



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

OFFICE OF PROFESSIONAL COMPETENCE
PLANNING, AND DEVELOPMENT

TELEPHONE: (415) 538-2167

DATE: March 3, 2017

TO: Rules Revision Commission Members

FROM: Lauren McCurdy
Sr. Administrative Staff

SUBJECT: March 7, 2017 Commission Meeting Agenda Item III.A.
Status Report on Public Comments Received on Proposed Amended Rule 1.7

The public comment deadline for proposed Rule 1.7 [3-310] ends on March 6, 2017. As of today, three public comments have been received. The following materials are included for your consideration of this rule:

1. public comment from Richard Zitrin dated 1/28/17;
2. public comment from Law Professors dated 3/2/17;
3. public comment from the Office of Chief Trial Counsel (OCTC) dated 3/2/17;
4. link to [public comment notice](#) posted at State Bar website; and
5. text of proposed rule 1.7 as authorized for public comment.

If you have input to provide on the comments received, please submit your comments directly to staff and we will forward them to the drafting team.

We will update the agenda posting with comments received through the close of the comment period on Monday evening.

Final consideration of the public comments received and action on the proposed Rule 1.7 will take place at your March 7, 2017 meeting.



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January 28, 2017

Hon. Lee Smalley Edmon, Chair
and all members
Second Commission for the Revision of the Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105
BY EMAIL c/o Lauren.McCurdy@calbar.ca.gov

Re: Comment on proposed Rule of Professional Conduct 1.7(b)

Dear Chair Edmon and members of the Commission:

Given time constraints, I write this letter on my own behalf, but reference the current positions that have been taken by teachers of Legal Ethics or Professional Responsibility at a law school in California. I am writing the commission rather than the "RAD" Committee of the Board simply because I'm not sure where the comment should go. I will provide it to both Lauren McCurdy and Randy Difuntorum, whom I'm sure will get it to the appropriate places.

The ethics professors' most recent letter argued for a return to the itemized list set forth in an earlier version of Rule 1.7(b). The commission has declined to make that change, but has added an introductory phrase to Rule 1.7(d) that explains that compliance with (a), (b), and (c) is necessary in addition to compliance with (d).

In our most recent letter, the ethics professors noted the following as to (d):

Paragraph (b) now references "compliance with paragraph (d)," and paragraph (d) uses a subjective test (representation permitted if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" – our emphasis). That language would vitiate the objective standard required in ABA MR 1.7(a)(2), and in the former draft we approved.

While the commission disagrees with us that the test is subjective, the additional language added to the beginning of (d) allays some of our concerns because it incorporates the "tests" embodied in (a), (b), and (c). The commission noted our letter as being among the reasons for this change. I agree.

Speaking now entirely for myself, I also strongly agree with the other changes the commission has made, most significantly to correct its omissions in comment paragraphs 1 and 2. The additional language of paragraph 1 is necessary and appropriate. The language in paragraph 2 correctly accepts the argument made by COPRAC to broaden the definition of "matter."

Thank you for the opportunity to address this comment to the commission.

Respectfully submitted,

Richard Zitrin

RRC2 Proposed Rules Public Comment FormZ

Professional Affiliation	54 legal ethics professors
Commenting on behalf of an organization	Yes
Name	Richard Zitrin
City	San Francisco
State	California
Email address	zitrinr@uchastings.edu
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	See letter of March 2, and two attachments.
Attachment	Mar. 2 2017 Reiteration of ethics professors position of Jan. 2 2017 with attachments.docx (127k)
Attachment	Attachment 1to March 2 2017 ltr. Ethics profs ltr. Jan. 2 2017 re Rule 1.7_.docx (134k)
Attachment	Eldred Attachment 2 to Ethics Profs ltr of March 2 2017.docx (19k)
Date	
File :	
Submitted via:	



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March 2, 2017

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State Bar of California
180 Howard Street
San Francisco, CA 94105
BY EMAIL c/o Lauren.McCurdy@calbar.ca.gov

Re: Comment on proposed Rule of Professional Conduct 1.7(b)

Dear Chair Edmon and members of the Commission:

The purpose of this letter is to reiterate the position taken in a January 2, 2017 letter by 54 of the 55 ethics professors who signed the September 21, 2016 letter that, among other things, addressed Rule 1.7, and specifically Rule 1.7(b). That letter maintains that the version of 1.7(b) that contains the five specific subparts is, in our view, far more protective of the rights of clients. The letter is Attachment 1.

