

**From:** Robert L. Kehr [rlkehr@kscllp.com]  
**Sent:** Wednesday, June 16, 2010 8:21 PM  
**To:** Dominique Snyder (Home) (E-mail); Kurt Melchior (E-mail); Kevin Mohr; Kevin Mohr G  
**Cc:** Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi;  
pwvapnek@townsend.com; Mark Tuft  
**Subject:** RRC\_Rule 1.7 June 25-26, 2010 agenda item J

Dom, Kurt, and Kevin: Here are my thoughts on OCTC's many comments on the Rule 1.7 Comments at pp. 9 – 11 of its 6/15/10 letter ---

1. This is an overall criticism of the Comments based on the premise that the Rule is simple. I best move on.
2. OCTC objects to the use of the term "directly adverse" and recommends the use of "adverse" alone. Yes, the meaning of "directly adverse" is not intuitively obvious and, yes, lawyers, courts, and disciplinary authorities will have to pay attention. However, removing "directly" would cause paragraph (a) (in any version of the Rule) to apply to all degrees and kinds of adversity, including economic adversity. This would mean, as an example, that a lawyer would violate paragraph (a) by representing a client who is suing another client's tenant and whose success might injure the economic interests of the other client. This cannot be done.
3. This follows the prior criticism in saying that Comments [6] and [7] may not provide adequate guidance. I have reviewed both paragraphs carefully. The second sentence of Comment [7] could be shortened, but the major problem is in Comment [6], which now contains MR description of the theoretical underpinnings of paragraph (a)(1). I recommend that we respond to OCTC by simplifying the comment as follows:

~~[6] The duty of undivided loyalty to a client prohibits undertaking a representations directly adverse to that a client whom the lawyer represents in another matter, without that client's informed written consent. Thus, absent consent, a lawyer may not act as an advocate against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the lawyer-client relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the representation is undertaken reasonably may fear the lawyer will pursue 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 client. Thus, a directly adverse representation arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer represents in another matter. See *Flatt*, etc. Similarly, a directly adverse representation under paragraph (a)(1) occurs when a lawyer, while representing a client, in another matter accepts the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. A directly adverse conflict may also arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client. On the other hand ....~~

4. OCTC says (with respect to the last complete sentence in the portion just quoted) that a lawyer is not directly adverse to a client unless the cross examination affects the client in the matter in which the lawyer represents the client. I disagree. As said in an earlier

version of the Comment: 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. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].) I recommend that this sentence be used in place of the one quoted above.

5. OCTC recommends striking the second sentence of Comment [6], thinking that it applies only if the client is a party to the matter. It does not (the client might be an identified target of the lawyer's work without being a party), but in any event I have recommended that the second sentence be removed.
6. OCTC says about Comment [8]:
  - a. It is too long and confusing, and sentences 2-4 should be dropped. I disagree. These three sentences come from MR Comment [6], with some improvement in language, and I think are necessary to the material limitation concept. However, I do think that the balance of the paragraph, which attempts to capture what currently is 3-310(B) would be better placed in a separate Comment [8A]. Adding this to the MR language creates a paragraph of excessive length.
  - b. Sentence 5 places in a Comment an expanded version of 3-310(C), and it would be better to say that the new rule does not change the current rule (which clearly is not correct) or place the comment in the rule. I'm lost on this one. My best guess is the OCTC does not intend to refer to the fifth sentence but to the 3-310(B) language. If so, I agree but have lost that argument.
7. Comment [9] is unnecessary in light of Rule 1.9 and the language in proposed Rule 1.7(a)(2), and suggests that (a)(2) be expanded by adding "or the attorney's duties as a fiduciary to others." I disagree and recommend no change.
8. This paragraph covers multiple comments:
  - a. Comment [10] is unnecessary in light of proposed Rule 1.7(a)(2). I disagree and recommend no change. Explanation of material limitation is vital.
  - b. Comment [12] is unnecessary in light of proposed Rule 1.8.10. This is merely a cross-reference to Rule 1.8.10. It could be handled differently but is not important enough to take any time on at this late hour.
  - c. Comment [13] is unnecessary in light of proposed Rule 1.8.6. I disagree and recommend no change. Rule 1.8.6 addresses client consent to the fact of payment by another while Rule 1.7 addresses the lawyer's conflict. I would keep both.
  - d. Comment [34] is unnecessary in light of proposed Rule 1.13(a). I disagree and recommend no change. The first sentence of this Comment is a cross-reference that I would keep. The balance is an explanation that is not found in Rule 1.13(a).
  - e. Comment [38] is unnecessary in light of proposed Rules 6.3 and 6.4. These are cross-references. As I said in one of my messages during the past day or so, these cross-references seem to me to be highly desirable given the substantial increase in the complexity of the Rules.

9. Again, multiple references:

- a. Comments [14] - [17A] should be reduced and tightened. I see only minor possible improvement, none of which is worth taking the time to accomplish. These Comments in general provide important guidance.
- b. Comments [23] - [25] are too long and confusing. I think there is some repetition here of points made in earlier Comments, but I don't have the time or ability to focus on that kind of detail at the moment. Perhaps over the weekend.
- c. Ditto Comments [26] and [27]. Ditto.
- d. Ditto Comments [29] and [29A]. I recommend no change.
- e. Ditto Comments [32] and [33]. There might be a bit too much said here, but I don't recommend that we take the time to tinker.

10. Comment [19] should be stricken b/c it is confusing and could send the wrong signal to attorneys that they may fail to make the disclosure necessary to obtain consent. I suppose the point of this comment is that we are to add the statement, if a lawyer cannot make the disclosure needed to obtain consent, the lawyer cannot accept the representation. I hardly think we need to say so given the content of the Rule. I recommend no change.

