

AGENDA ITEM 701 MARCH 2017

DATE: March 7, 2017

TO: Members, Board of Trustees

FROM: Justice Lee Edmon, Chair, Commission for the Revision of the Rules of Professional Conduct
Randall Difuntorum, Director, Professional Competence

SUBJECT: SUPPLEMENTAL REPORT - Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Return from Public Comment and Request for Adoption

EXECUTIVE SUMMARY

The Board of Trustees ("Board") assigned the Commission for the Revision of the Rules of Professional Conduct ("Commission") to conduct a study of the Rules of Professional Conduct of the State Bar of California and to recommend comprehensive amendments. This agenda provides a supplemental report on the 30-day public comment period for proposed rule 1.7. The comment period ended on March 6, 2016 and following consideration of the comments received, the Commission made no changes to the rule and recommends Board adoption.

Members with questions about this agenda item may contact Randall Difuntorum: (415) 538-2161 or State Bar of California, 180 Howard Street, San Francisco, CA 94105.

BACKGROUND AND ISSUE PRESENTED

The background for this matter is provided in the February 24, 2017 memorandum for agenda item 701 MARCH 2017. The issue presented for the Board's action is whether to adopt proposed rule 1.7 as recommended by the Commission. (The text of proposed rule 1.7 is appended to this memorandum as Enclosure 1.)

DISCUSSION

As summarized in the February 24, 2017 memorandum, proposed rule 1.7 governs conflicts of interest among current clients and would replace current rule 3-310. In part, the current rule can be described as a "checklist" approach to identifying conflicts because it describes discrete situations that might arise in a representation that trigger a duty to provide written disclosure to a client or obtain a client's informed written consent in order to continue the representation. These situations include, for example, a representation where a lawyer has a relationship with a party or witness in the case or a situation where a lawyer has a financial interest in the subject matter of the representation.

The proposed new rule would replace the current “checklist” approach with generalized standards that follow the ABA Model Rule approach to current client conflicts. Under this new approach, the inquiry for assessing whether a conflict is present is to ask: (1) whether there is direct adversity to a current client; and (2) whether there is a significant risk that a lawyer’s representation of a current 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. (A full report and recommendation on proposed rule 1.7 is provided in Attachment C-1 to the February 24, 2017 agenda item.) The adoption of a new approach to conflicts of interests and the possible effect of those new rules on civil and disciplinary litigation of conflicts cases is a policy consideration.

The additional 30-day public comment period on proposed rule 1.7 ended on March 6, 2017 and three written comments were received. The comments were from: a group of law professors who teach legal ethics, OCTC and attorney Richard Zitrin who commented on his own behalf but noted his role as the spokesperson for the group of law professors. Each of the three commenters recommend further revisions to the rule. (A public comment synopsis table and the full text of the public comments are appended to this memorandum as Enclosure 2.¹ A revised executive summary and report for proposed rule 1.7 is provided as Enclosure 3. The other rule 1.7 materials provided with the February 24, 2017 memorandum for agenda item 701 MARCH 2017 remain unchanged.)

The Commission met on March 7, 2017 to consider the public comments received. Following discussion, the Commission made no changes to the rule and voted to recommend Board adoption. The vote was 15 yes, 0 no, and 0 abstain.

FISCAL/PERSONNEL IMPACT

None.

RULE AMENDMENTS

This agenda item requests Board adoption of proposed new and amended Rules of Professional Conduct. However, the adopted rules do not become binding and operative unless and until they are approved by the Supreme Court of California.

BOARD BOOK IMPACT

None.

BOARD RESOLUTIONS

Should the Board of Trustees concur with the recommendation of the Commission for the Revision of the Rules of Professional Conduct, the following resolutions would be appropriate:

¹ In connection with the earlier 45-day public comment period authorized by the Board, the Los Angeles Public Defender and the Alternate Defender each submitted late comments that were not in time for the Commission’s consideration. The Commission has considered these late comments in connection with current 30-day public comments and a synopsis and Commission response is included in the public comment table.

RESOLVED, following notice and publication for comment and upon the recommendation of the Commission for the Revision of the Rules of Professional Conduct, that the Board of Trustees adopt proposed Rule 1.7 of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that staff is directed to submit the proposed rule as a part of the comprehensive proposed amendments to the Supreme Court of California with a request that the proposed rule be approved.

ENCLOSURES:

- (1) Proposed Rule 1.7
- (2) Revised Executive Summary and Revised Report and Recommendation for Proposed Rule 1.7
- (3) Public Comment Synopsis Table and Full Text of Comments on Proposed Rule 1.7

**Rule 1.7 [3-310] Conflict of Interest: Current Clients
(Commission's Proposed Rule Adopted on March 7, 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.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.7
(Current Rule 3-310(B), (C))
Conflict of Interest: Current Client

EXECUTIVE SUMMARY

The Commission evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations: Model Rules 1.7 (Current Client Conflicts); 1.8(f) (third party payments); 1.8(g) (aggregate settlements); and 1.9 (Duties To Former Clients).

Rule As Issued For 90-day Public Comment

The result of the Commission's evaluation is a two-fold recommendation for implementing:

- (1) the Model Rules' framework of having separate rules that regulate different conflicts interest situations: proposed Rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and
- (2) proposed Rule 1.7 (conflicts of interest: current clients), which regulates conflicts situations that are currently regulated under rule 3-310(B) and (C). Proposed Rule 1.7 represents an approach that is a "hybrid" of the California and ABA approaches to current client conflicts.

Proposed Rule 1.7 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Conflicts Framework**. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules.¹

¹ Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client]).

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is currently studying those rules.

2. **Recommendation of the “hybrid” approach of proposed Rule 1.7.** The recommended “hybrid” approach involves merging the “checklist approach”² of regulating conflicts involving current clients in current rule 3-310(B) and (C) with the ABA Model Rule’s approach, which generally describes two kinds of conflict situations relating to current clients: (1) those involving direct adversity, (MR 1.7(a)(1)), and (2) those involving a significant risk that a lawyer’s representation of current clients will be materially limited by the lawyer’s responsibilities to another client or third person, or by the lawyer’s personal interests. (MR 1.7(a)(2)).

There are a number of reasons for the Commission’s recommendation. *First*, a hybrid rule will facilitate compliance with enforcement of the current client conflicts rule provisions by incorporating more clearly-stated general conflicts principles, (see paragraph (a) and introductory clause to paragraph (b)), while providing specific examples (“checklist items”) within the latter category that carry forward the current California Rule requirements. These listed requirements in turn clarify how situations that violate those principles might be recognized in practice. *Second*, the hybrid approach will also increase client protection by including the generally-stated conflicts principles that are subject to regulation under the rule, rather than limiting the rule’s application to several discrete situations as in current rule 3-310(B) and (C). *Third*, by incorporating the generally-stated principles in Model Rule 1.7(a)(1) and (2) into paragraphs (a) and (b), the proposed rule will help promote a national standard in conflicts of interest. *Fourth*, by incorporating the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts into proposed paragraph (d), the proposed rule will move this important concept into the black letter rather than relegate it to two separate Discussion paragraphs in the current rule (see rule 3-310, Discussion paragraphs 2 and 10).

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California’s more client-protective requirement that a lawyer obtain the client’s “informed written consent,” which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only “informed consent, confirmed in writing.” That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed Rule 1.7 incorporates the concept of direct adversity of interests of two current clients. This carries forward the concept in current rule 3-310(C)(2) and (3), and Model Rule 1.7(a)(1).

Paragraph (b) incorporates the concept of material limitations on a lawyer’s representation of a client because of duties owed another current or former client, or because a relationship with a client or other person. The paragraph borrows the language of Model Rule 1.7(a)(2) in carrying forward the concepts found in current rule 3-310(B) and (C)(1). Subparagraphs (b)(1) through (b)(5) are the provisions that warrant the characterization of the proposed rule as a “hybrid” as these are derived from current rule 3-310 “checklist” of specified conflicts that trigger the current rule. In the proposed rule, these are nonexclusive examples of interests and relationships that result in a material limitation and require that the lawyer obtain informed written consent.

