when positional conflicts trigger paragraph (b) of the Rule. Consistent with this new focus, COPRAC also suggests that the Comment be placed after the discussion of SRML conflicts.

Comment [8] deals with informed written consent to a future conflict. COPRAC agrees that such consents should be permitted by the Rule and that the key criterion should be whether the client understands the risks involved. COPRAC also believes, however, that consistent with Model Rule 1.7, Comment [22], national authorities (ABA Formal Opinion 05-436), and basic principles of contract and fiduciary law, the Comment should recognize that the experience and sophistication of the client, including whether the client is independently represented by counsel in giving consent, is relevant to determining whether or not the understanding required to enforce the waiver is present. Our proposed Comment [9] reflects that change.

Thank you for your consideration of our comments.

Very truly yours,



Merri A. Baldwin, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

**Rule 1.7 [3-310] Conflict of Interest: Current Clients
(COPRAC's Proposed Revisions)**

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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.

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.~~

[23] 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).

[34] 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.

[45] 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. interests, or relationships. Such responsibilities, interests, or relationships may be legal, business, financial, professional or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from the lawyer's present or past relationships with a party, a witness or another person who may be affected substantially by resolution of the matter. Similarly, the fact that a lawyer for another party in the same matter 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 a lawyer will ordinarily create a risk requiring disclosure and informed consent.

[5] Paragraph (c) requires a lawyer to inform the client in writing when he or she has one of the specified relationships with another lawyer in the same matter, whether or not that relationship gives rise to a significant risk the that lawyer's representation of the client will be materially limited by that relationship. If a relationship covered by paragraph (c) also gives rise to a conflict of interest requiring informed written consent under paragraph (b), the lawyer shall comply with that paragraph as well.

[65] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of a client might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if a lawyer's concern about creating a precedent adverse to the interest of the other client gives rise to a significant risk that the lawyer may temper or limit her advocacy in order to avoid harming the interests of the second client. Similarly, a conflict exists if there is a significant risk that a lawyer's action on behalf of the first client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the client's informed consent is required include the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer.

[76] 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.

[87] 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].)

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

[89] 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).

[910] 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.

Drafting Team: Martinez (Lead), Cardona, Eaton, Harris, Stout

September 2, 2016 McCurdy Email re 1.7 to Drafting Team, cc Difuntorum, Mohr, Marlaud & Lee:

Rule 1.7 Drafting Team:

This message provides information and instructions for Rule 1.7 assignment for the September 30th meeting.

I. Follow-up on the Discussion at the 8/26/16 Commission Meeting

- Kevin Mohr's August 26th Commission meeting notes flagged the following point for the drafting team's consideration:

Whether the drafting team should consider paragraphs 1.7(b) and 1.7(c) to assure that there will be no confusion to the average lawyer.

II. Consideration of Public Comments and Public Hearing Testimony

In accordance with the protocol established at the August meeting, the drafting team is assigned to review the public comments received for this rule. Your prior assignment for the last meeting covered comments received through August 14, 2016. The following public comments for Rule 1.7 have been received since August 14th and are assigned for your review in preparation for the September meeting.

1. X-2016-43I COPRAC (Baldwin)
2. X-2016-52d-Law Professors (Zitrin)
(The comments for Rule 1.7 in this August 25, 2016 Law Professors' comment letter are identical to the comments for this rule in the July 25, 2016 Law Professors' comment letter, with the exception of additional law professor signatories, however, they are being considered and logged as separate comments, as they were submitted on separate dates with additional signatories.)
3. Richard Zitrin 7-26-16 Public Hearing Testimony
4. Michael Goodman 7-26-16 Public Hearing Testimony
(Refer to testimony in bookmarked transcript attached.)