11. The first sentence of Comment [20] should be stricken and the balance of the paragraph should be amended to explain whether any one of these factors requires find a conflict. This makes no sense to me. I think a reference to another Comment was intended, but I cannot sort out which one.

12. I think this comment means that the definition of informed written consent should include a written explanation of the confidentiality concepts discussed in Comment [30]. There is something to this, and I will look at it over the weekend when I am fresher.

13. Recommends that advance waivers be prohibited. The scope of a proper advance consent is debatable, but I think not that they are and should be permitted in some situations. I recommend no change.

And to all a good night.

Robert L. Kehr  
Kehr, Schiff & Crane, LLP  
12400 Wilshire Blvd. 13th Fl.  
Los Angeles, CA 90025  
310/820-3455 (tele)  
310/820-4414 (fax)  
[rlkehr@kscllp.com](mailto:rlkehr@kscllp.com)

Confidentiality notice: This message is from a law firm and may contain privileged or confidential information. Unless you are the intended recipient, please advise the sender by reply e-mail and delete the message. If you are not the intended recipient you may not disclose the message to anyone or use the message.

## **Difuntorum, Randall**

---

**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Tuesday, June 15, 2010 9:50 PM  
**To:** Robert L. Kehr  
**Cc:** Dominique Snyder; Melchior, Kurt W; Kevin Mohr G; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; hbsondheim@verizon.net; Mark Tuft; pwwapnek@townsend.com  
**Subject:** Re: RRC\_Rule 1.7  
**Attachments:** RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-15-10)RLK-KEM-AT.doc

Bob and all:

I've attached Draft 3.3 (6/15/10), which incorporates your revisions re the response to SDCBA re class actions, but also includes the COPRAC comment and response that I added in Draft 3.2 (you're a draft or two behind, which is understandable given the unceasing e-mail traffic the last couple of days!).

I've also summarized Mr. Paulsen's (construction industry problems) and Mr. Senator's (thrust upon conflicts) comments, and provided a proposed response to Mr. Paulsen's comment. I have not attempted to respond to the Senator comment as its resolution will have to await the meeting.

I've also summarized the Zitrin et al. positions on the Rule and provided responses. I disagree with Bob that we need not address the last point that is made. We can discuss this at the meeting.

Like you, I have not attempted to either summarize or address the OCTC comments.

Please let me know if you have any questions. Thanks,

Kevin

Attached:

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-15-10)RLK-KEM-AT.doc

Robert L. Kehr wrote:

I have attached a revised draft of the commenter chart, with these observations:

1. I have removed "narrow and particular" in response to Kurt's message as, on reflection, they don't seem to add anything to the Response. While it is my recollection that the general sense of the Commission was that there was no practical way of dealing broadly with class action issues, I think we also discussed the fact that certain of the issues fall comfortably within rules that would exist in any event, and that we are in a position to provide guidance on how those rules apply to class actions. I do want to point out that we have not overlooked class actions in our work, and I hope the attachment covers both points adequately.

2. I have commented in a separate email on the thrust-upon conflict issue. Any addition to the commenter chart will have to wait for the outcome of the meeting.

3. The Zitrin letter says nothing about this rule that we need to deal with.

4. The OCTC letter comments in some detail on 16 or 17 of the Comments. There is no way of addressing this before tomorrow's deadline. I will deal with them before the meeting.

Unless I'm overlooking something, that covers it all.

rlk

---

**From:** Melchior, Kurt W [<mailto:kmelchior@nossaman.com>]  
**Sent:** Tuesday, June 15, 2010 12:59 PM  
**To:** Kevin Mohr; Robert L. Kehr  
**Cc:** Dominique Snyder; Kevin Mohr G  
**Subject:** RE: RRC\_Rule 1.7

As far as I can follow the back-and-forth, which is hard to do unless you stay with it every minute, I have no problems with the proposed responses, except that I find the following language in the response to San Diego probably useless and possibly misguided:

in part because of the ability to address narrow and particular class action issues in existing rules.

I voted against a class action conflicts rule (if I did: don't remember) not because we can deal with "narrow and particular" problems otherwise, but because the subject is too extensive, polyglot and incapable of cabining in narrow limits. So from my personal perspective, this excuse for not responding is not a good one. But be that as it may. Anyway, the reasons why various Commission members voted as they did, on the myriad questions on which we voted, are not a part of our legislative history. Or are they?

---

**From:** Kevin Mohr [<mailto:kemohr@charter.net>]  
**Sent:** Sunday, June 13, 2010 12:21 PM  
**To:** Robert L. Kehr  
**Cc:** Melchior, Kurt W; Dominique Snyder; Kevin Mohr G  
**Subject:** Re: RRC\_Rule 1.7

Bob:

I thought your initial response to Mr. Alex was fine but I'm also fine w/ your further elaboration. Ditto re the response to the San Diego submission on the class action comment.

On the second San Diego point, let's just delete the footnotes. To paraphrase your observation re 1.8.7, there is no reason to tinker further with our response. First, San Diego simply resubmitted their comment re the initial public comment draft. Our initial response was accurate and it remains accurate. Second, San Diego never explained why they thought the sentence, whatever it was, is an inaccurate statement of the law. I have not heard anyone suggest that anything we have written in last half of comment [22] is an inaccurate statement of law, so our response is accurate. We simply disagree w/ San Diego. If San Diego's point was significant, they would have clarified what they

meant by replying to our response. They chose not to so we should not spend any more time on this. I stand by our previous response.

I've attached new draft 3 of the Chart, with footnote 5 deleted as you noted. I think the other footnotes should remain as they provide necessary information to the reader. It also highlights in yellow the changes you have made to the chart.