² The “checklist” approach in current rule 3-310(B) and (C) involves the identification of discrete categories of current conflict situations. Unless an alleged conflict fits within one of these discrete categories, the lawyers involved will not be subject to discipline.

Paragraph (c) carries forward the concept in current rule 3-320. Similar to paragraph (b), this paragraph is concerned with limitations on the lawyer's ability to represent a client because of the lawyer's relationships with an opposing party's lawyer. The situation is not included in paragraph (b) because the Commission believes that the standard in current rule 3-320 – the lawyer must only “inform” the client of the relationship – should be carried forward, rather than applying paragraph (b)'s “informed written consent” standard.

Paragraph (d) incorporates the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts. The concept is currently found in two separate Discussion paragraphs of current rule 3-310 (paragraphs 2 and 10).

Unlike the Model Rule with 35 Comments, there are only 10 Comments to proposed Rule 1.7, all of which provide interpretative guidance or clarify how the proposed rule, which is intended to govern a broad array of complex conflicts situations, should be applied. Comment [1] explains “direct adversity” of legal interests and importantly distinguishes clients with economically adverse interests. Comment [2] explains when adverse positions clients have taken on a legal issue may require a lawyer to obtain the clients' informed written consent. Comment [2] carries forward the concept in current rule 3-310, Discussion ¶.7, and explains the rule's application to joint client representations. Comment [4] carries forward current Discussion ¶.9, which the Supreme Court approved in 2002 after extensive debate among various stakeholders in the insurance industry. Comment [5] explains how paragraph (b) should be applied by providing several discrete examples. Comment [6] crucially explains that a lawyer's duty of confidentiality may preclude the lawyer from providing a disclosure sufficient to ensure the client's consent is informed. Comment [7] carries forward the substance of current Discussion ¶¶.2 and 10 concerning unconsentable conflicts and provides citations to several cases that have addressed the issue. Comment [8] is new and provides interpretative guidance regarding paragraphs (a) and (b) regarding the extent to which they might apply to advance consents to future conflicts of interest. Comment [9] notes that a second consent may be required should the circumstances under which a consent was originally obtained change. Comment [10] provides cross-references to proposed Rules 6.3 and 6.5, both of which permit otherwise conflicted representations or provide exceptions for imputation under certain conditions.

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made several changes to both the rule and Comments of proposed Rule 1.7.

Rule. In paragraphs (a) and (b), the Commission added the phrase “in compliance with paragraph (d)” to clarify that a lawyer must not only obtain the client's informed written consent but must also comply with the requirements in paragraph (d).

In paragraph (b), deleted all of the examples that had been provided in the public comment draft except for former subparagraph (b)(1), which has been moved to paragraph (c) as subparagraph (c)(1).

The Commission added new paragraph (c), with a new introductory clause. Paragraph (c) carries forward subparagraph (b)(1) of the public comment draft as subparagraph (c)(1) and paragraph (c) of the public comment draft as subparagraph (c)(1). Similar to paragraphs (a) and (b), paragraph (c) provides that not only must the lawyer give written disclosure to the

Enclosure 2: Revised Executive Summary and Revised Report and Recommendation

client of the relationships in paragraphs (c)(1) and (2), but must also comply with the requirements in paragraph (d).

Comment. In Comment [2], which addresses the issue of positional conflicts, the first sentence has been deleted and the second sentence has been moved to new Comment [7], which contains a fuller discussion of positional conflicts.

The Commission has added new Comment [2], which explains what is meant by the term “matter.” This Comment is also cross-referenced in the Comment to both Rule 1.9 (Duties to Former Clients) and Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officials and Employees).

In Comment [4], the Commission added a reference to paragraph (b), which also corresponds to current rule 3-310(C)(3).

In Comment [5], the Commission added the clause “or relationships, whether legal, business, financial, professional, or personal” to clarify the scope of paragraph (b). The last sentence of Comment [5] was also added for the same reason.

New Comment [6] has been added to clarify the scope and application of new paragraph (c). Public comment suggested that the public comment version of paragraphs (b) and (c) as drafted created confusion because their coverage might overlap in some situations.

New Comment [7] contains a fuller discussion of positional conflicts. See Comment [2], above.

In Comment [10] (Comment [8] in public comment draft), the Commission added a new third sentence (“The experience and sophistication ... consent.”) to identify factors in determining the feasibility of obtaining an advance consent.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Post Public Comment Revisions

After consideration of comments received in response to the additional 45-day public comment period, the Commission made several changes to the proposed rule, both the rule and the Comments, including some substantive changes.

Paragraph (d): Paragraphs (a), (b), and (c) identify when a conflict of interest may arise and state that a lawyer must obtain a client’s informed consent or make written disclosure to a client, depending on the type of conflict. Paragraph (d) identifies circumstances when a conflict of interest cannot be cured by client consent or disclosure. The Commission has revised paragraph (d) to emphasize the interrelationship among these paragraphs. The Office of the Chief Trial Counsel submitted a comment stating that this was not clear and might lead to confusion about whether consent or disclosure, standing alone, can cure a conflict.

Comment [1]: This Comment explains how to apply the concept of “direct adversity” by providing non-exclusive examples. The Commission revised the Comment to expressly state that the identified situations are non-exclusive examples of direct adversity conflicts, and

added an additional example that describes the directly adverse conflict that arises when a lawyer is retained to sue a person who is a current client of the lawyer or the lawyer's firm.

Comment [2]: This Comment clarifies that a "matter" giving rise to a conflict of interest is not limited to litigation but might involve a variety of client representations. The Commission has revised the Comment to recognize that a matter might also be a "transaction," "investigation," "charge," "accusation" or an "arrest." The Commission agreed with the United States Department of Justice, which submitted a Comment recommending broader language. The State Bar Standing Committee on Professional Responsibility and Conduct also submitted a Comment recommending broader language.

Comment [4]: This Comment carries forward Discussion paragraph 9 in current rule 3-310, which the Supreme Court of California approved in 2002 after extensive study with participants of various stakeholders in the insurance industry. Discussion paragraph 9 clarifies the extent to which rule 3-310(C)(3) might apply to a lawyer's duties in an insurance defense tripartite relationship. The Commission has revised the Comment to refer only to paragraph (a) of the proposed rule which carries forward current rule 3-310(C)(3). Attorney Stanley Lamport submitted a comment recommending this revision.

Comment [7]: In part, this Comment carries forward Discussion paragraph 1 in current rule 3-310 which explains that representing inconsistent legal positions in different matters ordinarily does not trigger a conflict of interest. The Commission has revised the second sentence of Comment [7] by using a simpler sentence structure and the phrase "sufficient, standing alone" to avoid the Comment from being potentially overbroad. The State Bar Standing Committee on Professional Responsibility and Conduct submitted a comment recommending clarifying changes to this sentence.

With these changes, the Board's Committee on Regulation and Discipline authorized an additional 30-day public comment period on the revised proposed rule.

Final Modifications to the Proposed Rule

The additional 30-day public comment period ended on March 6, 2017 and the Commission met on March 7, 2017 to review the public comments received. Following consideration of public comments, the Commission made no changes to the rule and voted to recommend the rule for adoption.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.7 [3-310]

Commission Drafting Team Information

Lead Drafter: Raul Martinez

Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Dean Stout

I. CURRENT CALIFORNIA RULE

Rule 3-310 Avoiding the Representation of Adverse Interests

- (A) For purposes of this rule:
- (1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
 - (2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure;
 - (3) “Written” means any writing as defined in Evidence Code section 250.
- (B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:
- (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
 - (2) The member knows or reasonably should know that:
 - (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
 - (b) the previous relationship would substantially affect the member’s representation; or
 - (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
 - (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

- (C) A member shall not, without the informed written consent of each client:
 - (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
 - (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
 - (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.
- (D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.
- (E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.
- (F) A member shall not accept compensation for representing a client from one other than the client unless:
 - (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
 - (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
 - (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law; or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, 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 an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

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) was violated when a member, 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*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (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].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: March 7, 2017

Action: Recommend Board Adoption of Proposed Rule 1.7 [3-310]

Vote: XX (yes) – X (no) – X (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 1.7 [3-310]

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

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

- (a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.
- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:
 - (1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
 - (2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is

a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.

- (d) Representation is permitted under this Rule only if 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.