The concern about eliminating the (b)(1) list and using the more general language, that a lawyer shall not “represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s [other] responsibilities” is supported by substantial empirical evidence. Behavioral psychologists are well aware of the concept of “overconfidence bias,” the natural tendency for all people, lawyers included, to overestimate their own abilities. Of particular relevance here is overconfidence bias as it relates to conflicts of interest, the subject of this important rule.

Also attached to this letter is a brief excerpt of a portion of Prof. Tigran Eldred’s well-regarded law review article, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH.ST. L. REV. 757, 788-791 (2016), specifically addressing this subject. That is Attachment 2.

Among other things, Prof. Eldred states the following (all emphasis added):

- “we all suffer from an ‘illusion of objectivity’ in which we overestimate our ability to act ethically in the face of conflicting duties, while at the same time underestimating the many ways in which our desires and self-interests can bias the decisions we reach”;
- “scholars have noted how easy it is to fail to make accurate assessments when confronting conflicts of interest”;
- “The most discomforting thing about bounded ethicality is that well-intentioned people can make serious ethical errors without ever consciously deciding to stray from the straight and narrow [and that] “people ‘make unconscious decision errors that serve their

self-interest but are inconsistent with their consciously espoused beliefs and preferences”;

- With respect to courts: “Judicial recognition that lawyers are susceptible to the unconscious influences of self-interest when confronted with conflicts of interest has started to take hold”;
- “under Model Rule 1.7, ... in the vast majority of cases, there will be no after-the-fact review, meaning that the lawyer’s own assessment will be the only word on the matter.”

Allowing the broad discretion that the current Rule 1.7(b) draft permits is thus dangerous for clients. Overconfidence bias makes common sense. More significantly, though, by now behavioral psychologists have proven its existence empirically. Rule 1.7(b) should narrow a lawyer’s discretion, lest it improperly, if unconsciously, be exercised to a client’s detriment. The rule should be modified back to the more specific iterations that the former draft contained and that we have supported.

Thank you for the opportunity to comment.

Respectfully submitted,

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On behalf of the January 2, 2017 ethics professors’ letter signatories

ATTACHMENT 1 TO MARCH 2, 2017 ZITRIN LETTER O/B/O/ ETHICS PROFESSORS



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January 2, 2017

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State Bar of California
180 Howard Street
San Francisco, CA 94105
BY EMAIL c/o Lauren.McCurdy@calbar.ca.gov

Re: Comment on proposed Rule of Professional Conduct 1.7(b)

Dear Chair Edmon and members of the Commission:

Please consider this comment on behalf of each of the undersigned, each currently or in the recent past a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are 54 of the 55 ethics professors who signed the September 21, 2016 letter that, among other things, addressed Rule 1.7, and specifically Rule 1.7(b). (A single signatory of that letter did not agree with this position, and he is thus not part of this letter.)

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 we approved of in our letter. This list, extremely valuable, has been replaced by vaguer language as to what matters require informed written mistake.

We adhere to our last comment, supporting approval of the prior draft that set forth Rule 1.7(b) (1)-(5) with specificity. To review this in more detail, the text of subsection (b) we approved read as follows:

- (b) A lawyer shall not, without informed written consent* from each affected client, represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or the lawyer's own interests, including when:
 - (1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
 - (2) the lawyer:
 - (i) knows* the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

- (ii) knows* or reasonably should know* the previous relationship will materially limit the lawyer's representation; or
- (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person* or entity the lawyer knows* or reasonably should know* will be affected substantially by resolution of the matter; or
- (4) the lawyer has or had, or knows* that another lawyer in the lawyer's firm* has or had, a legal, business, financial, or personal interest in the subject matter of the representation that the lawyer knows* or reasonably should know* will materially limit the lawyer's representation; or
- (5) the lawyer knows* or reasonably should know* that there is a reasonable* likelihood that the interests of clients being represented by the lawyer in the same matter will conflict.