Use the Dropbox link below to access the above listed public comments – this is a direct link to the public comments folder for this specific rule:

<https://www.dropbox.com/sh/y4t0wf9kj3fwun7/AADZ44CKIRd7cVNoO2jRGzaoa?dl=0>

Please note that this folder includes comments that were previously assigned for the August meeting. This folder will also include future comments that we anticipate will be assigned for the October meeting. You are responsible for reviewing and considering the comments listed above for the September meeting. We have set September 1st as the cut-off point for comments assigned for the September meeting. However, we encourage you to periodically check the folder for subsequently received comments as these will be assigned for the October meeting.

Drafting Team: Martinez (Lead), Cardona, Eaton, Harris, Stout

An updated public comment synopsis table is attached.

As was the case with the assignments for the August meeting, following review of the public comments, please do one of the following:

1. If the drafting team believes the comment(s) received warrant a revision to the proposed rule, please submit an annotated revised rule draft responsive to the public comment(s);

OR

2. If the drafting team believes the comment(s) received DO NOT warrant further revision to the proposed rule, then please draft the recommended RRC Response for the public comment synopsis table. In some cases, a comment may be supportive of the proposed rule or otherwise not require a substantive response. For those comments, please indicate expressly the drafting teams decision that no response is required.

Assignment Due Date: Please submit either of these items to all those copied on this message by **Friday, September 16th at 10:00 am** for circulation with the September 30th agenda materials.

Assistance with Conference Calls: If you would like the assistance of staff to schedule/notice a conference call for your drafting team to discuss the comment(s), please include all those copied on this message with that request and one of the admin. staff will send out a notice.

Attached:

RRC2 - [1.7][3-310] - Public Comment Synopsis Table - REV (09-02-16).doc

RRC2 - Process - PubCom - Transcript of 07-26-16 Public Hearing (LA-SF-TeleConf) - FINAL (09-02-16).pdf

September 3, 2016 Cardona Email re 1.7 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

Attached is a redline from the current proposed rule in which I attempt to address the various comments, as well as our discussion at the August 26 meeting. In sum:

- (1) I have jettisoned the hybrid approach to 1.7(b), taking into account the comments at the meeting and in the COPRAC public comment. I believe what are now 3-310(C)(1), (B)(2), (B)(3), and (E) (as it applies to current clients) are all adequately encompassed by 1.7(b), with what I propose as comment 4 (previously comment 5) modified in accordance with COPRAC's comments.
- (2) Because 1.7(b) requires a substantial risk of material limitation, it does not encompass what are now 3-310(B)(1) or (B)(4) or 3-320, all of which currently require written disclosure of certain relationships or interests without regard to whether there is such a substantial risk. We had previously rejected carrying over 3-310(B)(4) because of its vagueness, but I do believe that the current rules' requirement of the lesser written disclosure of the relationships they cover provides additional client protection that we should not lose in the transition to the new Rule 1.7. We had previously included 3-320 in 1.7(c), and I have now modified 1.7(c) to also encompass current 3-310(B)(1). In accordance with COPRAC's comments, and Mark Tuft's comments at the meeting, I have also added language to the

Drafting Team: Martinez (Lead), Cardona, Eaton, Harris, Stout

rule itself to make clear that 1.7(c) applies whether or not there is a substantial risk of material limitation, and have added new comment 5 to make clear that if, under the particular circumstances, the relationships covered by 1.7(c) create a substantial risk of material limitation, informed written consent under 1.7(b) will be required. Finally, to address the public defenders' comment, I have added a knowledge requirement (knows or reasonably should know) to 1.7(c)(2).

- (3) I accepted COPRAC's comments regarding inconsistent legal positions, and have included a new comment 6 that I believe accords with those comments (though slightly modified for language).
- (4) I also accepted COPRAC's comment regarding adding to comment 9, which relates to advance consents, language relating to the experience and sophistication of the client, which I think makes sense.

I think this works, and provides a better rule, closer to the ABA Model Rule, while still preserving some of the additional client protection provided by the current California rule.

