

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

TOTAL = 5	A = 1
	D = 0
	M = 4
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-27a	Alternate Public Defender Los Angeles County (Fukai) (01-17-17)	Y	M		We would not oppose this rule if (1) the comment section were clarified to remove the word “embarrassment,” and (2) the word “knowingly” was added to establish a required mens rea in order to be in violation of the rule.	[RESPONSE NEEDED - THIS COMMENT WAS RECEIVED LATE IN CONNECTION WITH THE 45-DAY PUBLIC COMMENT PERIOD AND A RESPONSE WAS DEFERRED TO THE 30-DAY PUBLIC COMMENT PERIOD]
Z-2017-2	Law professors (Zitrin) (03-02-17)	Y	M		<p>1. We 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 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.</p> <p>2. The concern about eliminating the (b)(1) list and using the more general language, that a</p>	<p>[FROM G. CARDONA EMAIL DATED 3/3/17]</p> <p>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</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>lawyer shall not “represent a client if there is 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 aware of the concept of “overconfidence bias,” the natural tendency for all people, lawyers included, to overestimate their own abilities. An excerpt from a law review article discussing this topic is attached.</p>	<p>“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. The citation to research on overconfidence bias as it relates to conflicts of interest does not convince the Commission that a return to the list of examples is required. The Commission notes in this regard: (1) as demonstrated by its application in the many states that have adopted it, the standard in paragraph (b) is an objective and not a subjective standard – as a result, (a) if a lawyer’s overconfidence bias leads that lawyer to incorrectly determine that a particular interest or relationship does not pose a “substantial risk” of “material limitation,” this will not preclude discipline for failure to obtain informed</p>

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						written consent and (b) as a result, there is an incentive for a lawyer to disregard any overconfidence bias and err on the side of obtaining informed written consent; and (2) even if a lawyer in such a circumstance fails to err on the side of obtaining written consent, paragraph (c) will still require written disclosure of the interest or relationship to the client, ensuring that clients will receive at least the same protection as under current California Rules 3-310(B).
Y-2016-28a	Public Defender Los Angeles County (Emling) (01-17-17)	Y	M		We proposed deleting "embarrassment" from the comment section, and including "knowingly" in the rule so that an attorney must actually <i>know</i> of the existence of a conflict in order to violate the rule.	[RESPONSE NEEDED - THIS COMMENT WAS RECEIVED LATE IN CONNECTION WITH THE 45-DAY PUBLIC COMMENT PERIOD AND A RESPONSE WAS DEFERRED TO THE 30-DAY PUBLIC COMMENT PERIOD]
Z-2017-3	State Bar Office of Chief Trial Counsel (OCTC)	Y	M		1. OCTC refers the Commission to its	[FROM RRC2 RESPONSE TO OCTC LETTER Y-2016-21e]

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	(Dresser) (03-02-17)				<p>September 27, 2016 and January 9, 2017 comments.</p> <p>2. OCTC supports this rule. 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 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] (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</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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					<p>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 should reconsider the first sentence of Comment [9].</p> <p>5. OCTC reiterates their concern regarding the use of “knowing” or “knowingly” in many of the proposed rules.</p>	<p>4. Please see response to comment #2</p> <p>[BELOW IS FROM OTHER RRC2 RESPONSES TO THE “KNOWINGLY” ISSUE]</p> <p>5. The definition of “knowingly” recognizes that a person’s knowledge may be inferred from circumstances, and the Commission believes this will encompass the same field as currently covered by conduct previously labeled with other terms. OCTC’s concerns about willful blindness appears overblown. In fact, the Review Department of the State Bar has recently held that “willful blindness . . . is tantamount to having actual knowledge” (In Matter of Carver (Rev. Dept. State Bar Apr. 12, 2016) 2016 WL 1546744, *4.) In reaching this conclusion, the Review Department cited a 1901 California Supreme Court decision which recognized that “willing</p>