In commenting on this rule draft, we applauded the commission "for adopting in principal part not only the first ethics professors' letter's recommendations, but also the bulk of the recommendations made in our letter of February 16, 2016...." We noted that "[t]hese changes are a major and important step in the protection of client rights. In particular, ... subsection (b) now requires informed written consent."

We also had in mind the specific subsections of Rule 1.7(b). For instance, we commented specifically on a suggested revision to section 1.7(b)(3):

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.

Thus, in our support, we were both cognizant and evaluative of the specific subsections of Rule 1.7(b).

In October that draft was retrenched, and now contains only a general statement:

- 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.

This language is far less protective of the rights of clients than the previous draft. On first glance, the revised language 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.

Paragraph (b) now references "compliance with paragraph (d)," and paragraph (d) uses a subjective test (representation permitted if "the lawyer reasonably believes that the lawyer will be

able to provide competent and diligent representation” – our emphasis). That language would vitiate the objective standard required in ABA MR 1.7(a)(2), and in the former draft we approved.

Second and perhaps more significant, 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 disclosure and not consent 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.)

The subsection (b) list has a long history in California rule-making. When the 1989 rules were approved, creating the current rule format, subsection (b), with its list of situations, required informed written consent. Then in 1992, a less client-protective modification was passed requiring only disclosure. After considerable discussion, this Commission moved back, properly so, to requiring consent. But this most recent revision essentially returns to the ill-advised 1992 version of the rules that this Commission had previously taken pains to modify.

We approved of proposed rule 1.7(b) – except as to our note regarding use of the word “resolution,” as noted above – with the protections offered under the then-current draft containing the specifics in a list of five subparagraphs, each requiring informed written consent. We urge the Commission to return to that draft for its final proposal.

Thank you for the opportunity to comment on this rule.

Respectfully submitted,

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ATTACHMENT 2 to MARCH 2, 2017 ZITRIN LETTER O/B/O/ ETHICS PROFESSORS

Tigran W. Eldred Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility, 2016 MICH.ST. L. REV. 757, 788-791 (2016)

a. Overconfidence Bias and Conflicts of Interest

The first is generally known as overconfidence bias, a well-documented phenomenon that describes the ways in which everyone, lawyers included, tend to overestimate their own abilities regarding a variety of positive traits, including whether they are competent, ethical, and deserving.¹²² The net result is that we all suffer from an “illusion of objectivity”¹²³ in which we overestimate our ability to act ethically in the face of conflicting duties, while at the same time underestimating the many ways in which our desires and self-interests can bias the decisions we reach.¹²⁴

Applying this research to the types of ethical decisions that lawyers make, scholars have noted how easy it is to fail to make accurate assessments when confronting conflicts of interest.¹²⁵ The point is not that lawyers tend to be venal by intentionally engaging in behavior that is unethical, although of course that occurs on occasion. Rather, the research on bounded ethicality demonstrates that people often fail to perceive how their over-inflated self-perception undermines their objectivity in making ethical decisions.¹²⁶ And because this process occurs without conscious awareness, it happens without leaving a trace, permitting the lawyer to maintain a self-image as honest and ethical.¹²⁷

There are many ways for students to experience the power of bounded ethicality. For example, early in the semester, as part of a blog post, I direct them to a wonderful online resource where they can take any number of tests that help to illuminate their ethical blind spots.¹²⁸ Then, when we start to discuss conflicts of interest, I reinforce the general notion through an easy demonstration. I start by asking students to rate themselves regarding a set of desirable attributes, such how well they drive a car, how interesting they are, how honest they

¹²⁵ Judicial recognition that lawyers are susceptible to the unconscious influences of self-interest when confronted with conflicts of interest has started to take hold. See, e.g., West v. People, 341 P.3d 520, 532 (Colo. 2015) (applying the research on bounded ethicality in determining the meaning of an “adverse effect” when a defendant seeks a new trial claiming that a conflict of interest resulted in ineffective assistance of counsel); United States v. Ky. Bar Ass’n, 439 S.W.3d 136, 154 (Ky. 2014) (citing the research on bounded ethicality to hold that defense lawyers cannot ethically advise a client to waive a claim of ineffective assistance of counsel).