IV. COMMISSION'S PROPOSED RULE
(REDLINE TO CURRENT RULE 3-310(B), (C), (D))

Rule 1.7 [3-310] ~~Avoiding the Representation of Adverse Interests~~ Conflict of Interest Current Clients

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

~~(A) For purposes of this rule:~~

- ~~(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;~~
- ~~(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;~~
- ~~(3) "Written" means any writing as defined in Evidence Code section 250.~~

~~(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:~~

- ~~(1) The member has~~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 member knows or reasonably should know that:~~

~~(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and~~

(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;

~~(b)(2) the previous relationship would substantially affect the member's representation~~ is not prohibited by law; or 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.

~~(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or~~

~~(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.~~

~~(C) A member shall not, without the informed written consent of each client:~~

~~(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~

Comment

~~(2) Accept or continue~~ [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; or (3) (ii) Representa

lawyer, while representing a client, accepts in another matter and at the same time in a separate matter accept as a client the representation of a person* or entity whose interest organization who, in the first matter, is directly adverse to the client in the first matter; 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.*

~~(D) — A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.~~

~~(E) — A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.~~

~~(F) — A member shall not accept compensation for representing a client from one other than the client unless:~~

~~(1) — There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and~~

~~(2) — Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and~~

~~(3) — The member obtains the client's informed written consent, provided that no disclosure or consent is required if:~~

~~(a) — such nondisclosure is otherwise authorized by law; or~~

~~(b) — the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.~~

Discussion

~~Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.~~

~~Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)~~

~~Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.~~

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

~~Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.~~

~~Subparagraphs (C)(1) [3] Paragraphs (a) and (C)(2) are intended to b] apply to all types of legal ~~employment~~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 ~~an ante-nuptial~~a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. ~~In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain~~If a lawyer initially represents multiple clients with the informed written consent—of* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients ~~thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member, the lawyer~~ must obtain ~~the~~ further informed written consent* of the clients ~~pursuant to subparagraph~~under paragraph (C)(2a).~~

~~Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.~~

[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 ~~member~~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, ~~subparagraph (C)(3) is not intended to~~ paragraph (a) does not apply with respect to the relationship between an insurer and a ~~member~~ 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 ~~for non-disciplinary purposes~~ 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.

~~Paragraph (D) is not intended to apply to class action settlements subject to court approval.~~

~~Paragraph (F) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)~~

V. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.7)

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

(a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

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

~~(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:~~

~~(1) the representation of one client will be directly adverse to another client; or~~

~~(2) there is~~Even when ~~a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.~~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:

~~(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client 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; and.~~

~~(4) each affected client gives informed consent, confirmed in writing.~~

Comment

General Principles

~~[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).~~

~~[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).~~

~~[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.~~

~~[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].~~

~~[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one 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 client from whose representation the lawyer has withdrawn. See Rule 1.9(c).~~

~~*Identifying Conflicts of Interest: Directly Adverse*~~

~~[61] 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. ~~The client as to whom~~ 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 ~~is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current~~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, ~~a directly adverse conflict may~~direct adversity can arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuitcross-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.*

~~[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.~~

[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).

~~Identifying Conflicts of Interest: Material Limitation~~

[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.

[85] Even where there is no direct ~~adverseness~~adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities—~~or~~, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a ~~lawyer asked to represent~~lawyer’s obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture ~~is likely to be, may~~ materially ~~limited in~~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 ~~others. The conflict in effect forecloses~~other clients. The

risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the ~~client~~ 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 ~~the client~~ 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.

~~*Lawyer's Responsibilities to Former Clients and Other Third Persons*~~

~~[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.~~

~~*Personal Interest Conflicts*~~

~~[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).~~

~~[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.~~

~~[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).~~

~~Interest of Person Paying for a Lawyer's Service~~

~~[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.~~

~~Prohibited Representations~~

~~[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.~~

~~[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).~~

~~[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.~~

~~[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a~~

~~mediation (because mediation is not a proceeding before a “tribunal” under Rule 1.0(m)), such representation may be precluded by~~ 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)(1).

~~Informed Consent~~

~~[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).~~

~~[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client’s interests.~~

~~Consent Confirmed in Writing~~

~~[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.~~

Revoking Consent

~~[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.~~

Consent to Future Conflict

~~[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).~~

Conflicts in Litigation

~~[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.~~

[247] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer ~~may take~~ takes inconsistent legal positions in different tribunals at different times on behalf of different clients. ~~The mere fact that advocating~~ Advocating a legal position on behalf of ~~one~~ a client might create precedent adverse to the interests of ~~a~~ another client represented by ~~the~~ a lawyer in an unrelated matter ~~does is~~ is not sufficient, standing alone, to create a conflict of interest. ~~A conflict of interest exists requiring informed written consent.*~~ Informed written consent* may be required, however, if there is a significant risk that ~~a:~~ (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~~ need to be advised of the risk' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether the issue 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 issue legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer. ~~If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.~~

[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.

~~[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.~~

[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].)

~~Nonlitigation Conflicts~~

[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.

~~[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].~~

~~[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.~~

~~[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility~~

~~of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.~~

Special Considerations in Common Representation

~~[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.~~

~~[3011] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.~~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.

~~[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information~~

~~will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.~~

~~[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).~~

~~[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.~~

Organizational Clients

~~[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.~~

~~[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or~~

~~might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.~~

VI. RULE HISTORY

A. Summary of 1972 Amendments

The predecessor to current rule 3-310, former rule 5-102, originally approved and made operative on January 1, 1975, was entitled “Avoiding the Representation of Adverse Interests.” Rule 5-102 was adopted following the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. Prior to the enactment of rule 5-102, Rule 7 of the 1928 Rules was the rule that governed conflicts. The text of rule 5-102(A) was identical to the text of the previous rule 7.

Rule 5-102. Avoiding the Representation of Conflicting Interests

A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned.

B. Summary of 1989 Amendments

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-310, which became operative on May 27, 1989.¹ Paragraph (A) continued the disclosure and consent requirements found in former rule 5-102(A) when the attorney has any relationship with the adverse party or any interest in the subject matter of the employment. The proposal expanded the rule to include situations in which the member had a relationship with another party in the past. The amendment was intended to make clear that, should an attorney discover during the course of representing a client that he or she has or had such a relationship or interest, he or she may not continue representation unless the requirements of the rule are met. Former rule 5-102(A) was subject to the interpretation that paragraph (A) was applicable only at the outset of the attorney-client relationship.

Paragraph (B) was derived from former rule 5-102(B), which prohibited an attorney from representing conflicting interests without the written consent of all parties concerned and expanded the rule to clarify that the client's counsel must be informed.

Paragraph (C) was new. Derived from ABA Model Rule 1.8(g), paragraph (G) clarified that an aggregate settlement of the claims of two or more clients is a special conflict situation that required the informed written consent of all the clients.

¹ See page 34 of Bar Misc. No. 5626, Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation, II December 1987.

Paragraph (D) carried forward former rule 4-101 as amended, which prohibited an attorney from accepting employment adverse to a client or former client without the client's informed written consent, when the new employment relates to a matter in which the attorney received confidential information from the client. The amendment to the rule limited its applicability of to those situations in which the confidential information is "material to the employment."

Paragraph (E) was new, derived from ABA Model Rule 1.8(f). It regulates those situations in which an attorney is paid by someone other than the client.

Paragraph (F) was new and intended to define "informed" as the term is used in 3-310.

The rule as originally proposed by the then Commission also included three Discussion paragraphs. The rule, in legislative blackline showing changes to the then current rules, provided:

Rule 3-310. 5-102.—Avoiding the Re presentation of Adverse Interests

- (A) ~~A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment.~~ If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.
- (B) ~~A member of the State Bar shall not represent conflicting interests concurrently represent clients whose interests conflict, except with the their informed written consent. of all parties concerned.~~
- (C) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, except with their informed written consent.
- (D) A member shall not accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client.
- (E) A member shall not accept compensation for representing a client from one other than the client unless:
 - (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
 - (2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The client consents after disclosure, provided that no disclosure is required if;

(a) such nondisclosure is otherwise authorized by law, or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or members of the public.

