

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

- (a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.
- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:
 - (1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
 - (2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm*, or has an intimate personal relationship with the lawyer.
- (d) Representation is permitted under this Rule only if:
 - (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] For purposes of this Rule, “matter” includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons*.

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an “uncontested” marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[4] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App. 4th 1422 [86 Cal.Rptr.2d 20], the court held that subparagraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer’s consent, Notwithstanding State Farm, 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, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer’s obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer’s representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer’s firm*, with a party, a witness, or another person who may be affected substantially by the resolution of the matter.

[6] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer’s representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer’s representation of the client, informed written consent is required under paragraph (b).

[7] Ordinarily paragraphs (a) and (b) will not require informed written consent simply because a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients. That advocating 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 clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[8] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this Rule. (See, e.g., Bus. & Prof. Code § 6068(e)(1) and Rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this Rule is likewise precluded.

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

[10] This Rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

[11] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the

conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

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

Note: Changes to September 30, 2016 Meeting Draft highlighted in yellow

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

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- (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.~~

[2] For purposes of this Rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, or other deliberation, decision, or action that is focused on the interests of specific persons*, or a discrete and identifiable class of persons*.

[3] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a

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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, 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.

[56] Paragraph (c) requires written* disclosure of any of the specified relationships whether there is even if there is not a significant risk that it relationship will substantially materially limit the lawyer’s representation of the client. If However, if the particular circumstances present a material significant risk the relationship will substantially materially limit the lawyer’s representation of the client, informed written consent is required under paragraph (b).

[67] 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

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~~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.~~

[68] 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.

[79] 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].)

[810] 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.

[911] 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).

[4012] 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 = 2	A = 6
	D = 0
	M = 7
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-32d	Law Professors (Zitrin) (07-25-16)	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>1. <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>1. <u>Paragraph (b)</u>: The Commission has removed subparagraph (b)(3) from the proposed rule. See response to COPRAC, X-2016-431, <u>below</u>.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					<p>2. <u>Paragraph (c)</u>: 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>2. <u>Rule 1.7(c)</u>. The Commission has changed the standard in paragraph (c) to a “written disclosure” requirement.</p>
X-2016-43I	Committee on Professional Responsibility and Conduct (COPRAC)	Y	M	(a)	<p>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.</p>	<p>After further consideration, the Commission largely agrees with the commenter’s assessment and has made changes to the proposed Rule in accordance with many of the commenter’s suggestions.</p>
				(b)	<p>1. COPRAC does not support 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 conflict law with the national standard set out in Model Rule 1.7(a)(2). COPRAC also agrees that informed written consent is the</p>	<p>1-2. The Commission has made changes to paragraphs (b) and (c) that it believes address most of the commenter’s concerns. The changes and reasons for the changes are as follows: Because Rule 1.7(b) requires a substantial risk of material limitation, it does not encompass what is covered in</p>

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					<p>appropriate standard for waiving such conflicts.</p> <p>Our concern with paragraph (b) lies in subparagraph (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. [examples of the rule being overbroad in some circumstances, and unduly narrow in others, are included in the letter]</p> <p>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</p>	<p>current rule 3-310(B)(1) or (B)(4) or rule 3-320, all of which currently require written disclosure of certain relationships or interests without regard to whether there is such a substantial risk. Consequently, the Commission has removed all of the subparagraphs from paragraph (b). Thus, paragraph 1.7(b) now more closely approximates Model Rule 1.7(a)(2) but with California’s heightened consent standard.</p> <p>The Commission has included current rule 3-310(B)(1) in paragraph (c) as (c)(1) Paragraph (c) has been further modified to include current rule 3-320 as paragraph (b)(2).</p> <p>To address concerns expressed by the commenter and a member of the Commission, the Commission has added prefatory language to paragraph (c) make clear that the paragraph applies even if there is not a substantial risk of a material limitation on the relationship. Put another way, although a situation as described in</p>

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				(c)	<p>subject matter, or from their past or present relationships with parties, witnesses and other affected persons, that can and should be done in the Comments to the Rule.</p> <p>One suggestion for addressing this issue would be to eliminate subparagraphs (1) – (5). Everything that is worth saving in the five subparagraphs 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.</p> <p>2. COPRAC 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.</p>	<p>paragraph (c)(1) can create a significant risk of a material limitation, there may be instances where it does not. Nevertheless, in the interests of public protection, the Commission determined that the lawyer should at a minimum provide the client with written disclosure as is required in the current rule.</p> <p>Finally, the Commission has added new Comment [5] to drive home the point that if, under the particular circumstances, the relationships covered by 1.7(c) do create a substantial risk of material limitation, informed written consent under 1.7(b) will be required.</p>