I've also attached a revised Rule draft that incorporates the revisions to Comment [22] that were approved at the last meeting. Thanks,

Kevin

Attached:

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3 (06-13-10)RLK-KEM.doc  
RRC - 3-310 [1-7] - Rule - ALT1 - Post-PCD [3] (06-13-10) - Cf. to DFT2A - LAND.doc

Robert L. Kehr wrote:

Kurt, Dom, and Kevin: I've taken a fresh look at the interesting letter from Glenn Alex and as a result am not satisfied that our prior draft response to him was entirely adequate. For one thing, we did not respond to the two specific suggestions he made in the last two sentences of his Rule 1.7 comments. Also, a new thought occurred to me as a result of joint venture negotiations in which a client of mine now is involved.

On the first of the S.D. comments, suggesting that we remove what then was Comment [34], I've slightly supplemented the earlier response b/c what we did initially now seems to me to be circular.

On the second S.D. comment, the one that Kevin and I struggled to understand, I have not made any changes yet b/c I would like to have the views of others. My current thought is that we should say that we don't know which sentence S.D. has in mind and then identify the two leading contenders and give our responses to both. Does anyone have any different suggestion? In any event, we need to get rid of the footnotes.

Robert L. Kehr

Kehr, Schiff & Crane, LLP  
12400 Wilshire Blvd. 13th Fl.  
Los Angeles, CA 90025  
310/820-3455 (tele)  
310/820-4414 (fax)  
[rlkehr@kscllp.com](mailto:rlkehr@kscllp.com)

Confidentiality notice: This message is from a law firm and may contain privileged or confidential information. Unless you are the intended recipient, please advise the sender by reply e-mail and delete the message. If you are not the intended recipient you may not disclose the message to anyone or use the message.

--

Kevin E. Mohr  
Professor  
Western State University College of Law  
1111 N. State College Blvd.  
Fullerton, CA 92831

**Rule 1.7 Conflicts of Interests- Current Clients  
[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
Disagree = \_\_\_  
Modify = \_\_\_  
NI = \_\_\_

No	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Alex, Glenn C.	M	No	Comment [29A]	<p>Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a <u>long-term, or continuing</u> basis to one or more <u>other</u>, especially small, agencies that lack or cannot afford their own counsel—a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking material limitation on the scope of the representation to one entity or the other. The conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an “informed” consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent. While the draft Comments do mention conflicting instructions</p>	<p>The Commission recommends no change to Rule 1.7 in response this comment. The Rules generally apply to governmental lawyers as they do to all other lawyers. See <i>People ex rel. Deukmejian v. Brown</i> (1981) 29 Cal.3d 150. This is true both in general and with respect to the challenging topic of a client's advance consent to a future conflict of interest (see proposed Comment [22], which has been the subject of numerous comments to the Commission). Even if otherwise warranted, the Commission does not believe it is possible to draft an exception to address this specific concern that reliably could cover the wide variety of governmental relationships and representations. Any exception should come within a specific factual setting, either by the consent of the clients involved or by a court ruling. Also, the potential problem can arise outside of the governmental context for example, where a client directs one of its lawyers to provide legal advice to a joint venture in which the client is involved.</p>

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

**Rule 1.7 Conflicts of Interests: Current Clients**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>and inconsistent interests (see draft Comment [29A],<sup>2</sup> for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employed entity.</p> <p>As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to <u>inform</u> the two agencies in writing generally about the types of conflicts that could arise.</p> <p>The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.</p>	<p>This suggestion apparently is intended to permit governmental lawyers to accept conflicting representations by providing information that falls short of the standard needed to obtain a client's informed consent (as defined in Rule 1.0-1(e)). The Commission does not agree that this would be appropriate in any situation. There are two additional problems with this proposal: (1) there does not seem to be any workable definition of a "small public agency" and (2) it is not in the interest of governmental lawyers or their clients to suggest through a dilution of standards that governmental lawyers are in any sense secondary to other lawyers.</p> <p>The Commission believes that conflicts of interest are no less important in non-litigation situations as they can involve a client's most important values and interests and can lead to or be intertwined with litigation.</p>

<sup>2</sup> Although the commenter referred to Comment [29], the specific comment referenced is draft Comment [29A].

**Rule 1.7 Conflicts of Interests: Current Clients**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	COPRAC	A	Yes		<p>We fully support the rule as drafted as a significant improvement of the prior draft and over the current Rule 3-310. Adopting a rule that is fundamentally consistent with the ABA Model Rule will benefit firms and practitioners who are dealing with conflicts of interest across jurisdictions by providing uniformity.</p> <p>We understand the concerns of the dissent, but do not agree that the proposed rule will reduce client protection. We believe the key terminology in the rule, along with the extensive comments, are adequately explained to enable the practitioner to understand and apply the rule.</p>	No response required.
5	Paulsen, Bradley		No	1.7(a)(2) 1.7(b)(4)	<p>The commenter has submitted a lengthy letter with attachments complaining about the conduct of certain plaintiffs' lawyers in the construction industry are violating the law and certain Rules of Professional Conduct in soliciting client homeowners. The commenter specifically refers to certain Rules of Professional Conduct, including proposed Rule 1.7(a)(2) and 1.7(b)(4), and asserts that the subject lawyers are in violation of these provisions. The commenter, however, does not suggest any revisions to the identified paragraphs of the Rule, instead noting that "random review and/or inspections are needed from the State Bar on attorney actions</p>	<p>The Commission has considered the commenter's submission and determined that his concerns lie not with the substance of the Rules, but rather with their enforcement, which is beyond the purview of the Commission's charge.</p>