(F) As used in this rule “informed” means full disclosure to the client of the circumstances and advice to the client of any actual or reasonably foreseeable adverse effects of those circumstances upon the representation.

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Paragraph (A) is intended to apply to all types of legal employment, including the representation of multiple parties in litigation or in a single transaction or 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 an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an “uncontested” marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, § 962) and must obtain the consent of the clients thereto. Moreover, if the potential adversity should become actual, the member must obtain the further consent of the clients pursuant to paragraph (B).

Paragraph (E) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

C. Summary of 1992 Proposed Amendments

Amendments to Blackletter Text

In 1992, in response to an inquiry from the Supreme Court, a substantial number of substantive and non-substantive amendments were made to rule 3-310. Structurally, former paragraph (F) became new paragraph (A), former paragraph (A) became new paragraph (B), former paragraph (B) became new paragraph (C), and the remaining sections were re-lettered accordingly.

Instead of defining “informed,” new subparagraph (A)(1) defined the term “disclosure.” The definition remained substantially the same except that: 1) the new definition applied expressly to former clients; 2) the phrase “effects of those circumstances upon the representation” found in former paragraph (F) was replaced with the phrase “consequences to the client or former client;” and 3) the term “relevant” was added before the word “circumstances” :

(1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

New subparagraph (A)(2) defined the phrase “informed written consent”:

(2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure;

New subparagraph (A)(3) defined the term “written” by reference to the California Evidence Code:

(3) “Written” means any writing as defined in Evidence Code section 250.

As explained by the then Commission, the definition was intended to provide flexibility in the application of the rule.

New paragraph (B) amended former paragraph (A) in two principal ways. It:(i) required “written disclosure” rather than “informed written consent;” and(ii) expanded variety of relationships and interests that the member would be required to disclose in writing to the client, including relationships with witnesses. It was believed that the client's interests are adequately protected by requiring written disclosure without written consent. Additionally, the written disclosure requirement provided both the attorney and the client with a writing evidencing disclosure to the client. Regarding witness relationships, as a member's relationship with a witness could affect the member's examination of such witness to the detriment of the client, such a relationship must also be disclosed to the client. The introductory clause of paragraph (B) thus provided:

~~(AB) If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent. A member shall not accept or continue representation of a client without providing written disclosure to the client where:~~

Generally, the four subparagraphs in new paragraph (B) expressly identified the relationships and interests that previously had only been implied by the broad language in former paragraph (A). The subparagraphs also generally expanded the scope of paragraph (B)’s coverage to encompass both past and present relationships with witnesses.

New subparagraph (B)(1) prohibited a lawyer from accepting or continuing representation absent written disclosure where the lawyer has any of several kinds of *current* relationships with a party or witness in the same matter:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

The enumeration of the relationships was intended to clarify the kinds of relationship that require written disclosure even if *de minimus* in nature.

New subparagraph (B)(2) prohibited a lawyer from accepting or continuing representation absent written disclosure where the lawyer has reason to know that: 1) the lawyer previously had any of several kinds of relationship with a party or witness in the same matter; and 2) the previous relationship would substantially affect the representation.

(2) The member knows or reasonably should know that:

(a) The member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, and

(b) The previous relationship would substantially affect the member's representation; or

The phrase “knows or reasonably should know” was included to recognize the difficulties in cataloguing all past relationships and interests, especially where the member could not know that a particular relationship would be relevant to a later representation. Additionally, the proposed new rule recognized that a past relationship may have no substantial effect on the member's representation and therefore need not be disclosed.

New subparagraph (B)(3) prohibited a lawyer from accepting or continuing representation absent written disclosure where the lawyer has or had any of the identified relationships with another person or entity that would be affected substantially by resolution of the matter:

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

New subparagraph (B)(4) prohibited a lawyer from accepting or continuing representation written disclosure where the member has or had any of the identified interests in the subject matter of the representation.

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

As such an interest could affect the member's zealous and impartial representation, the interest should be disclosed .

New subparagraphs (C)(1) and (C)(2) combined and continued the concepts found in then current paragraph (B) and Discussion ¶. 2 regarding joint representations, i.e., the representation of multiple clients in a single action or transaction. Subparagraph (C)(1) addressed joint representation situations where the clients' interests *potentially* conflict; subparagraph (C)(2) addressed joint representation situations where the clients' interests *actually* conflict. This rule amendment simply transferred the concept from the Discussion to the black letter text.

New subparagraph (C)(3) addressed the situation where a member represents Client A versus Party B and at the same time wishes to represent Party B versus Party C. Paragraph (C) thus provided:

~~(BC) A member shall not concurrently represent clients whose interests conflict, except with their informed written consent. A member shall not, without the informed written consent of each client:~~

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Paragraph (D) was identical to then current paragraph (C) except for a non-substantive clarifying syntax change:

~~(CD) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients , except with their without the informed written consent of each client.~~

Paragraph (E) was identical to then current paragraph (D) except for a non-substantive clarifying syntax change:

~~(DE) A member shall not, without the informed written consent of the client or former client, accept employment adverse to a the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client.~~

A proposed amendment to then current subparagraph (E)(3) imposed a stricter standard by requiring the lawyer to obtain informed written consent rather than simply

obtaining the client's consent after disclosure. In effect, the proposed amendment added a writing requirement:

(~~E~~F) A member shall not accept compensation for representing a client from one other than the client unless:

(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and

(2) Information relating to representation of ~~a~~the client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consents~~—after disclosure~~, provided that no disclosure or consent~~is~~ required if:

(a) such nondisclosure is otherwise authorized by law; or

(b) The member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or ~~members of~~ the public.

Amendments to Discussion section

Then current Discussion ¶.1 was carried forward verbatim.

New Discussion ¶. 2 provided notice to lawyers that, in some instances, a client's identity or nature of representation may be a client confidence.

New Discussion ¶. 2 clarified that amended paragraph (B) was not intended to apply to the relationship of a member to another party's lawyer and that such relationships are governed by rule 3-320 (Relationship With Other Party's Lawyer).

New Discussion ¶¶. 4 and 5 clarified the relationship between amended paragraphs (B) and (E).

New Discussion ¶. 6 clarified that rule 3-310(B) was not intended to apply to situations in which a lawyer fails to advise any affected client of a relationship or interest which a partner or associate in the member's firm may have with another party unless the lawyer was aware of such relationship or interest.

New Discussion ¶. 7 clarified that rule 3-310(C) was intended to apply to representations of clients in both litigation and transactional matters.

The amendment to then current Discussion ¶. 2 (renumbered 8) simply conformed it to the relettering of the blackletter text paragraphs.

New Discussion ¶. 9 provided notice to members that written conflict waivers pursuant to this rule might not suffice for non-disciplinary purposes, such as motions for disqualification. Case authority was provided in support of the stated proposition.

New Discussion ¶. 10 clarified that amended paragraph (C) was not intended to apply to class action settlements subject to court approval. In this situation, it was believed that clients' interests are protected by the court.

The amendment to then current Discussion ¶. 3 (renumbered 11) simply conformed it to the relettering of the blackletter text paragraphs.

The proposed Discussion paragraph provided in its entirety:

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Other rules and laws may preclude making adequate disclosure under this rule. If such disclosure is precluded, informed written consent is likewise precluded. (See, e.g., Business and Professions Code section 6068, subdivision (e).)

Paragraph (B) is not intended to apply to the relationship of a member to another party's lawyer. Such relationships are governed by rule 3-320.

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.

Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

Paragraph (A) Subparagraphs (C)(1) and (C)(2) is are intended to apply to all types of legal employment, 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 an ante-nuptial agreement, or joint or reciprocal wills for a husband and wife, or

the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (B) (C)(2).

Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.

There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 1 85]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 5 09]; *Ishmael v. Millington* (196 6) 24 1 Cal.App.2d 520 [50 Cal.Rptr. 592].)

Paragraph (D) is not intended to apply to class action settlements subject to court approval.

Paragraph (E) is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].)

D. Summary of 2002 Proposed Amendments

An amendment to rule 3-310, new Discussion ¶. 9, was adopted by the Board on May 4, 2002 and was subsequently approved by the Supreme Court. The amendment was developed in response to Business and Professions Code § 6068.11, requiring the State Bar to conduct a study, in consultation with representatives of the insurance defense bar, plaintiff's bar, the insurance industry and the Judicial Council, concerning the legal and professional responsibility conflict of interest issues arising from the decision of the California Court of Appeal in *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20].