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						ignorance” may be “regarded as equivalent to actual knowledge.” (Levy v. Levine (1901) 134 Cal. 664, 671-672.) The Commission believes that the definition covers willful blindness by providing “knowledge can be inferred from circumstances.”
Z-2017-1	Zitrin, Richard (01-28-17)	N	A		<p>I write this letter on my own behalf but note that the ethics professors’ most recent letter argued for a return to the itemized list set forth in an earlier version of proposed Rule 1.7(b). The Commission declined to make that change, but has added an introductory phrase to Rule 1.7(d) that explains compliance with (a), (b), and (c) is necessary <u>in addition to</u> compliance with (d). The ethics professors’ most recent letter noted the following as to (d):</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.’ – our emphasis).</p>	<p>[FROM RRC2 RESPONSE TO ZITRIN LETTER Y-2016-8a]</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</p>

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					<p>That language would vitiate the objective standard required in ABA MR 1.7(a)(2), and in the former draft we approved.”</p> <p>While the Commission disagrees with the law professors 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.</p> <p>Speaking now entirely for myself, I also strongly agree with the other changes the Commission has made, most significantly to correct its omissions in Comments [1] and [2]. The additional language of Comment [1] is necessary and appropriate. The language in Comment [2] correctly accepts arguments made by COPRAC to broaden the definition of “matter.”</p>	<p>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 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 “nonconsentable” 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</p>

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						<p>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 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 reasonable.” (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,</p>

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						<p>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 significant risk that the lawyer's representation of the client will be materially 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</p>

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						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).



THE STATE BAR OF CALIFORNIA

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OFFICE OF PROFESSIONAL COMPETENCE
PLANNING, AND DEVELOPMENT

TELEPHONE: (415) 538-2167

DATE: March 6, 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 following two letters were received after the close of the 45-day public comment period.

1. Alternate Public Defender Los Angeles County (Fukai) (01-17-17)
2. Public Defender Los Angeles County (Emling) (01-17-17)

The relevant text of these comments is provided below:

Alternate Public Defender Los Angeles County (Janice Fukai)

The Commission for the Revision of the Rules of Professional Conduct has circulated a second round of proposed revisions to the Rules of Professional Conduct after having incorporated some changes since the initial promulgation. These are our comments on the various rules:

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

As written, the Rule (with the exception of subdivision (c)) does not require that an attorney actually *know* of the existence of a conflict in order to be in violation of the rule. We suggest adding the word “knowingly” to establish a requisite mens rea. Similarly, there is a comment that indicates that where a witness and a party are both represented by an attorney’s office, and that cross-examination of the witness by the attorney’s office is likely to cause the witness “embarrassment,” that this would be a conflict requiring written waiver by the clients. The word embarrassment is insufficiently defined and could cause difficulty (e.g., if the witness is embarrassed just to be called to testify – does that qualify as a conflict?).

We would not oppose this Rule *if*: a) the comment section were clarified to remove the word “embarrassment,” and b) the word “knowingly” was added to establish a required mens rea as indicated below in red.

(a) A lawyer shall not **knowingly**, 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 **knowingly**, 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.

Public Defender Los Angeles County (Kelly Emling)

The Commission for the Revision of the Rules of Professional Conduct has circulated a second round of proposed revisions to the Rules of Professional Conduct after having incorporated some changes since the initial promulgation. See the below comments on the various proposed rules:

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

As written, the Rule (with the exception of subdivision (c)) does not require that an attorney actually *know* of the existence of a conflict in order to violate the provision. We suggest adding the word “knowingly” to establish a requisite means rea.

There is also a comment which indicates that where a witness and a party are both represented by an attorney's office, and when cross-examination of the witness by the attorney's office is likely to cause the witness “embarrassment,” a conflict would exist requiring written waiver by the clients. The word embarrassment is insufficiently defined.

We propose deleting “embarrassment,” from the comment, and including “knowingly” as described above.

The actual text of these letters are available upon request.