**Rule 1.7 Conflicts of Interests: Current Clients**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					and processes used in lawsuits and SB 800 claims."	
1	MacNaughton, Richard		No	Comment generally	<p>Unlike Los Angeles County, where there is the District Attorney and County Counsel, there is only one City Attorney for the City of Los Angeles. There are members of the City Council and other city officials (attached two articles and provided an example in his letter) who engage in questionable and illegal conduct. It strikes me that the City Attorney has an inherent conflict of interest. For example, the City Attorney has to provide legal advice to members of the City Council, and the City, and defend them both when sued. The City Attorney has a serious conflict of interest in investigating and/or prosecuting his own clients. If a City Council member is engaged in a fraud or wrongdoing, how does the City Attorney investigate the City Council member? That leaves the public with no one to protect their interests. It seems to me that the structure of the City Attorney's Office conflicts with the Rules of Professional Conduct, but the Rules do not address this conflict. I do not expect you to deal with any specifics of any case. I mention the examples to highlight the type of conflict that seems to be inherent in the City Attorney's Office. If my observation is correct, it seems that the State Bar should have some Comment in the new</p>	<p>The Commission recognizes that city attorneys sometimes face challenging conflict of interest issues. See, e.g., Cal. State Bar Opn. 2001-156. However, the Commission is unable to see what Comment might be added to Rule 1.7 to provide guidance in this area. The Commission proposes no change as a result of this comment.</p>

**Rule 1.7 Conflicts of Interests: Current Clients  
[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
Disagree = \_\_\_  
Modify = \_\_\_  
NI = \_\_\_

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC-Response
					Rules.	
2	San Diego County Bar Association	M	Yes	Comments [22] and [25] [formerly numbered Comments [33] and [34] in the initial public comment draft (3/1/08)]	<p>Delete Comment [34]<sup>3</sup> regarding class representation because it should be addressed in a separate rule on class representation.</p> <p>Delete fourth sentence from the end of Comment [33]<sup>4</sup> regarding advance consent because it does not accurately state the status of current law.</p>	<p>The Commission carefully considered the possible adoption of a separate rule on class actions (although there is no such Model Rule) but voted against doing so, in part because the topic is too extensive and varied to be handled in a rule format and in part because of the ability to address some class action issues in existing rules. Doing so provides valuable guidance within the context of rules that apply - or do not apply - in class actions. This has been done in Comment [34] (now numbered Comment [25]). Also see Rule 1.4, Comment [4], Rule 1.8.7, Comment [1], and Rule 7.2, Comment [4].</p> <p>The Commission reconsidered the fourth sentence from the end of Comment [33] (now numbered Comment [22]) (stating: "An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar.") and has concluded that it is an accurate statement of the law. Nevertheless, the Commission has revised Comment [22] to clarify with even more precision the factors to be</p>

<sup>3</sup> The subject comment was numbered Comment [34] in the initial public comment draft (3/1/08). It is now numbered Comment [25] in the current draft.

<sup>4</sup> The subject comment was numbered Comment [33] in the initial public comment draft (3/1/08). It is now numbered Comment [22] in the current draft.

**Rule 1.7 Conflicts of Interests: Current Clients**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						considered in determining whether an "open-ended" consent complies with the Rule.
6	Senator, Stuart N. (Alston & Baird LLP, Duane Morris LLP, Morgan Lewis & Bockius LLP, and Munger Tolles & Olson LLP)		Yes	ABA Comment [5]	<p>The commenters urge the adoption of Comment 5 to the ABA Model Rule 1.7, regarding "thrust upon" or "unforeseeable" conflicts because Comment 5 would provide guidance for attorneys who are faced with conflicts that arise during the course of a representation and that were unforeseeable at the outset.</p> <p>Thrust upon conflicts often are discussed in the case of changing corporate ownership, e.g., the firm's client's adversary is acquired by another client of the firm during litigation, such as in the context of third-party discovery. The adoption of Comment 5 would provide some guidance as to how the firm should handle this and other thrust-upon, unforeseeable conflicts by providing that the attorney may have the option of withdrawing from one of the representations to avoid the conflict of interest. Because Comment 5 provides that the lawyer must maintain and protect the confidences of the client from whose representation the lawyer has withdrawn, there are no confidentiality issues. The comment essentially adopts the "thrust upon defense" established by case law from other jurisdictions. Under that case law, when</p>	

**Rule 1.7 Conflicts of Interests: Current Clients**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					a conflict arises through no fault of the attorney, the attorney may withdraw from one representation so as to convert the current client into a former client and avoid compromising the duty of loyalty. See <i>Gould, Inc. v. Mitsui Min. &amp; Smelting Co.</i> , 738 F. Supp. 1121 (N.D. Ohio, 1999).	
7	Zitrin, Richard (on behalf of law professors)		Yes		<p>We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate.</p> <p>This letter does not address the issue of whether Comment [22] of Rule 1.7, on advanced waivers, is or is not appropriate. The June 2008 Letter from Ethics Professors addressed this issue, and opposed the adoption of the Comment paragraph, then enumerated ¶ 33.</p> <p>The comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised were not as carefully vetted. Accordingly, we encourage the Board to carefully review these comments and re-refer to the Commission those comments that are unclear, overly dense, puzzling, or otherwise lacking. We believe more study of the verbiage of these</p>	<p>No response required.</p> <p>No response required.</p> <p>The Commission disagrees with the commenters' assertion that the comments to the proposed rule were not carefully vetted.</p>

**Rule 1.7 Conflicts of Interests: Current Clients**  
**[Sorted by Commenter]**

TOTAL = \_\_\_ Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					comments, including some simplification, would be helpful to guide the average practitioner, and would ensure clarity and harmony between the rule and the comments.	