New Discussion ¶. 9 paragraph clarified that rule 3-310(C)(3) does not apply when the lawyer-client relationship with an insurance company client arises from the handling of a defense matter for a policyholder of the insurance company. This proposed Discussion section was to appear between paragraph eight and nine.

In *State Farm Mutual Auto Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422, the court held that subparagraph (C)(3) was violated when a member, 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*, subparagraph (C)(3) is not intended to apply with respect to the relationship

between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to action.

The first sentence of Discussion ¶. 9 clarified that the *State Farm* holding occurred in a specific and narrow fact setting.

The second sentence of clarified that the *State Farm* holding does not apply where there is no direct action against an insurer client and the insurer client's only interest is that of an indemnity provider.

In effect, new Discussion ¶. 9 also clarified the application of the rule to an insurance defense setting, which previously had been addressed in then Discussion ¶. 11, which provided in relevant part: "Paragraph (F) [regarding fees paid by a person other than the client] is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interests."

No amendments have been made to rule 3-310 since the 2002 amendments.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule.² However, to avoid confusion, subsection (d) should state: "Even with the client's informed written consent, ..." OCTC recognizes that Comment 7 explains that, but it should be in the rule, not a Comment.

Commission Response: The Commission agrees and has revised the rule to capture the concept described in the suggested change. See revised paragraphs (a), (b) and (c).

2. OCTC supports Comments [1], [2], [3], [4], [5], [6], [9], and [10]. OCTC has no position on Comment 8 [advanced waivers]. If the Comments discuss advanced waivers, however, they should also discuss the requirements for an adequate advanced waiver.

Commission Response: No response required.

3. If subsection (d) is revised as indicated above, the Commission might want to reconsider Comment [7].

Commission Response: No response required.

² OCTC, however, is concerned about the proliferation of conflict rules as discussed in the General Comments section of its September 27, 2016 letter.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**
(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC refers the Commission to its September 27, 2016 and January 9, 2017 comments.

Commission Response: No response required.

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.

Commission Response: 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.

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.

Commission Response: 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.

4. If subsection (d) is revised as indicated above, the Commission should reconsider the first sentence of Comment [9].

Commission Response: Please see response to comment #2.

5. OCTC reiterates their concern regarding the use of "knowing" or "knowingly" in many of the proposed rules.

Commission Response: 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 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."

For the 30-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day and 45-day public comment version of the rule and the Commission's responses to OCTC remained the same.

- **State Bar Court:** No comments were received from State Bar Court.

VIII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, seventeen public comments were received. Five comments agreed with the proposed Rule, ten comments agreed only if modified, and two comments did not indicate a position. During the 45-day public comment period, five public comments were received. All five comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report. During the 30-day public comment period, five comments were received. One comment agreed with the proposed Rule, and four comments agreed only if modified.

Two speakers appeared at the public hearing whose testimony was in support of the proposed rule if modified. That testimony and the Commission's response is also in the public comment synopsis table.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

See Section VI on the history of the current rule. In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

1. General Overview of Conflicts.

- *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620], review denied (6/23/2010)
- *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal. Rptr. 3d 771]

- *People ex rel Dept. of Corp. v. Speedee Oil Change Sys., Inc.* (1999) 20 Cal.4th 1135, 1151-1152 [86 Cal. Rptr. 2d 816]
- *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal. Rptr. 2d 537]

2. Conflicts Involving Current Clients (3-310(B), (C)).

- *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284 [36 Cal. Rptr. 2d 537] (representation directly adverse to current client). (“The primary value at stake in cases of simultaneous or dual representation is the attorney’s duty-and the client’s legitimate expectation-of loyalty, rather than confidentiality.”)
- *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action)
- *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties’ interests in the matter are in actual conflict)
- *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20] (insurance defense)
- *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]
- *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392] (relationship between insurers and lawyers representing insureds)
- State Bar Formal Ethics Op. 2003-163, available at:
<http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=xVPoTzYq93U%3d&tabid=838>

3. Conflicts Involving Corporate Affiliates.

- *Morrison Knudsen Corporation v. Hancock, Rothert & Bunshoft* (1999) 69 Cal.App.4th 223 [81 Cal. Rptr. 2d 425]
- *Brooklyn Navy Yard Cogeneration Partners v. Superior Court* (1997) 60 Cal.App.4th 248 [70 Cal. Rptr. 2d 419]

4. Unwaivable (Prohibited or Unconsentable) Conflicts of Interest.

- *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]

5. Advance Consents to Conflicts.

- *In re Shared Memory Graphics LLC* (Fed. Cir. 2011) 659 F.3d 1336 (applying California law) (permitted).
- *UMG Recordings, Inc. v. MySpace, Inc.* (C.D.Cal. 2008) 526 F.Supp.2d 1046 (permitted).

- *Concat LP v. Unilever, PLC* (N.D.Cal.2004) 350 F.Supp.2d 796 (not permitted).
- *Visa U.S.A., Inc. v. First Data Corporation* (N.D.Cal.2003) 241 F.Supp.2d 1100 (permitted).
- *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285 [37 Cal.Rptr.2d 754] (permitted).

6. Substantial Relationship Test.

Given that the standard in rule 3-310(E) is the “materiality” of the information to the current matter, it has been left to the courts to craft a test to determine whether information a lawyer likely acquired from a former client is “material.” The courts have accomplished this by creating a substantial relationship test that is applied in civil actions to determine whether a lawyer should be disqualified. See, e.g., *H.F. Ahmanson & Co. v. Salomon Bros., Inc.* (1991) 229 Cal.App.3d 1445 [280 Cal.Rptr. 614] (To establish substantial relationship of matters, inquire re: (1) factual similarity of the cases; (2) their legal similarity; and (3) the extent of the lawyer’s involvement in the cases). See also *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324 [104 Cal.Rptr.2d 116]; *City National Bank v. Adams* (2002) 96 Cal.App.4th 315 [117 Cal.Rptr.2d 125]. Conversely, unlike CR 3-310(E), MR 1.9(a) does not explain why the substantial relationship inquiry is made: to determine whether the lawyer acquired confidential information material to the present matter.

In *Jessen v. Hartford General Casualty Co.* (2003) 3 Cal.Rptr.3d 877, 884-885 [111 Cal.App.4th 698], the court stated that the test for determining whether a substantial relationship exists between the current matter and the former matter “turns on two variables: (1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation.” See also *Farris v. Fireman’s Fund Ins. Co.* (2004) 119 Cal.App.4th 671 [14 Cal.Rptr.3d 618] (Figure 17); *Brand v. 20th Century Ins. Co.* (2004) 124 Cal.App.4th 594 [21 Cal.Rptr.3d 380] (Figure 18). In effect, *Jessen* conflates the first two factors of the H.F. Ahmanson test (similarity of factual and legal issues) into one. Although *Jessen*, *Farris* and *Brand* provide a test that arguably is broader and more likely to result in disqualification than the test originally set out in *H.F. Ahmanson*, more recent decisions have held that mere conclusory allegations by the moving party of the migrating lawyer’s alleged relationship to the former client will not be sufficient to meet the moving party’s burden to prove the matters are substantially related. See, e.g., *Faughn v. Perez* (2006) 145 Cal.App.4th 592 [51 Cal.Rptr.3d 692] (moving party’s heavy reliance on inferences and failure to submit direct evidence that pointed to specific confidential information to which attorney could have had access required denial of disqualification motion)

B. ABA Model Rule Adoptions

Model Rule 1.7. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.7: Conflicts of Interest: Current Client,” revised September 5, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7.authcheckdam.pdf [Last visited 2/6/17]
- Nineteen jurisdictions have adopted Model Rule 1.7 verbatim.³ Twenty-two jurisdictions have adopted a slightly modified version of Model Rule 1.7.⁴ Ten jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.7.⁵

Model Rule 1.7, Comment [34] (Parent/Subsidiary Conflicts Situations). The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct Rule 1.7, Comment [34],” revised October 21, 2010, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7_cmt_34.authcheckdam.pdf [Last visited 12/28/15]
- Thirty jurisdictions have adopted Model Rule 1.7, Comment [34] verbatim.⁶ Three jurisdictions have adopted a modified version of Model Rule 1.7, Comment [34].⁷ Thirteen jurisdictions have not adopted a version of the Comment.⁸

³ The nineteen jurisdictions are: Arkansas, Colorado, Delaware, Indiana, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Utah, Vermont, and West Virginia.

