

Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Commission's Proposed Rule Adopted on October 21–22, 2016 – Clean Version)

- (a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.
- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* 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*, paragraphs (a) and (b) do 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: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

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

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

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

[11] A material change in circumstances relevant to application of this Rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. See Rule 1.9(c).

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

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- (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;
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Comment

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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.

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[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

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[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.

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Synopsis of Public Comments

TOTAL = 5 **A = 0**
D = 0
M = 5
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-18a	Lamport, Stanley	N	M		<p>1. Paragraph (c) should be removed from the rule. Paragraph (c) should not be in a conflicts of interest rule. Proposed Paragraph (c) requires written disclosure of a relationship with or responsibility to a party, a witness or with another party's lawyer, even when a significant risk that would require disclosure and consent under paragraph (b) is not present. In other words, this proposed Rule would require written disclosure in circumstances that do not present a conflict of interest.</p> <p>2. The last sentence of Comment [4] should be limited to paragraph (a). Comment [4] attempts to carry over the Discussion in current rule 3-310, which makes Rule 3-310(C)(3) inapplicable when a lawyer represents an insurer in connection with defending an insured and accepts a representation that is adverse to another insured defended by the same insurer. Rule 3-310(C)(3) is encompassed by proposed Rule 1.7(a), which applies to</p>	<p>1. The Commission disagrees with the commenter's position. The situations described in paragraph (b)(1) and (2) carry forward current rule 3-310(B)(1) and 3-320, respectively. Regardless of whether informed written consent is required, the lawyer should have a duty to provide written disclosure of such relationships or responsibilities so that the client can decide whether to retain the lawyer or seek other counsel.</p> <p>2. The Commission has made the suggested change.</p>

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

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					representations that are directly adverse to another client in the same or a separate matter.	
Y-2016-8a	Law Professors (Zitrin) (01-03-17)	Y	M	(b)	<p>1. When we submitted our letter in September, our approval and support of Rule 1.7 was predicated on the then-existing draft, which included a list of items under subsection (b) – similar to the list currently in Rule 3-310(B) – that required informed written consent. That draft proposal was subsequently changed to eliminate the list that was approved of in our letter. This list, extremely valuable, has been replaced by vaguer language as to what matter require informed written [consent]. We adhere to our last comment, supporting approval of the prior draft that set forth Rule 1.7(b)(1)-(5) with specificity. (However, we maintain our continued objection to use of the word “resolution” in subsection 1.7(b)(3)).</p> <p>2. New subsection (b) is far less protective of the rights of clients than the previous draft. On first glance, the revised language more closely tracks ABA Model</p>	<p>1. The Commission determined that the list of examples previously included in paragraph (b) should be eliminated because certain of the examples were either over or under-inclusive in setting out situations in which informed written consent should be required because there was a “significant risk” that the lawyer’s representation would be “materially limited.” The Commission continues to believe this is correct, and that the general statement in Comment [5] making clear that this may occur as a result of the lawyer’s other responsibilities, interests, or relationships “whether legal, business, financial, professional, or personal,” together with the discussion that follows, provides better guidance.</p> <p>2. The Commission disagrees with the commenter’s assertion that paragraph (b) imports a subjective test by requiring compliance with</p>

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					<p>Rule 1.7(a)(2). However, upon closer scrutiny this revised language adversely affects client loyalty in two ways. First, the ABA comments make clear that the “material limitation” test is objective. That is no longer true in the California draft.</p> <p>Paragraph (b) now references “compliance with paragraph (d),” and paragraph (d) uses a <u>subjective</u> test (representation permitted if “the lawyer <u>reasonably believes</u> that the lawyer will be able to provide competent and diligent representation” – emphasis added). That language would vitiate the objective standard requires in ABA MR 1.7(a)(2), and in the former draft we approved.</p> <p>3. Second, the most important specific language of subsection (b) has now been removed from the rule and relegated to a comment, paragraph 5. This language – “materially limited [by]</p>	<p>paragraph (d). First, both paragraph (b) and Comment [5] state the relevant test in objective terms, that is, simply whether there “is a significant risk.” Second, paragraph (d), which corresponds to ABA Model Rule 1.7(b), sets forth certain “unwaivable” or “non-consentable” conflicts. The addition of the language requiring compliance with paragraph (d) simply means that even with the clients’ consent, the lawyer may not accept or continue the representation if any of the conditions set out in paragraph (d) are not satisfied. Finally, the Commission disagrees that “reasonable belief” is a purely subjective standard. Proposed Rule 1.0.1(i) defines the term to mean “that the lawyer believes the matter in question and that the circumstances are such that the belief is <i>reasonable</i>.” (Emphasis added.)</p> <p>3. The Commission disagrees with the commenters’ assessment that the current draft of the rule “vitiates the thrust of the informed consent requirement in section (b) and</p>