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					<p>Logically there is no reason to treat these potential conflicts differently from the other ones discussed above (in subparagraph (b)). 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 [COPRAC provided a redline of rule attached to letter].</p>	
				(d)	3. COPRAC supports the adoption of proposed Rule 1.7(d).	3. No response required.
				Comment [2]	4. 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	4. The Commission agrees with the commenter's concerns and has made changes to address them: It has deleted the first sentence of Comment [2] and moved the second sentence of that comment into new Comment [6], which is derived from MR 1.7, cmt. [24]

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					<p>this proposed Comment.</p> <p>First, the national authorities recognize that the vast majority of positional conflicts are not direct adversity conflicts, but rather SRML conflicts. See, 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.</p> <p>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.</p>	

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					<p>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’</p>	

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					<p>willingness to undertake pro bono representation. Cf. Norman Spaulding, <i>The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico</i>, 50 Stan.L.Rev. 1395 (1998).</p> <p>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.</p>	
				Comment [8]	<p>5. 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</p>	<p>5. The Commission agrees and had added those factors.</p>

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					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.	
2016-52d	Law Professors (Zitrin) (08-24-16)	Yes	M	(b), (c)	The comment is the same as that of Law Professors (Zitrin), X-2016-32d, above.	Please see response to Law Professors (Zitrin), X-2016-32d, above.
Public Hearing	Law Professors (Zitrin, Richard) (Provided oral public hearing testimony on July 26, 2016. See pages 23-24 of the public hearing transcript.)	Yes		1.7(c)	What does informing the client in writing mean? It's not defined anywhere in the Rules. It's an odd term that doesn't appear anywhere else. It's a simple fix. You should require the same informed written consent for (c) that you do for (b) and (a). It's a very simple fix.	Please see response to Law Professors (Zitrin), X-2016-32d, above.
Public Hearing	Alternate Public Defender for Los Angeles (Goodman, Michael) (Provided oral public hearing testimony on July 26, 2016. See pages 61-62 of the public hearing transcript.)	Yes			Principally, we don't have any problem with this rule, so long as in addition to a 1.7 Rule, Rule 1.10 is also adopted. With respect to 1.7(c), our office policy is not to inform clients in writing about things like this, we just don't accept representation	The Commission has added a knowledge requirement (knows or reasonably should know) to proposed Rule 1.7(c)(2).

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					<p>when issues of conflict like this arise. We would recommend a knowledge requirement be added to the Rule.</p> <p>If the Rule was rephrased to say, "The lawyer shall not knowingly represent" any of the people that are positioned as the rest of Rule 1.7 suggests. So if that knowledge requirement was added, we think that would resolve what is potentially a large number of conflicts. And that arises for us because there are lawyers within our office that are married or are involved in relations, either prosecutors or other people that are in a relationship, and it would be encompassed within this rule.</p>	
X-2016-67o	Orange County Bar Association (Friedland)	Y	M	(b)	The checklist provided in proposed subsection (b)(1)-(5) seems too broadly worded in that not all of the scenarios identified in the list always give rise to a "significant risk" as provided in (b). For example, (b)(1) references the situation in which a lawyer or member of the lawyer's firm has a business or financial relationship with a party or witness. This broad language would encompass an attorney who files suit against a bank with which an associate at an	Please see response to COPRAC, X-2016-43I, above.

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					<p>attorney’s firm maintains a small checking account. Such a situation may not impose a significant risk that the lawyer’s representation may be materially limited.</p> <p>In light of this, one suggestion to remedy this ambiguity is to remove subsections (1)-(5) from the text of the proposed rule and move them to the comments as possible examples of instances that may pose a significant risk which would require informed written consent from each affected client. Including the checklist in the comments allows lawyers to review possible instances that may give rise to a significant without identifying them as they are proposed now in a manner that leads lawyers to believe that any of these instances automatically requires “informed written consent.”</p>	
X-2016-66g	San Diego County Bar Association (Riley)	Y	A		We approve the proposed rule and in particular the requirement for the client’s informed written consent in subsections (b)(1)-(5) where current Rule 3-310(B)(1)-(4) would require only written disclosure to the client. We recognize that “material limitation” will require judgment on the part of lawyers—and	Please see response to COPRAC, X-2016-43l, above.