⁴ The twenty-two jurisdictions are: Alaska, Arizona, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, New Jersey, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Tennessee, Virginia, Washington, Wisconsin, and Wyoming.

⁵ The ten jurisdictions are: Alabama, California, District of Columbia, Florida, Georgia, Michigan, Mississippi, North Dakota, Ohio, and Texas.

⁶ The thirty jurisdictions are: Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

⁷ The three jurisdictions are: Alaska, District of Columbia, and New York.

⁸ The thirteen jurisdictions are: Alabama, California, Florida, Louisiana, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oregon, and Virginia.

**X. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES;
NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of the ABA Model Rules' approach to have separate rules for different conflicts of interest situations, i.e., Rule 1.7 (current client conflicts), Rule 1.9 (former client duties), Rule 1.8.6 (third-party payor), Rule 1.8.7 (aggregate settlements), rather than amalgamating the provisions in a single rule, current rule 3-310.
 - Pros: Such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules.
 - Cons: Current rule 3-310 has been applied without any perceived problems for over 25 years. There has been no showing of a compelling need to change the basic structure of the conflicts rules in California.
2. Recommend adoption of the ABA Model Rule approach to current client conflicts in Rule 1.7.
 - Pros: The ABA's explicit conflicts standards set forth in paragraph (a) of Model Rule 1.7 are a clear, succinct and straightforward statement – in two subparagraphs – of the kinds of conflicts that involve a current client. These two kinds of conflict situations are implemented in the proposed rule in two paragraphs: (i) paragraph (a) addresses direct adversity conflicts, a concept found in current rule 3-310(C)(2) and (3); and (ii) paragraph (b) addresses conflicts where there is a significant risk that a lawyer's duties to or relationships with another person, or the lawyer's own personal interests, will materially limit the representation. These latter conflicts situations are currently addressed in rule 3-310(B)(2) through (4) and 3-310(C)(1). Paragraph (b) of Model Rule 1.7 explicitly identifies those conflict situations that are not consentable in three subparagraphs (Model Rule 1.7(b) is found in proposed Rule 1.7(d).) Notwithstanding its succinctness, the Model Rule and proposed rules are more comprehensive in their scope of coverage and would be more protective of a client's interests. Nearly every jurisdiction in the country has adopted the Model Rule either verbatim or a very close approximation. California should similarly adopt the basic framework and language of Model Rule 1.7 and contribute to the establishment of a national standard. Finally, the twelve proposed Comments to the rule, substantially fewer in number than the Model Rule Comments, all provide guidance on how the rule should be interpreted and applied. The number of Comments is the

same number of Discussion paragraphs in current rule 3-310, many of which have been carried forward in the proposed rule.

- Cons: The Model Rule may appear to be straightforward but the devil is in the details, which the Model Rule addresses by including 35 Comments, many of them lengthy. The first Commission also used the Model Rule structure and language, and inserted 41 Comments of explanation. The number of Comments accompanying both versions of the Model Rule approach would appear to belie a claim that the rule is straightforward. Straight adoption of the ABA Model Rule approach would completely forego the current California Rule approach, which has proved workable and useful.
3. Retain the current California Rules' standard for obtaining a client's consent to most conflicted representations, "informed written consent," rather than the Model Rules' less robust standard, "consent, confirmed in writing."
- Pros: This standard is more client-protective because written disclosure is required, a consent being informed only to the extent that the disclosure is sufficient. Retaining the standard carries forward long-standing California policy. There is no evidence the requirement does not work in practice or is ignored.
 - Cons: None identified.
4. Retain the current California Rules' less stringent standard of requiring only "written disclosure" in some situations based on a lawyer's duties to or relationships with other persons, or the lawyer's personal interests. (See discussion of proposed paragraph (c), below.)
- Pros: Carries forward long-standing California policy intended to ensure that a client is made aware of a much broader set of lawyer relationship and interests that would not otherwise be disclosed under the Model Rule's "significant risk that a lawyer's representation will be materially limited" standard in Model Rule 1.7(a)(2), thus avoiding the under-regulation of that standard. There is no evidence that California's approach is broken. Moreover, the perceived under-regulation problem of current rule 3-310(B), i.e., that serious relationship or personal interest conflicts do not require informed consent, is obviated by the recommended adoption of paragraph (b).
 - Cons: The justification for requiring only written disclosure, to increase the breadth of relationships and interests that are disclosed, is attractive in theory but it is only when a client is confronted with signing a disclosure document that the client will take the time to consider whether the relationship or interest is sufficiently inconsequential and proceed with the lawyer's representation. There is also a reasonable likelihood that if a consent is not required, lawyers will honor the rule primarily by its breach.

5. Recommend adoption of paragraph (a), which incorporates the general concept of direct adversity found in Model Rule 1.7(a)(1).
 - Pros: A criticism of current rule 3-310(C) has been that it does not capture this broader concept of direct adversity. By substantially adopting the Model Rule 1.7(a)(1) language, the proposed rule will capture the broader concept of direct adversity that was identified in *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537], and has been absent in current rule 3-310(C). This is clarified in proposed Comment [1].
 - Cons: There is no need to broaden rule 3-310(C)(3) as the broader concept of direct adversity is already recognized in case law, i.e., the *Flatt* case. Further, the Supreme Court has already interpreted current rule 3-310(C)(3) to encompass the *Flatt* standard when it adopted rule 3-310, Discussion ¶. 9, concerning conflicts in the insurance defense context.
6. Recommend adoption of paragraph (b), which incorporates Model Rule 1.7(a)(2)'s general concept of a lawyer's ability to represent a client being compromised by a relationship with, or responsibilities owed to another client or third person, or by the lawyer's personal interests.
 - Pros: See "Pros" in Section IX.A.1, above. Of special note is the Commission's recommendation that the heightened requirement of "informed written consent" be applied to these material limitation conflicts rather than the less stringent "written disclosure" requirement in current rule 3-310(B). As to current rule 3-310(C)(1), which addresses a "potential" conflict in a joint client representation, rule 3-310 currently requires informed written consent.
 - Cons: See "Cons" in Section IX.A.1, above, as to the recommendation to adopt the Model Rule approach.
7. Recommend adoption of paragraph (c), which (i) carries forward current rule 3-310(B)(1) largely intact, and (ii) adds the concept in current rule 3-320 regarding a lawyer's relationship with another party's lawyer.
 - Pros: 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 the described relationships or responsibilities so that the client can decide whether to retain the lawyer or seek other counsel. Further, 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). Finally, incorporating current, standalone rule 3-320 into the proposed rule brings into a single rule all of the relationship and personal interest conflicts, increasing the likelihood that

lawyers from other jurisdictions practicing in California as authorized under California's multijurisdictional framework will be able to find them.

- Cons: 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. It thus requires written disclosure in circumstances that do not present a conflict of interest. It will only cause confusion because it will be difficult to know when there is significant risk that will trigger the application of paragraph (b). Further, the argument that when the question is close, a lawyer will err on the side of caution, would apply equally in the absence of paragraph (c). Finally, incorporating current rule 3-320 risks confusion by removing a separate California rule that has been in place with no indication that it is not working in this form.
8. Recommend adoption of paragraph (d), which incorporates the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts of interest.
- Pros: Proposed paragraph (d) moves the important concept of unconsentable conflicts into the blackletter rather than relegate it to two separate Discussion paragraphs (see rule 3-310, Discussion paragraphs 2 and 10). A provision that in effect provides an insurmountable obstacle to obtaining a client's consent to a conflicted representation belongs in the black letter of the Rule. Further, by including a cross-reference to paragraph (d) in each of paragraphs (a), (b) and (c), as well as a cross-reference to the latter paragraphs in paragraph (d), the rule makes clear that not only must informed consent be obtained or written disclosure made, but also each of the conditions in paragraph (d) must be satisfied before a lawyer may represent a client in a conflict situation governed by the proposed rule.
 - Cons: There is no evidence that including the concept only in the Discussion section of rule 3-310 has caused any lack of awareness of the concept. Further, there is a abundant case law that sets forth the principle of unconsentable conflicts of interest.
9. Recommend adoption of Comment [1], which is derived in part from Model Rule 1.7, Cmt. [1].
- Pros: By identifying undivided loyalty as the primary principle involved in conflicts of interest involving current clients, the rule provides important interpretative guidance on the scope and application of the rule. Further, by providing examples of how directly adverse conflicts can arise, the rule provides useful and important guidance on the scope and application of paragraph (b).
 - Cons: None identified.