**Rule 1.7: Conflict Of Interest: Current Clients**  
(Commission's Proposed Rule – Clean Version)

- (a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client in a matter in which the lawyer's representation of that client will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client.
- (b) Representation of multiple clients in one matter. A lawyer shall not, without the informed written consent of each client:
  - (1) Accept or continue 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.
- (c) Representation of an Adverse Party. While representing a client in a first matter, a lawyer shall not, in a second matter, accept the representation of a person or organization who is directly adverse to the lawyer's client in the first matter, without the informed written consent of each client.
- (d) Personal relationships and interests. A lawyer shall not accept or continue representation of a client without the client's informed written consent where:
  - (1) The lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
  - (2) The lawyer knows or reasonably should know that:
    - (i) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
    - (ii) the previous relationship would substantially affect the lawyer's representation; or
  - (3) The lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity and the lawyer knows or reasonably should know that either the relationship or the person or entity would be affected substantially by resolution of the matter; or
  - (4) The lawyer has or had a legal, business, financial, or professional interest in the subject matter of the representation; or
  - (5) The lawyer knows that the lawyer, the lawyer's law firm, or a lawyer who is associated in that law firm is a client of another lawyer involved in the matter; or
  - (6) The lawyer knows that another lawyer involved in the matter, the other lawyer's law firm, or a lawyer associated in that law firm is the lawyer's client; or

- (7) The lawyer knows that the lawyer representing another person involved in the matter has one of the following relationships with the lawyer or with another lawyer associated in the lawyer's law firm: (i) a spousal, parental, or sibling relationship; (ii) a cohabitational relationship; or (iii) an intimate personal relationship.

## COMMENT

*General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)*

- [1] This rule and the other conflict rules seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. For the purpose of considering whether the lawyer's duties to a client or other person could impair the lawyer's ability to fulfill the lawyer's duties to another client, a lawyer should consider all of the following: (1) the duty of undivided loyalty (including the duty to handle client funds and property as directed by the client); (2) the duty to exercise independent professional judgment for the client's benefit, not influenced by the lawyer's duties to or relationships with others, and not influenced by the lawyer's own interests; (3) the duty to maintain the confidentiality of client information; (4) the duty to represent the client competently within the bounds of the law; and (5) the duty to make full and candid disclosure to the client of all information and developments material to the client's understanding of the representation and its control and direction of the lawyer. See Rule 1.2(a) regarding the allocation of authority between lawyer and client.
- [2] The first step in a lawyer's conflict analysis is to identify his or her client(s) in a current matter or potential client(s) in a new matter. In

considering his or her ability to fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant representation of a client or proposed representation of a potential client. Only then can the lawyer determine whether a conflict rule prohibits the representation, or permits the representation subject to a disclosure to the client or the informed written consent of the client or a former client. Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules.

- [3] This rule describes a lawyer's duties to current clients. Additional specific rules regarding current clients are set out in Rules 1.8.1 to [1.8.9]. For conflicts duties to former clients, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "written," see Rule 1.0.1(e) and (b). See also Comments [26] – [30] to this Rule.

### *Lawyer Acting in Dual Roles*

- [4] A lawyer might owe fiduciary duties in capacities other than as a lawyer that could conflict with the duties the lawyer owes to clients or former clients, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director. (See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].)

### *Paragraph (a): Representation Directly Adverse to Current Client*

- [5] A lawyer owes a duty of undivided loyalty to each current client. For purposes of paragraph (a), the duty of undivided loyalty means that, without the informed written consent of each affected client, a lawyer may not act as an advocate or counselor in a matter against a person

or organization the lawyer represents in another matter, even when the matters are wholly unrelated. The duty of loyalty reflected in paragraph (a) applies equally in transactional and litigation matters. For example, a lawyer may not represent the seller of a business in negotiations when the lawyer represents the buyer in another matter, even if unrelated, without the informed written consent of each client. Paragraph (a) would apply even if the parties to the transaction expect to, or are, working cooperatively toward a goal of common interest to them. (If a lawyer proposes to represent two or more parties concerning the same negotiation or lawsuit, the situation should be analyzed under paragraph (b), not paragraph (a). As an example, if a lawyer proposes to represent two parties concerning a transaction between them, the lawyer should consult paragraph (b).)

- [6] Paragraph (a) applies only to engagements in which the lawyer's work in a matter is *directly* adverse to a current client in any matter. The term "direct adversity" reflects a balancing of competing interests. The primary interest is to prohibit a lawyer from taking actions "adverse" to his or her client and thus inconsistent with the client's reasonable expectation that the lawyer will be loyal to the client. The word "direct" limits the scope of the rule to take into account the public policy favoring the right to select counsel of one's choice and the reality that the conflicts rules, if construed overly broadly, could become unworkable. As a consequence of this balancing and the variety of situations in which the issue can arise, there is no single definition of when a lawyer's actions are directly adverse to a current client for purposes of this Rule.
- [7] Generally speaking, a lawyer's work on a matter will not be directly adverse to a person if that person is not a party to the matter, even if the non-party's interests could be affected adversely by the outcome of

the matter. However, in some situations, a lawyer's work could be directly adverse to a non-party if that non-party is an identifiable target of a litigation or non-litigation representation, or a competitor for a particular transaction (as would occur, for example, if one client were in competition with another of the lawyer's clients on other matters to purchase or lease an asset or to acquire an exclusive license). 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. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)

- [8] Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, e.g., if a client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, e.g., if the lawyer were advocating inconsistent positions in front of the same tribunal; and (5) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute.

- [9] If a conflict under paragraph (a) arises during a representation, the lawyer must in all events continue to protect the confidentiality of information of each affected client and former client. Regarding former clients, see Rule 1.9(c).