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					the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal" – thus again merely requires <u>disclosure and not consent</u> under Comment paragraph 5. This vitiates the thrust of the informed consent requirement in section (b) and is a serious retrenchment as to client protection. (We also note that it also appears to legislate in a comment, something the Supreme Court has asked not to occur.)	is a serious retrenchment as to client protection." Consistent with ABA Model Rule 1.7, paragraph (b) continues to require informed written consent whenever there is a significant risk of a material limitation. This goes beyond former California Rule 3-310(B)(2) and (3), which required only written disclosure (not informed written consent) in some situations falling within the scope of proposed Rule 1.7(b). The Commission continues to believe that a lawyer's responsibilities to or relationships with another client, a former client or a third person,* or the lawyer's own interests, do not in every instance create a <i>significant risk</i> that the lawyer's representation of the client will be <i>materially</i> limited. In certain circumstances where they do not, consistent with current California Rules 3-310(B)(1) and (4), paragraph (c) continues to require written disclosure. Moreover, current rule 3-320 requires only that a lawyer "inform" the client. By including the substance of rule 3-320 in paragraph (c), the

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						heightened requirement of “written disclosure,” providing greater client protection, applies. Finally, paragraph (c) and Comment [6] recognize that in practice, where the question is close, a prudent lawyer will comply with the informed written consent requirement of paragraph (b) rather than providing only written disclosure under paragraph (c).
Y-2016-21e	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Y	M	(d)	<p>1. OCTC supports this rule.</p> <p>2. However, to avoid confusion, subsection (d) should state: “Even with the client’s informed written consent, ...” OCTC recognizes that Comment 8 explains that, but it should be in the text of the rule, not in a Comment.</p> <p>3. OCTC supports Comments 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11. OCTC has no position on Comment 10 [advanced waivers].</p>	<p>1. No response required.</p> <p>2. The Commission disagrees with the suggested change. The suggested change is unnecessary because paragraphs (a) and (b), both of which require informed consent, already require “compliance with paragraph (d).” Further, to make the change would be confusing because paragraph (c) also requires compliance with paragraph (d) but does not require the clients’ informed written consent.</p> <p>3. The Commission did not include the suggested guidance because it believes the specific requirements for</p>

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					<p>If the Comments discuss advanced waivers, however, they should also discuss the requirements for an adequate advanced waiver. OCTC is concerned that Comment 12 is unnecessary because proposed rules 6.3 and 6.5 are self-explanatory.</p> <p>4. If subsection (d) is revised as indicated above, the Commission might want to reconsider the first sentence of Comment 9.</p>	<p>an “adequate” advance waiver will be contextual and should be left to case law. Further, providing such guidance would conflict with the Commission’s Charter.</p> <p>4. Please see response to comment #2.</p>
Y-2016-7c	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Y	M	Comment [2]	<p>1. As an initial matter, COPRAC repeats its strong support for the Commission’s decision to adopt the basic framework set out in ABA Model Rule 1.7 for the analysis of concurrent client conflicts. COPRAC also supports most of the changes to the Rule and the Comments approved by the Commission on October 21-22.</p> <p>2. COPRAC opposes new Comment [2] defining what constitutes a “matter” for purposes of Rule 1.7 (and, by cross-reference, for Rules 1.9 and 1.11). This definition is clearly too narrow in its application to transactional work, limiting such work to single contracts. It is also confusing in</p>	<p>1. No response required.</p> <p>2. The Commission continues to believe that as a non-exclusive list of examples of what is included within the term matter, Comment [2] is an appropriate comment. However, the Commission has modified Comment [2] so that the list of examples is not only closer to that contained in</p>

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					its application to many common situations, such as mediation prior to the filing of a lawsuit or administrative or legislative lobbying. The definition also appears to fall into the category of law-making by Comment that the Supreme Court has disapproved. Finally, this definition appears to be a departure from prior law that is not required for national uniformity, since the ABA Model Rules do not contain such a definition. It appears that other jurisdictions (like California) have been content to treat the question of what counts as a matter (like the question of whether an attorney-client relationship exists) as one to be developed in the case law rather than specified by rule. In light of these considerations, COPRAC suggests that the Comment be dropped or substantially modified.	current ABA Model Rule 1.11(e), but also is appropriate for use with respect to Rules 1.7 and 1.9 as well.
				Comment [7]	3. COPRAC also proposes a small clarifying stylistic revision to new Comment [7] on positional conflicts. We suggest that the Comment's second sentence, beginning with "That advocating..." be rewritten for clarity as follows: "Advocating a legal position on behalf of a client	3. The Commission has made the suggested change.

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					that might create precedent adverse to the interests of another client represented by the lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent."	
Y-2016-12	U.S. Department of Justice (Ludwig) (1-9-16)	Y	M		<p>In our September 27, 2016, letter to the Commission, we recommended that the Commission provide lawyers with guidance regarding what constitutes a "matter" for purposes of proposed California Rule 1.9. We understand that the Commission has elected to define the term "matter" in Comment [2] to proposed California Rule 1.7 and to apply that definition to all of the conflict of interest rules. In doing so, it appears that the Commission largely relied upon the definition of "matter" previously found in proposed California Rule 1.11(e)(1).</p> <p>We support the Commission's decision, but note that, as drafted, the term "matter" does not include "investigation[s], charge[s], accusation[s], [or] arrest[s]," all of which previously were included in proposed Rule 1.11(e). We understand that the</p>	The Commission agrees that the definition of matter should be broader and has made the suggested change.

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					Commission's definition is not and cannot be comprehensive—that it merely “includes” those matters described in the proposed Comment. That said, we think that it is important to define “matter” explicitly to include investigations, charges, accusations, and arrests—which do not readily fall into any of the other types of matters listed—and respectfully request that the Commission include these terms in Comment [2] to proposed Rule 1.7.	