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					arguably time and additional authoritative guidance, including judicial decisions, to understand in what circumstances such a material limitation might arise—but we believe that the proposed rule is not only an improvement on the current Rule 3-310 but also on the articulation in ABA Model Rule 1.7.	
X-2016-68d	Law Professors (Zitrin)	Y			The comment is the same as that of Law Professors (Zitrin), X-2016-32d, above.	Please see response to Law Professors (Zitrin), X-2016-32d, above.
X-2016-72	Law Firm General Counsel Group (Hendricks)	Y	A		1. As commercial law practice has increasingly become a national rather than local profession, lawyers and law firms like ours whose practices overlap multiple jurisdictions have long struggled with variances between California's Rules and the rules of other jurisdictions that more closely follow the ABA Model Rules on critical issues often involving interstate commerce such as ethical conflicts. The adoption of your draft will be a dramatic step in the direction of harmony among the states with regard to the ethical rules that govern lawyers. In short, we enthusiastically support the proposed Rules and hope that they will swiftly be adopted.	1. No response required.

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				Comment [8]	<p>2. We specifically write in support of Comment 8 to proposed Rule 1.7. Comment 8 recognizes – as have California courts – that a lawyer may ethically obtain an “advance waiver” from a client, and that a client can validly consent to conflicts of interest that may arise in the future. In the area of commercial legal practice that forms the bulk of the legal services provided by the firms of the undersigned, advance waivers provide greater certainty to both law firms and their clients. Advance waivers help law firms sort through complex, current-client conflict scenarios, and, most importantly, they provide greater assurance to clients that their chosen outside counsel will be available to them when the need arises. Advance waivers have long been recognized by courts in California and elsewhere as an acceptable term of the attorney-client relationship, and it is important that the proposed Rule recognizes this.</p> <p>We have had an opportunity to review the Commission's latest draft of Comment 8, which includes new language noting that the sophistication of the</p>	2. No response required.

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					<p>client is a factor to consider when assessing whether the client's consent is adequately informed. With this additional language, we believe proposed Comment 8 is an accurate statement of the law and useful guidance for California lawyers. We believe Comment 8 in this latest form should be adopted.</p>	
X-2016-79	Association of Corporate Counsel (Blatch)	Y	A		<p>1. We support the California approach to advanced waivers over the ABA Model Rule approach. We fully support proposed Comment [8] to proposed rule 1.7, which does not explicitly condone the use of “general and open-ended” advance waivers against sophisticated clients.</p> <p>2. However, to add further clarity to the enforceability of advanced waivers, the State Bar should incorporate the <i>Visa</i> factors into Comment [8] of proposed rule 1.7. The factors used in <i>Visa U.S.A. v. First Data Corp.</i> to evaluate whether the client signed an informed waiver of future conflicts are: (1) the breadth of the waiver; (2) the temporal scope of the waiver; (3) the quality of the conflict discussion between the attorney and the client; (4) the specificity</p>	<p>1. No response required. But see response 5 to COPRAC, X-2016-431, above.</p> <p>2. The Commission has not added the <i>Visa U.S.A.</i> factors but has made additions to the Comment. See response 5 to COPRAC, X-2016-431, above.</p>

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					<p>of the waiver; (5) the nature of the actual conflict; (6) the sophistication of the client; and (7) the interests of justice.</p> <p>Notably, under the <i>Visa</i> factors, the sophistication of the client is but one factor of many to be considered in the enforceability of an advanced waiver. We think this strikes a reasonable balance between accommodating clients' interest in their attorneys' duty of loyalty and allowing lawyers to craft appropriate advanced waivers that allow them to be less restricted in the clients whom they can serve.</p>	
X-2016-87a	Attorneys Liability Assurance Society (ALAS)	Y	NI		ALAS agrees with the Commission on two threshold issues: (1) that adopting the multiple-rule framework used by the ABA Model Rules of Professional Conduct should facilitate compliance with an enforcement of conflicts of interest principles by promoting a national standard, and (2) that the rule should explicitly acknowledge the continued availability of advance conflicts waivers in California. Before the recent revisions, however, we were concerned that the proposed rule was confusing and ambiguous. We also were	No response required.