*Paragraph (b): Representation of multiple clients in a matter*

- [10] Paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or other common enterprise. Examples of a transaction or common enterprise include the formation of a business organization for multiple investors, the preparation of an ante-nuptial agreement for both parties, and the preparation of a post-nuptial agreement, a trust or wills, and the resolution of an "uncontested" marital dissolution, for both spouses. In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer knows or reasonably should know it is reasonably possible that the lawyer's performance of the lawyer's duties to one of the joint clients will or does interfere with the lawyer's performance of the duties owed to another of the joint clients. See Comment [36] with respect to the application of paragraph (b) to an insurer's appointment of counsel to defend an insured.
- [11] The following are examples of actual conflicts in representing multiple clients in a single matter: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible

for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer's duty requires the lawyer to advise each client about how to advance that client's position relative to the other's position, because the lawyer cannot be expected to exercise independent judgment in that circumstance; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); and (6) the clients make inconsistent demands for the original file.

- [12] A lawyer's representation of two or more clients in a single matter can create potential confidentiality issues on which the lawyer must obtain each client's informed written consent under paragraph (b). First, although each client's communications with the lawyer are protected as to third persons by the lawyer's duty of confidentiality and the lawyer-client privilege, the communications might not be privileged in a civil dispute between the joint clients. (See Business and Professions Code section 6068(e)(1), Rule 1.6, and Evidence Code sections 952 and 962.) Second, because the lawyer is obligated to make disclosures to each jointly represented client to the full extent required by Rule 1.4, and because the lawyer may not favor one joint client over any other, each joint client normally should expect that its communications with the lawyer will be shared with other jointly represented clients.
- [13] If a lawyer obtains the consent of multiple clients to the lawyer's representation of them in a matter notwithstanding the existence of a potential conflict under paragraph (b)(1), the lawyer must obtain a new,

informed written consent from each client pursuant to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a previously unanticipated or unidentified potential or actual conflict arises, the lawyer then must obtain consent of each client in the matter under paragraph (b)(1). Clients may provide such consents in advance of the conflict arising, subject to the criteria set forth below in Comment [31].

- [14] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be able to benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). See Rule 1.2 (c) (limiting the scope of representation).
- [15] A client, who has consented to a joint representation under paragraph (b), may terminate the lawyer's representation at any time with or without a reason. If a jointly represented client terminates the lawyer-client relationship, the lawyer may not continue to represent the other jointly represented client or clients if the continued representation would be directly adverse to the client who terminated the representation unless the client terminating the representation consents or previously did so.

*Paragraph (c): Representation of an Adverse Party.*

- [16] Paragraph (c) applies when a lawyer represents client A in a matter adverse to B, and B proposes to retain the lawyer on another matter in which the lawyer's work will not be adverse to A. The purposes of paragraph (c) include (1) ensuring that client A's relationship with, and trust in, the lawyer are not disturbed by the lawyer accepting the representation of client A's adversary, B, without A's informed written consent; and (2) ensuring that B understands that the lawyer will continue to owe all of his or her duties in the first matter solely to A, notwithstanding the lawyer's representation of B on another matter. If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a) would apply, not paragraph (c).

*Paragraph (d): Personal Relationships and Interests*

- [17] Paragraph (d) requires a lawyer to obtain a client's informed written consent when the lawyer has any of certain present or past relationships with others. The purpose of this requirement is to permit the client or potential client to make a more informed decision about whether and on what conditions to retain, or continue to retain, the lawyer. Paragraph (d) applies in litigation and in non-litigation representations.
- [18] A lawyer also should not allow his or her own interests to have an adverse effect on the representation of a client. Paragraph (d)(4) requires a lawyer to obtain the client's informed written consent when the lawyer has an interest in the subject matter of the representation. Examples of this include the following: (1) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; and (2) the lawyer represents a landlord in lease

negotiations with a professional organization of which the lawyer is a member. In addition, the subject of a representation might raise questions about the lawyer's own conduct, such as questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by paragraph (d)(4) unless the lawyer and client have agreed to take a common position, as might occur, for example, in response to a motion for discovery sanctions. See Rules 1.8.1 through 1.8.9 for additional rules pertaining to other personal interest conflicts, including business transactions with clients, and Rule 3.7 concerning lawyer as witness.

- [19] When a lawyer owns an interest in a publicly-traded investment vehicle, such as a mutual fund, paragraph (d)(4) does not require the lawyer to investigate whether the investment vehicle owns an interest in parties to a matter. However, if the lawyer knows that a publicly-traded investment vehicle in which the lawyer owns an interest owns an interest in a party to the matter, the lawyer must disclose the interest to the client and obtain the client's informed written consent to the lawyer's continued representation of the client.
- [20] Paragraph (d)(4) requires a lawyer to obtain the informed written consent of the lawyer's client if the lawyer has been having, or when the lawyer decides to have, substantive discussions concerning possible employment with an opponent of the lawyer's client or with a lawyer or law firm representing the opponent.
- [21] Paragraph (d) applies only to a lawyer's own relationships and interests, except: (1) when the lawyer knows that another lawyer in the same firm as the lawyer has or had a relationship with another party or witness, or has or had an interest in the subject matter of the representation; or (2) as stated in paragraph (d)(5), (6), or (7). See also

Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

- [22] Paragraph (d) requires informed written consent only from current clients. Rule 1.9 specifies when a lawyer must obtain informed written consent from a former client.
- [23] Paragraph (a) applies, rather than paragraph (d)(1) or (d)(3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [5] to this Rule.)

#### *Prohibited Representations*

- [24] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent. These include at least the following: (1) when the lawyer cannot provide competent representation to each affected client (See Rule 1.8.8(a)); (2) when the lawyer cannot make an adequate disclosure, for example, because of confidentiality obligations to another client or former client (See Business and Professions Code section 6068(e)(1) and Rule 1.6); (3) when the representation would involve the assertion of a claim by one client against another client, where the lawyer is asked to represent both clients in that matter. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] ["the attorney of a family-owned business, corporate or otherwise, 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] [attorney may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict]; and *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857] [attorney may not represent both a closely-held corporation and directors/shareholders who are accused

of wrongdoing or whose interests are otherwise adverse to the corporation]); and (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38; and see Rule 1.14 regarding clients with diminished capacity.)