10. Recommend adoption of Comment [2], which provides examples of what constitutes a matter” within the scope of the rule. Derived from Model Rule 1.11(e), it is also cross-referenced in proposed Rules 1.9, 1.11, and 1.12.
 - Pros: The Comment provides meaningful and useful guidance by way of non-exclusive examples regarding the wide array of situations under which a conflict of interest between or among clients might arise.
 - Cons: The proposed Comment is a definition and should be in the black letter of the rule.
11. Recommend adoption of Comment [3], which carries forward the concept in current rule 3-310, Discussion ¶. 7, concerning joint client conflicts in a single matter.
 - Pros: Provides meaningful and useful guidance on the application of the rule to particular joint client situations that often arise in practice. It importantly recognizes and alerts lawyers to the fact that a representation that might begin as a material limitation conflict governed by paragraph (b) can transform into a direct adversity conflict, governed by paragraph (a), requiring a separate consent from the affected clients. The current Discussion paragraph has been in place for over 25 years and there is nothing to suggest that it has been unnecessary or unhelpful.
 - Cons: None identified.
12. Recommend adoption of Comment [4], which carries forward largely unchanged current rule 3-310, Discussion ¶. 9, concerning conflicts that might arise in the insurance defense context.
 - Pros: The Supreme Court approved this Comment in 2002 after extensive debate among various stakeholders in the insurance industry. It provides meaningful and useful guidance regarding a particular situation that often arises in insurance contexts. The current Discussion paragraph has been in place for nearly 15 years and there is nothing to suggest that it has been unnecessary or unhelpful.
 - Cons: None identified.
13. Recommend adoption of Comment [5], which is new and concerns paragraph (b).
 - Pros: Comment [5], which is derived from Model Rule 1.7, Cmt. [8], provides meaningful and useful interpretative guidance regarding paragraph (b). It provides several examples that alert lawyers to how situations requiring a client’s informed written consent might arise.
 - Cons: None identified.

14. Recommend adoption of Comment [6], which is new, and explains the rationale for the different disclosure and consent regimes in paragraph (b) [“informed written consent”] and paragraph (c) [“written disclosure”].
 - Pros: By explaining the rationale for the different approaches to relationship and personal interest conflicts in paragraphs (b) and (c), the Comment provides interpretative guidance on when one or the other of the paragraphs might apply in situations not expressly identified in a subparagraph of either paragraph.
 - Cons: None identified.
15. Recommend adoption of Comment [7], derived in part from Model Rule 1.7, Cmt. [7], which carries forward the concept in current rule 3-310, Discussion ¶.1 concerning positional conflicts that might arise in representing different clients in separate matters. (See, e.g., State Bar Formal Ethics Op. 1989-108.) The Comment was substantially expanded following public comment from the State Bar’s Committee on Professional Responsibility and Competence (COPRAC).
 - Pros: The Comment provides meaningful and useful guidance on application of the rule to the situations that arise involving positional conflicts. The current Discussion paragraph has been in place for over 25 years and there is nothing to suggest that it has been unnecessary or unhelpful in this complex area of the law.
 - Cons: None identified.
16. Recommend adoption of Comment [8], which carries forward the concept in current rule 3-310, Discussion ¶. 2, which explains that when disclosure is precluded by rules protecting the confidentiality of another client’s information, representation in situations covered by paragraphs (a) through (c) is prohibited.
 - Pros: Maintains a current Comment that emphasizes the overarching duty to protect confidential client information. Provides meaningful guidance to alert lawyers that an inability to disclose confidential client information may preclude compliance with the disclosure requirements of the conflict rule. Current Discussion paragraph has been in place and there is nothing to suggest that it has been unnecessary or unhelpful.
 - Cons: None identified.
17. Recommend adoption of Comment [9], which carries forward current rule 3-310, Discussion ¶. 10 concerning unconsentable conflicts, and notes that paragraph (d) is the blackletter manifestation of the concept.
 - Pros: Provides an important explanation of paragraph (d), which in effect describes conflicts where consent cannot be obtained or written disclosure will not suffice, thereby overriding the other provisions of the Rule (paragraphs (a) through (c).)

- Cons: None identified.
18. Recommend adoption of Comment [10], which provides that the Rule does not prohibit a lawyer from entering into an agreement with a client under which the client provides an “advance consent” to a future conflict of interest.
- Pros: In modern practice involving large law firms, a client otherwise might be precluded from retaining the lawyer or law firm of the client’s choice because the lawyer foresees that a conflict might arise in the future between the client and a current client of the lawyer, and wants assurance that the new client will not later prevent representation of the current client. This provision provides assurance that a lawyer will not be disciplined simply from entering into such an agreement. It does not, however, sanction enforcement of the agreement or attempt to define specific requirements for such an agreement to be effective. These will be determined on a case-by-case basis by the courts.
 - Cons: This is an area of law that should be left to be developed on a case-by-case basis in the civil courts.
19. Recommend adoption of Comment [11], which explains that material changes in the circumstances under which a consent was obtained may require a lawyer to obtain a new consent.
- Pros: This Comment importantly clarifies that the effectiveness of a consent might become diminished over time and a change in circumstances. It is a general statement of the principle alluded to in the last sentence of Comment [3].
 - Cons: None identified.
20. Recommend adoption of Comment [12], which provides cross-references to two proposed Rules, recommended for adoption by this Commission, which permit otherwise conflicted representations or provide exceptions for imputation under certain conditions.
- Pros: Both referenced rules, proposed Rules 6.3 and 6.5, promote lawyer conduct that promotes confidence in the legal profession or the administration of justice, or would increase the access to justice, or both. Lawyers should be made aware that the principles set forth in proposed Rule 1.7 are not intended to prevent such conduct.
 - Cons: None identified.
21. Delete Discussion paragraphs 3 through 6, 8, 11, and 12 of current rule 3-310.
- Pros: As noted in the redline comparison of the proposed Rule to current rule 3-310 in Section IV, above, each of these paragraphs has not been carried forward because the proposed revisions to the 3-310 provisions which they

are intended to explain have been deleted, moved to another rule, incorporated in the black letter of this rule, or rendered irrelevant because a cross-referenced rule has been imported into the proposed Rule.

- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of a “hybrid” approach to the current conflicts rule provisions by merging the “checklist approach” to regulating conflicts involving current clients, (i.e., as is done in current rule 3-310(B) and (C)) with the ABA Model Rule’s approach, which generally describes two kinds of conflict situations relating to current clients: (1) those involving direct adversity, (Model Rule 1.7(a)(1)), and (2) those involving a significant risk that a lawyer’s representation of current clients will be materially limited by the lawyer’s relationships with, or responsibilities to, another client or third person, or by the lawyer’s personal interests.

- Pros: **First**, as explained more fully below, a hybrid rule will facilitate compliance with enforcement of the current client conflicts rule provisions by incorporating more clearly-stated general conflicts principles, (see introductory clauses to proposed paragraphs (a) and (b)), while providing specific examples (“checklist items”) within each category that carry over the current California Rule requirements which clarify how situations that violate those principles might be recognized in practice.

Second, this hybrid approach will also increase client protection by including the generally-stated conflicts principles that are subject to regulation under the rule, rather than limiting the rule’s application to several discrete situations as in the current rule (Compare current rule 3-310(B) and (C)).

Third, by incorporating the generally-stated principles in Model Rule 1.7(a)(1) and (2) into the introductory clauses of paragraphs (a) and (b), the proposed rule will help promote a national standard in conflicts of interest.