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					<p>concerned by the failure to include key factors in Comment [8] that had been recognized in the analogous Comment to the Model Rule counterpart, specifically, the client’s sophistication and the client’s representation by independent counsel.</p> <p>We are pleased to see that the Commission addressed those issues in the draft circulated in advance of its Sept. 30th meeting, which deleted a checklist included in the prior draft and added the relevant factors to Comment [8]. These changes bring the Proposed Rule closer to ABA Model Rule 1.7, thus further facilitating compliance and enforcement by promoting a national standard.</p>	
X-2016-93b	Los Angeles County Public Defender	Y	M		<p>We see nothing in this rule that is <i>likely</i> to affect our current conflict policies. However, there is a comment that indicates that where a witness and a party are both represented by defense counsel, and that cross-examination of the witness is likely to cause the witness “embarrassment” (even if not legal trouble), that this would be a conflict requiring written waiver by the clients. The word</p>	<p>The Commission has not made the suggested change to define “embarrassment.” The duty of undivided loyalty requires that a lawyer not do anything to harm a <i>current</i> client, to which the rule applies.</p> <p>The Commission continues to recommend proposed Rule 1.10.</p>

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					<p>embarrassment is insufficiently defined and could cause difficulty (e.g., if the witness is “embarrassed” to be asked questions – does that qualify as a conflict?).</p> <p>We would not oppose this Rule if: a) it were passed concurrently with Rule 1.10; b) the comment section were clarified to better define “embarrassment,” and; c) the word “knowingly” were added to establish the required mens rea.</p>	<p>The Commission has added a knowledge requirement to paragraph (c)(2) [paragraph (c) in the public comment version of the Rule].</p>
X-2016-96c	Bar Association of San Francisco Legal Ethics Committee	Y	M		<p>The Committee is concerned that the hybrid approach will create confusion. In particular, it is not clear that the “checklist items” in proposed rule 1.7(b)(1)-(5) are merely intended to be examples of potential conflict situations that could give rise to a material limitation conflict under certain circumstances, as opposed to per-se material limitation conflicts. In addition, the “checklist items” are unnecessary as the general explanation of a “material limitation” conflicts in subsection (b) sufficiently captures the wide variety of conflicts of interest that could impair a lawyer’s independent professional judgment and duty of loyalty.</p>	<p>Please see responses to COPRAC, X-2016-43l, above.</p>

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					<p>The “material limitation” standard in subsection (b) provides a commonly understood standard that is used in the ABA Model Rules and many other state rules of professional conduct. Most other jurisdictions and the Restatement of the Law Governing Lawyers have adopted the same or a substantially similar standard the Committee favors a uniform approach.</p> <p>The Committee also believes subsection (c) creates unnecessary confusion. Subsection (c) appears to create a lower disclosure standard for certain types of potential conflicts. A lawyer’s relationship with another party’s lawyer, however, could create a material limitation conflict under certain factual circumstances. If a material limitation conflict exists, the same informed written consent standard should apply as in subsection (b). Separately requiring written disclosure of only certain relationships with another party’s lawyer creates confusion as to which standard applies in the event that the relationship creates a material limitation conflict. Therefore, the</p>	

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					Committee recommends that subsection (c) be deleted from the proposed rule as it is only one example of a situation that could give rise to a material limitation conflict that requires informed written consent.	
X-2016-104m	Office of Chief Trial Counsel	Y	A		<p>1. OCTC supports this rule. However, to avoid confusion, subsection (d) should state: "Even with the client's informed written consent, ..." OCTC recognizes that Comment 7 explains that, but it should be in the rule, not a Comment.</p> <p>2. OCTC supports Comments 1, 2, 3, 4, 5, 6, 9, and 10. OCTC has no position on Comment 8 [advanced waivers]. If the Comments discuss advanced waivers, however, they should also discuss the requirements for an adequate advanced waiver.</p> <p>3. If subsection (d) is revised as indicated above, the Commission might want to reconsider Comment 7.</p>	<p>1. The Commission agrees and has revised the rule to capture the concept in the suggested change. See revised paragraphs (a), (b) and (c).</p> <p>2. No response required.</p> <p>3. No response required.</p>
X-2016-115e	Lamport, Stanley	N	M		<p>Proposed Rule 1.7 should be revised as shown on the attached redline. The attached redline addresses two points:</p> <p>1. that the "significant risk the</p>	<p>1. The Commission has not</p>