¹²⁶ See Prentice, *supra*, at 1086 (“The most discomforting thing about bounded ethicality is that well-intentioned people can make serious ethical errors without ever consciously deciding to stray from the straight and narrow.”); Shahar Ayal & Francesca Gino, *Honest Rationales for Dishonest Behavior*, in THE SOCIAL PSYCHOLOGY OF MORALITY 152 (Mario Mikulincer & Phillip R. Shaver eds., 2012) (noting that bounded ethicality causes people to “make unconscious decision errors that serve their self-interest but are inconsistent with their consciously espoused beliefs and preferences . . . [that] they would condemn upon further reflection or greater awareness”).

are, and finally, how modest they are.¹²⁹ Then, by a show of hands I ask who in the class believes they are “above average” in each of these desirable attributes. My experience has been that, consistent with a large body of research on this subject,¹³⁰ most students report that they are better than average on these traits. We then take a moment to expose the obvious problem with these results: By definition, no more than 50% of the population can be above average for any given attribute and therefore, unless the class is made up of students who happen to rate especially high on positive attributes, the fact that most of the students believe themselves to be above average reveals how many of them have made overconfident self-assessments. Once I point out this obvious fact, there tends to be a moment of laughter, as it sinks in that many in the class have, through this simple exercise, revealed the overconfidence bias.

After the demonstration, we discuss how the research on bounded ethicality exposes the difficulty in making accurate self-assessments about conflicts of interest. As a doctrinal matter, the rules on conflicts place the responsibility on lawyers to determine whether a conflict exists and, if so, whether it is consentable. These calculations require careful self-assessment. For example, under Model Rule 1.7, a lawyer must decide whether there is a significant risk that other duties or interests will materially limit obligations owed to a current client and, if so, whether despite the conflict the lawyer can nonetheless “provide competent and diligent representation.”¹³¹ To be sure, in some cases the lawyer’s self-assessment will be subject to later review, perhaps by a disciplinary body, during a disqualification motion, or in a malpractice action.¹³² But in the vast majority of cases, there will be no after-the-fact review, meaning that the lawyer’s own assessment will be the only word on the matter. Accuracy in self-evaluation, therefore, could not be more important.



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March 2, 2017

Randall Difuntorum, Director
Office of Professional Competence, Planning
& Development
State Bar of California
180 Howard Street
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Re: Comments of the Office of Chief Trial Counsel to
Proposed Rule 1.7 of the Rules of Professional Conduct

Dear Mr. Difuntorum:

The Board of Trustees requested additional public comment on proposed rule 1.7 of the draft revised Rules of Professional Conduct developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Rule 1.7 [Conflict of Interest: Current Clients]

1. OCTC refers the Commission to its September 27, 2016 and January 9, 2017 comments.
2. OCTC supports this rule.¹ To avoid confusion, however, subsection (d) should state: "Even with the client's informed written consent...." OCTC recognizes that Comment 8 explains that subsection (d) applies even if there is informed written consent, but this explanation should be in the rule, not a Comment.
3. OCTC supports Comments 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11. OCTC has no position on Comment 10 [advance waivers]. If the Comments discuss advance waivers, however, they should also discuss the requirements for an adequate advance waiver. OCTC is concerned that Comment 12 is unnecessary, because proposed rules 6.3 and 6.5 are self-explanatory.
4. If subsection (d) is revised as indicated above, the Commission should reconsider the first sentence of Comment 9.

OCTC reiterates that it views many of the proposed rules as a positive step in formulating an updated set of new Rules of Professional Conduct and appreciates the Commission's significant work. OCTC

¹ OCTC, however, is concerned about the proliferation of conflict rules as discussed in its September 27, 2016 letter.

continues, however, to have significant concerns about the use of “knowing” or “knowingly” in many of the proposed rules.