Attached:

RRC2 - [1.7][3-310] - Rule - DFT 4 (09-03-16) - Cf. to DFT3 (04-01-16).docx

September 4, 2016 Martinez Email re 1.7 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

Here are my comments:

Paragraph (b) --We went with the hybrid approach in order to reach a compromise between the categorical California, but less inclusive approach, against the broader, but arguably more opaque, ABA "material limitation" approach. However, I think we ended up with a Rule with too many subparts and too many moving parts --words like "has" or "had," "knows" or "reasonably should know"—that are repeated throughout paragraph (b) and make the Rule difficult to read. While I agree we should jettison the baggage in Paragraph (b), as COPRAC is suggesting, I wonder if we shouldn't try to preserve a modicum of the check list approach. For example, (b) could read more simply:

(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 by the lawyer's own interests, **including where the lawyer has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in a matter.**

Paragraph (c) --I am concerned about the possible inconsistencies and perceived overlap between paragraph (b) and your (c)(1) and that some lawyers will use (c)(1) as the default even if there is a material limitation. I would just retain paragraph (c) as it currently stands or only use (c)(2) of your proposal—limit (c) to relationships with another party's lawyer. The more specific provision (para (c)) would control over the more general one (para (b)) to resolve any inconsistency.

Positional conflicts. I would not delete Comment [2] as COPRAC suggests and replace it with the ABA version but recast it and reformulate it by avoiding the linkage to Paragraph (a).

I'm ok with the rest.

September 5, 2016 Cardona Email re 1.7 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

The concern I have with your proposal for paragraph (b) is that it does not solve the problem cited by COPRAC because it continues to equate the listed relationships (legal, business, financial, professional or personal with a party or witness) with a substantial risk of material limitation when, as COPRAC notes (I think correctly) there can be instances where there is such a relationship, but it does not pose a substantial risk of material limitation. Given this, I think it better to preserve the current California rule regarding these relationships (my proposed (c)(1)), which requires their written disclosure in all circumstances (which I believe warranted for client protection purposes), while making clear (as the preface to my proposed (c)(1), and the related proposed comment do) that if these relationships rise to posing a substantial risk of material limitation, informed written consent is required. I think lawyers confronted with a close call will take the conservative route and seek informed written consent if there is a possibility a relationship would pose the required risk, and so am less concerned about lawyers defaulting to written disclosure for all.

If we believe these types of relationships are of necessity so serious that informed written consent is required and that we do not want to leave it to lawyer's judgment to determine when they do or do not pose a substantial risk of material limitation, then I think we would need to carve out a new portion of section (b) that would require that, but without equating them with posing a substantial risk of material limitation. I would not be in favor of this.

With respect to the comment, I am agnostic about going with what I proposed or instead simply modifying our existing comment 2 – either would address the COPRAC comment. If we modify comment 2, here is what I would propose:

Paragraphs (a) and (b) do not require informed written consent simply because a lawyer represents 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 or there is a substantial risk the lawyer's advocacy on behalf of one client may be materially limited out of concern about creating precedent adverse to the interest of another client. Factors relevant in determining whether informed written consent is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

Do others have thoughts? Should we schedule a conference call?

September 5, 2016 Martinez Email re 1.7 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I agree with you regarding my proposal for paragraph (b). I viewed the word "including" as a word of limitation. But in looking at case law, it appears the word "includes" is ordinarily a term of enlargement rather than limitation. (Ornelas v. Randolph (1993) 4 Cal.4th 1095, 1101.)

So this leaves us to tinker with c(1) and c(2) and the vestiges of our current Rule. The problem I see with c(1) is that it doesn't provide a clear line of demarcation between (b) and c(1). The conservative lawyer will err on the side of adhering to (b) by obtaining written consent. However, reasonable minds may differ and I can see many lawyers taking the easier option under c(1) and providing only written disclosure, especially since the concepts of "material limitation" and "substantial risk" are so elusive. So I wonder if we are only adding more confusion to the mix given the overlap (perceived or real) between (b) and (c)(1).

As for positional conflicts, the Commission's approach to Comment [2] is certainly pithier than the ABA's wordier version. Pithier is good.

September 5, 2016 Eaton Email re 1.7 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I generally prefer the simpler approach advocated by Raul, but find myself in general agreement with George.