- [25] If a lawyer seeks permission from a tribunal to terminate a representation and that permission is denied, the lawyer is obligated to continue the representation even if the representation creates a conflict to which not all affected clients have given consent, and even if the lawyer has a conflict to which client consent is not available. (See Rule 1.16(c).)

#### *Disclosure and Informed Written Consent*

- [26] Informed written consent requires the lawyer to disclose in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client or former client. See Rule 1.0.1(e) (informed written consent). The facts and explanation the lawyer must disclose will depend on the nature of the potential or actual conflict and the nature of the risks involved for the client or potential client. When undertaking the representation of multiple clients in a single matter, the information must include the implications of the joint representation, including possible effects on loyalty, and the confidentiality and lawyer-client privilege issues described in Comment [12] to this Rule.
- [27] 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.

- [28] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the material facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and obtaining a new written consent.
- [29] If the lawyer is required by this Rule or another Rule to make a disclosure, but the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. (See, e.g., Business and Professions Code section 6068(e)(1), Rule 1.6.) A lawyer might be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board of directors, or because of contractual or court-ordered restrictions.
- [30] In some situations, Rule 1.13(g) limits who has authority to grant consent on behalf of an organization.

#### *Consent to Future Conflict*

- [31] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but this is subject to the usual requirement that a client's consent must be "informed" to comply with this Rule. Determining whether a client's advance consent is "informed," and thus

complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [26] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comment [26] ordinarily requires. Whenever seeking an advance consent, the lawyer's disclosure to the client should include an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also should disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, including litigation, or whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was adequately instituted and maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular

type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved. In any case, advance consent will not be in compliance in the circumstances described in Comment [24] (prohibited representations). See Rule 1.0.1(g) ("informed consent").

#### *Representation of a Class*

[32] This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to obtain the consent of an unnamed class member before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed class member whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

#### *Organizational Clients*

[33] A lawyer who represents an organization does not, by virtue of that representation alone, represent any constituent of the organization. (See Rule 1.13(a).) The lawyer for an organization also does not, by

virtue of that representation alone, represent any affiliated organization, such as a subsidiary or organization under common ownership. The lawyer nevertheless could be barred under case law from accepting a representation adverse to an affiliate of an organizational client, even in a matter unrelated to the lawyer's representation of the client, under certain circumstances.

- [34] A lawyer for a corporation who also is a member of its board of directors (or a lawyer for another type of organization who has corresponding fiduciary duties to it) should determine whether it is reasonably foreseeable that the responsibilities of the two roles might conflict, for example, because, as its lawyer, he or she might be called on to advise the corporation on matters involving actions of the directors. The lawyer should consider such things as the frequency with which these situations might arise, the potential materiality of the conflict to the lawyer's performance of his or her duties as a lawyer, and the possibility of the corporation obtaining legal advice from another lawyer in these situations. If there is material risk that the dual role will compromise the lawyer's ability to perform any of his or her duties to the client, the lawyer should not serve as a director or should cease to act as the corporation's lawyer. The lawyer should advise the other members of the board whenever 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 to withdraw as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

#### *Insurance Defense*

- [35] 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 the predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraphs (a) and (c) do not apply 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.
- [36] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).

#### *Public Service*

- [37] For special rules governing membership in a legal service organization, see Rule 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with certain limited legal services programs, see Rule 6.5.



**June 9, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:**

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

**ASSIGNMENT SUBMISSION DEADLINE:** The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15<sup>th</sup> has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15<sup>th</sup> comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

**LIST OF ASSIGNED RULES** (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

**1.0.1** (Agenda Item III.B)

**1.7** (Agenda Item III. J) Co-Lead w/Mohr

**1.8.7** (Agenda Item III.S)  
**1.16** (Agenda Item III.DD)  
**8.3** (Agenda Item III.VVV)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

***Attached:***

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - KEHR - DFT1 (06-09-10).pdf  
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM.doc  
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).pdf  
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).doc  
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.pdf  
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.doc  
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.pdf  
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.doc  
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.pdf  
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.doc  
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).pdf  
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).doc

**June 9, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:**

Kevin,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

**ASSIGNMENT SUBMISSION DEADLINE:** The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15<sup>th</sup> has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15<sup>th</sup> comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

**LIST OF ASSIGNED RULES** (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 1.6 (Agenda Item III.I)
- 1.7 (Agenda Item III.J) Co-Lead w/Kehr
- 1.18 (Agenda Item III.FF)
- 7.1 (Agenda Item III.MMM)
- 7.2 (Agenda Item III.NNN)
- 7.3 (Agenda Item III.OOO)
- 7.4 (Agenda Item III.PPP)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

**Attached:**

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - MOHR - DFT1 (06-09-10).pdf
- RRC - [1-18] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2 (05-21-10)2.doc
- RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM22.doc
- RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.pdf
- RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.doc
- RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.doc
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).pdf
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).doc
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10) - CLEAN-LAND.pdf
- RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.doc
- RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.doc

**June 13, 2010 Kehr E-mail to Drafters (Melchior, Snyder & KEM):**

I've taken a fresh look at the interesting letter from Glenn Alex and as a result am not satisfied that our prior draft response to him was entirely adequate. For one thing, we did not respond to the two specific suggestions he made in the last two sentences of his Rule 1.7 comments. Also, a new thought occurred to me as a result of joint venture negotiations in which a client of mine now is involved.

