

Attachment B: Commission's Proposed Rule 1.7 Public Comment Synopsis Table

Martinez (L), Cardona, Eaton, Harris, Stout

Proposed Rule 1.7 [3-310] Conflict of Interests: Current Clients Synopsis of Public Comments

TOTAL = 5
A = 0
D = 0
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No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
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 This list, extremely valuable, has been replaced by vaguer language as to what matter require informed written [consent].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</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</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>more closely tracks ABA Model 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>requiring compliance with 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. Further, to avoid confusion about the requirements that might permit representation despite the presence of a conflict, the Commission has added to the introductory clause of paragraph (a) the clause, “the lawyer complies with paragraphs (a), (b), and (c).” This additional clause should further clarify that not only must the requirements in (d)(1) through (3) be satisfied, but also that either informed written consent under</p>

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					<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] 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.)</p>	<p>paragraphs (a) and (b) be obtained or written disclosure under paragraph (c) is given. 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 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).</p>

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						<p>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 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).</p>

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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 subparagraphs (c)(1) and (2) carry forward current rule 3-310(B)(1) and 3-320, respectively. Regardless of whether informed written consent is required under paragraph (b) because there is a significant risk the representation will be materially limited, 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 recognizes this inadvertent oversight and has made the suggested change.</p>

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					representations that are directly adverse to another client in the same or a separate matter.	
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]. 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</p>	<p>1. No response required.</p> <p>2. The Commission did not make the specific suggested change but did add an additional clause to the introductory clause of paragraph (d) to avoid the confusion that the commenter believes might arise. See Response 2 to Law Professors, Y-2016-8a, above. The Commission notes it did not make the commenter's specific change 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 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>

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					rules 6.3 and 6.5 are self-explanatory. 4. If subsection (d) is revised as indicated above, the Commission might want to reconsider the first sentence of Comment 9.	4. Please see response to comment #2.
Y-2016-7c	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (12-20-16)	Y	M	Comment [2]	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. 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 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	1. No response required. 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 current ABA Model Rule 1.11(e), but also is appropriate for use with respect to Rules 1.7 and 1.9 as well.

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					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.	
				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 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	3. The Commission has made the suggested change.

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					create a conflict of interest requiring informed written consent.”	
Y-2016-12	U.S. Department of Justice (Ludwig) (01-09-16)	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 Commission's definition is not and cannot be comprehensive—that it merely “includes” those matters described in the</p>	The Commission agrees that the definition of matter should be broader and has made the suggested change. See Comment [2].

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					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.	