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					<p>lawyer’s representation of the client will be materially limited” standard in proposed Rule 1.7(b), should be incorporated into each of the subparts to proposed Rule 1.7(b), and</p> <p>2. That the substance of Comment [6] should be stated in the Rule.</p>	<p>made the suggested change. See response to COPRAC, X-2016-43l, above.</p> <p>2. The Commission did not make the suggested change. The Commission believes that Comment [6] is appropriate as a comment because it clarifies that the disclosure required to obtain the clients’ informed written consent under paragraphs (a) and (b), or to comply with the lawyer’s duty to provide written disclosure under paragraph (c), is limited by the lawyer’s duties under Rule 1.6 and Bus. & Prof. Code § 6068(e). The limitation is not a separate requirement for representation.</p>
X-2016-120b	LGBT Bar Association of Los Angeles	Y	A		We support the proposed revisions to this rule.	No response required.
	Treat, Judge Charles	N	NI		1. In comment [8]: Examples (4) and (5), near the end of this comment, are difficult to read because it takes some study to sort out the difference between “the lawyer” (meaning the person whose ethical conduct is under discussion) and “a lawyer”	The Commenter appears to have commented on proposed Rule 1.7 as recommended by the first Commission. No response required.

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					<p>(meaning someone else). The problem is compounded by the fact that the preceding three examples (which don't involve "a lawyer") all start out with "the lawyer", while these two start out "a lawyer". I suggest inverting the order. Thus, (4) should be: "the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm has a lawyer-client relationship with a lawyer or law firm representing a party or witness in the matter".</p> <p>2. I would also suggest adding "other than the lawyer's client". There is no reason to apply this to co-counsel for the same client.</p> <p>3. Syntax aside, example (5) is unnecessary and logically flawed.</p> <p>a. The comment calls for disqualification of a lawyer if opposing counsel is the lawyer's own spouse, parent, or sibling. But it calls for disqualification if opposing counsel is the romantic partner not only of the lawyer in question, but also of any other lawyer in his or her firm. That is internally inconsistent; surely we should be at least as concerned (probably more so)</p>	

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					<p>if opposing counsel is the spouse of the lawyer's firm colleague, than if opposing counsel is only a romantic partner of the colleague.</p> <p>b. The latter part of example (5) is also too categorical. Presumptive disqualification on this ground (including spouses, parents, siblings, or children) makes sense if we're talking about a small law office where everyone is likely to know the families or romantic partners of all the other lawyers in the firm. It makes no sense if we're talking about much larger firms. Even within a single office, if there are hundreds of attorneys it is dubiously probable that each attorney has a substantial acquaintance even of the spouses of all the other attorneys, let alone their parents or siblings. And when they work in different cities (or states or countries), it becomes downright unlikely.</p> <p>c. However, I propose to delete example (5) altogether, perhaps substituting a cross-reference to comment [11].</p>	

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					<p>The issue of family or personal relationships is addressed with far better coherence and nuance in the latter. And when a colleague’s family or household relationships really do pose a danger of materially affecting the representation (as in the two-lawyer office), that is picked up by more the more general breadth of Rule 1.7(a)(2), and the flexible provisions of Rule 1.10 – the same as if opposing counsel were the lawyer’s best friend, or some other close relationship.</p> <p>d. I would also add “child” to spouse, parent, or sibling. If a lawyer is disqualified because the opposing counsel is his or her parent, the parent should likewise be disqualified because opposing counsel is his or her child.</p> <p>4. Comment [20A] should clarify that if a contingency is fairly covered by a consent to future conflict (as addressed in Comment [22]), the actual arising of that contingency is not a “material change” requiring a new consent.</p>	

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					<p>5. Comment [21] should clarify that the client, in revoking consent, cannot thereby force the lawyer to cease representation of another client in mid-stream. Of course a client can revoke consent in the sense of firing the attorney from representing the client itself. But it will typically be the case that the lawyer and Client B, in entering into their own attorney-client relationship, have acted in direct and reasonable reliance on Client A's having consented to the lawyer's representation of Client B. If Client A can pull the plug on the representation of Client B at will, that will unjustifiably harm Client B's legitimate interests and reasonable expectations. Worse, it puts Client A in a position to extort unjustified advantage from Client B, on threat of withdrawing the consent.</p>	