Business and Professions Code section 6077 authorizes discipline for a willful breach of the Rules of Professional Conduct. It does not require actual knowledge, bad faith, or evil intent, only that the attorney acted purposely.² Violations of the Business and Professions Code require a somewhat more specific level of willfulness than that required for a violation of the Rules of Professional Conduct.³ Thus, including “knowing” in some of the proposed new rules risk lowering the high standards of conduct currently required of attorneys in this State.

Also, many of the comments within the proposed new rules, and some of the proposed rules themselves, are inconsistent with the Supreme Court’s direction that the Commission “begin with the current CRPC [Rules of Professional Conduct] and focus on revisions that are necessary to address developments in the law, and that eliminate, where possible, any unnecessary differences between California’s rules and those used by a preponderance of the states.”

OCTC has noted, on occasion, that the proposed rules go beyond the Supreme Court’s direction and may make it more difficult to establish violations of the rules. Based on comments at the last Commission meeting, there appears to be a misunderstanding of OCTC’s concern about the difficulty of establishing a violation of the rules. OCTC’s concern is not to make it easier for OCTC to prosecute a matter. OCTC’s concern is about its ability to enforce the important public policies embodied in the rules so as to protect the public and the courts, maintain high professional standards, and promote public confidence in the legal profession.

The rules must not be illusory or purely aspirational, but enforceable discipline rules that protect the public, as directed by the Supreme Court. The difficulty of establishing a violation is a well-recognized and important consideration in adopting and implementing the rules. (See *Athearn v. State Bar* (1982) 32 Cal.3d 38, 44 [“The difficulty of proving similar claims undoubtedly motivated the adoption of the straightforward requirement of written notice by certified or registered mail which is embodied within [former] rule 955. Compliance with such a rule is easily established.”].⁴

² See *Gadda v. State Bar* (1990) 50 Cal.3d 344, 355 [as a result of petitioner's carelessness in failing to check a newspaper article, he misled at least 14 people into believing that they might be eligible for United States citizenship, in violation of former rule 2-101]; *Abeles v. State Bar* (1973) 9 Cal.3d 603, 610-611. Former rule 2-101(A) is current rule 1-400 prohibiting misleading communications and solicitations. Negligence is generally not, and should not be, a basis for discipline. Gross negligence, recklessness, and willful blindness are disciplinable and should be. (See *Lowe v. State Bar* (1953) 40 Cal.2d 564, 570 [“It has been held that ‘Gross negligence is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client. (citations.) It warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability.’ (citations.)”].

³ *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.

⁴ See current rule 9.20 of the Rules of Court. Although *Athearn v. State Bar*, *supra*, 32 Cal.3d at 38, addresses a violation of a former Rule of Court and not a Rule of Professional Conduct, the same concerns with establishing a violation of the rule apply to the Rules of Professional Conduct.

A rule of professional conduct, like a statute, is a statement of public policy adopted to protect the public.⁵ Consequently, the difficulty of establishing a violation of a rule is an important consideration in drafting and adopting the rule. For example, the difficulty of establishing a violation is one of the reasons for requiring written consent or written disclosure in the conflict rules and stating that a violation of proposed rule 1.7 occurs when the lawyer knows, or reasonably should know, that another lawyer in his firm has a conflict. It is also why “knowingly” is an inappropriate standard for many of the proposed rules, as discussed in OCTC’s previous comments to the proposed rules.

OCTC again thanks the Commission for the opportunity to present its views. OCTC also thanks the members of the Commission for the considerable efforts they made in crafting the proposed rules of conduct for California attorneys.

If you have any questions, please feel free to contact us.

Very truly yours,

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⁵ See *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 71-72; *City of Brentwood v. Central Valley Regional Water Quality Control Board* (2004) 123 Cal.App.4th 714, 722.

Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Commission's Proposed Rule Adopted on January 20, 2017 – 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 the lawyer complies with paragraphs (a), (b), and (c), and:
 - (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) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (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; or (iii) a lawyer accepts representation of a person in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm*. 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, transaction, claim, controversy, investigation, charge, accusation, arrest, 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. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to 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.