Fourth, by incorporating the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts into proposed paragraph (d), the proposed rule will move this important concept into the blackletter rather than relegate it to two separate Discussion paragraphs (see rule 3-310, Discussion paragraphs 2 and 10).

Fifth, by retaining a written disclosure requirement that broadly applies to a much broader category of potential personal conflicts of a lawyer, (see current rule 3-310(B) and proposed paragraph (c)), the rule will continue to increase client protection and promote confidence in the legal profession and administration of justice by requiring written disclosure of even those relationships or interests that do not rise to the level of presenting a significant risk they will have a substantial effect on the lawyer’s representation of the client.

- Cons: The hybrid approach of the proposed Rule is more complex than either the current rule provisions or Model Rule 1.7. The hybrid approach's complexity might confuse lawyers as to their duties and risks weakening both compliance with and enforcement of basic conflicts principles. A combination of approaches is not found in any other jurisdiction and would maintain California's departure from a national standard that would operate more effectively to regulate national practices across jurisdictions. A current conflicts rule should adhere to either the current rule's approach or adopt the Model Rule's approach. Perhaps more important, nearly all of the concepts that are listed as favoring the "hybrid" approach are carried forward in proposed Rule 1.7, the only concept not being carried forward being the blackletter "checklist" of specific material limitation conflicts that are now in current rule 3-310(B)(1) through (4). (See next paragraph.)
2. Retain the current "checklist" approach in current California rule 3-310 (B) and (C), without incorporating general principle concepts from Model Rule 1.7.
- Pros: The rule has been in existence for over 25 years. There is no evidence that lawyers cannot understand their duties as stated in the rule, or that compliance with it, or discipline under it, is impaired. See also "Cons" in Section IX.B.2, above.
 - Cons: See "Pros" in Section IX.B.2, above.
3. Recommend adoption of a definition of "written disclosure" for purposes of this Rule.
- Pros: Provides a definition that explains the scope of disclosure required under paragraph (c). This is a necessary addition to the Rule because, while "informed consent" and "informed written consent" are defined in the global terminology rule (see proposed Rule 1.0.1(e) and (e-1)), neither "disclosure" nor "written disclosure" is. It would be both confusing and redundant to place a definition of "disclosure" in Rule 1.0.1 because the definition of "informed written consent" already describes the disclosure that is required to obtain such consent.
 - Cons: The Commission has moved to the Model Rule approach of defining "informed consent" rather than the approach in current rule 3-310(A) of defining "disclosure" in subparagraph (A)(1) and in subparagraph (A)(2) defining "informed written consent" to mean the client's "written agreement to the representation following disclosure." A separate definition of "written disclosure" is not necessary because implied in the definition of "informed consent" is the requirement of "disclosure."⁹

⁹ Proposed rule 1.0.1(e) provides:

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Paragraph (a) is a substantive change in that it incorporates and describes the situations corresponding to current rule 3-310(C)(2) and (C)(3)] as situations involving direct adversity. Paragraph (a) is also a substantive change to the extent that it impliedly incorporates the holding of *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537], which is broader than the concept in current rule 3-310(C)(3).
2. Paragraph (d) is a substantive change because it moves the description of unconsentable conflicts into the black letter of the Rule.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term “lawyer” for “member.”
 - Pros: The current Rules’ use of “member” departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Change the rule number to conform to the ABA Model Rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there

“Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

- Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.
3. Paragraph (a)'s substitution of "representation" for "accept or continue the representation" in current rule 3-310(C)(2) and (3) is not a substantive change.
 4. All other changes to the rule are not intended as substantive changes in lawyers' duties.

E. Alternatives Considered:

1. In addition to the alternatives discussed in "Concepts Rejected" above, the Commission also considered simply carrying forward the various provisions in current rule 3-310 as separate standalone rules, with 3-310's provisions amended to incorporate the global changes the Commission has agreed to ("lawyer" for "member," etc.) and the separate standalone rules corresponding to the ABA numbering. The Commission abandoned that approach at an early stage of its deliberations. A copy of the rules considered under this approach is attached.

XI. DISSENT/MINORITY STATEMENTS SUBMITTED BY COMMISSION MEMBERS

Mr. Kehr and Mr. Martinez submitted a written dissent. See attached for the full text of the dissent and the Commission's response to the dissent.

XII. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.7 [3-310] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.7 [3-310] in the form attached to this Report and Recommendation.

Enclosure 2: Revised Executive Summary and Revised Report and Recommendation

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

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

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		<p>We would not opposed this rule if:</p> <p>1. the comment section were clarified to remove the word “embarrassment,” and</p> <p>2. the word “knowingly” was added to establish a required mens rea in order to be in violation of the rule.</p>	<p>The Commission did not make the suggested changes.</p> <p>1. The Commission continues to believe that the duty of undivided loyalty, which underlies the proposed rule, requires that a lawyer not do anything to harm a current client, including embarrassing the client, which cause the client to question the lawyer’s loyalty.</p> <p>2. Adding the word “knowingly” is not warranted since Rule 1.0(b) requires a willful violation as a basis for discipline and adding a knowledge element would dilute the client protection objectives of Rule 1.7. The Commission assumes that this comment is concerned with the imputation of conflicts within a public defender’s office. That concern is addressed in proposed rule 1.10(a), which provides in pertinent part,</p> <p>“(a) While lawyers are</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>associated in a firm,* none of them shall <i>knowingly</i>* represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9” (Emphasis added).</p> <p>The Commission also notes, however, that proposed rule 5.1(a) provides:</p> <p>“(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that <i>the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these Rules and the State Bar Act.</i>” (Emphasis added.)</p> <p>Proposed rules 1.10 and 5.1 read together require that the managerial lawyers in a law firm (which includes law offices such as those of the commenter) make reasonable efforts to ensure that its lawyers are aware of conflicts</p>

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

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						such as those prohibited by rule 1.7(a) and (b) that might be imputed to the lawyers under rule 1.10(a).
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 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>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. The citation to research on overconfidence bias as it relates to conflicts of interest does not convince the</p>

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

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

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

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						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 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).

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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.	See responses to Alternate Public Defender L.A. County, Y-2016-27a, above.
Z-2017-3	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (03-02-17)	Y	M		<p>1. OCTC refers the Commission to its 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</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</p>

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

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	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>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.</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>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> <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</p>

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

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

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
						1901 California Supreme Court decision which recognized that “willing 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</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 “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,

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

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

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
					<p>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.”</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>business, financial, professional, or personal,” together with the discussion that follows, provides better guidance.</p> <p>The Commission disagrees 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 presence of a conflict, the Commission has added to the introductory clause of</p>

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

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

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

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	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
						<p>paragraph (d) 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.”</p> <p>The Commission disagrees with the 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</p>

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

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

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

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						<p>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 greater client protection, applies. Finally, paragraph (c) and Comment [6] recognize that in practice, where the</p>

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

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

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

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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
						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).

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Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

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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.

[TEXT OMITTED]

Sincerely,

JANICE FUKAI
Alternate Public Defender
County of Los Angeles

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments



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March 2, 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
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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,

Richard Zitrin
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University of California, Hastings College of the Law
On behalf of the January 2, 2017 ethics professors’ letter signatories

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments
ATTACHMENT 1 TO MARCH 2, 2017 ZITRIN LETTER O/B/O/ ETHICS PROFESSORS



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January 2, 2017

Hon. Lee Smalley Edmon, Chair
and all members
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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”).

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments

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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January 17, 2017

CHIEF DEPUTY PUBLIC DEFENDER

EXECUTIVE OFFICE

Audrey Hollins
State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
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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 mens 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.

[TEXT OMITTED]

Date:

1/17/2017

Signature:

Kelly G. Emiling

KELLY G. EMLING
Chief Deputy Public Defender

Enclosure 3: Public Comment Synopsis Table and Full Text of Comments



**THE STATE BAR
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March 2, 2017

Randall Difuntorum, Director
Office of Professional Competence, Planning
& Development
State Bar of California
180 Howard Street
San Francisco, California 94105

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.

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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.

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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,

Gregory Dresser
Interim Chief Trial Counsel

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.

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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