On the first of the S.D. comments, suggesting that we remove what then was Comment [34], I've slightly supplemented the earlier response b/c what we did initially now seems to me to be circular.

On the second S.D. comment, the one that Kevin and I struggled to understand, I have not made any changes yet b/c I would like to have the views of others. My current thought is that we should say that we don't know which sentence S.D. has in mind and then identify the two leading contenders and give our responses to both. Does anyone have any different suggestion? In any event, we need to get rid of the footnotes.

***Attached:***

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.3 (06-13-10)RLK-KEM.doc

**June 13, 2010 KEM E-mail to Kehr, cc Melchior & Snyder:**

I thought your initial response to Mr. Alex was fine but I'm also fine w/ your further elaboration. Ditto re the response to the San Diego submission on the class action comment.

On the second San Diego point, let's just delete the footnotes. To paraphrase your observation re 1.8.7, there is no reason to tinker further with our response. First, San Diego simply resubmitted their comment re the initial public comment draft. Our initial response was accurate and it remains accurate. Second, San Diego never explained why they thought the sentence, whatever it was, is an inaccurate statement of the law. I have not heard anyone suggest that anything we have written in last half of comment [22] is an inaccurate statement of law, so our response is accurate. We simply disagree w/ San Diego. If San Diego's point was significant, they would have clarified what they meant by replying to our response. They chose not to so we should not spend any more time on this. I stand by our previous response.

I've attached new draft 3 of the Chart, with footnote 5 deleted as you noted. I think the other footnotes should remain as they provide necessary information to the reader. It also highlights in yellow the changes you have made to the chart.

I've also attached a revised Rule draft that incorporates the revisions to Comment [22] that were approved at the last meeting.

***Attached:***

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3 (06-13-10)RLK-KEM.doc  
RRC - 3-310 [1-7] - Rule - ALT1 - Post-PCD [3] (06-13-10) - Cf. to DFT2A - LAND.doc

**June 13, 2010 Kehr E-mail to KEM, cc Melchior & Snyder:**

My only comment is on the editing to Comment [22] at the last meeting. There now is a sentence that lacks parallel construction. This is –

A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education, language skills, and **the client's familiarity with the particular type of conflict ....**"

The sentence would track properly if we were to remove the two words that I've placed in bold and underlined.

Subject to any comments from Kurt and Dom, and any new letters, I think this otherwise is ready to go.

**June 14, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:**

Bob,

Additional comments in opposition or recommending modifications have been received for the following rules previously assigned and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule> ). Please review the assignment instructions described in my earlier message below.

1.7 (Agenda Item III. J) Co-Lead w/Mohr (NOTE: We haven't added the synopsis for the Bradley Paulsen comment to the commenter chart yet, but will do so soon.)

1.8.7 (Agenda Item III.S)

8.3 (Agenda Item III.VVV)

If the drafters prepared and shared with staff an updated public commenter chart with proposed RRC responses, we have tried to use that version for this updated assignment. Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

**Attached:**

RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1.1 (06-14-10).doc

RRC - 3-310 [1-8-7] - Public Comment Complete - REV (06-14-10).pdf

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.1 (06-14-10)RLK-KEM-AT.doc

RRC - 3-310 [1-7] - Public Comments Complete - REV (06-14-10).pdf

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1.1 (6-14-10).doc

RRC - 1-120 [8-3] - Public Comment Complete - REV (06-14-10).pdf

**June 14, 2010 Kehr E-mail to Drafters:**

I am forwarding Lauren's message with the Rule 1.7 attachments b/c Dom and Kurt were not copied on it. The only new comment is COPRAC's approval of the proposed rule, to which no RRC Response is needed.

**Attached:**

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.1 (06-14-10)RLK-KEM-AT.doc

RRC - 3-310 [1-7] - Public Comments Complete - REV (06-14-10).pdf

**June 14, 2010 KEM E-mail to Drafters, cc Difuntorum, McCurdy, Lee & Andrew Tuft:**

I've attached the Public Comment Chart, Draft 3.2 (6/14/10), which inserts the COPRAC comment and our stock response "no response required".

I've copied staff so they can use this most recent version of the chart in case more comments come in before the deadline.

**Attached:**

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.2 (06-14-10)RLK-KEM-AT.doc

**June 15, 2010 Difuntorum E-mail to Drafters, cc Staff:**

Rule 1.7 Codrafters:

More comments keep arriving. More supplemental assignments are being prepared. Since time is short, here's another heads-up. Three prominent law firms have joined in a comment advocating for guidance on "thrust upon conflicts" by the addition of MR 1.7 Comment [5]. Below is the last consideration of this comment by the Commission. –Randy D.

RC Action: At the 2/26-27/10 meeting, a motion to adopt a comment concerning "thrust upon" or "unforeseeable" conflicts was defeated by a 4-6-1 vote. See 2/26-27/10 KEM Meeting Notes, IV.A., at ¶. 15.

RRC – Rule 1.7 [3-310]  
Rule – ALT1 – Draft 1.3 (2/9/10) – ANNOTATED  
February 26-27, 2010 Meeting; Agenda Item IV.A.

82 [5]<sup>9</sup> Unforeseeable developments, such as changes in corporate and other  
83 organizational affiliations or the addition or realignment of parties in litigation, might  
84 create conflicts in the midst of a representation, as when a company sued by the lawyer  
85 on behalf of one client is bought by another client represented by the lawyer in an  
86 unrelated matter. Depending on the circumstances, the lawyer may have the option to  
87 withdraw from one of the representations in order to avoid the conflict. The lawyer must  
88 seek court approval where necessary and take steps to minimize harm to the clients.  
89 See Rule 1.16. The lawyer must continue to protect the confidences of the client from  
90 whose representation the lawyer has withdrawn. See Rule 1.9(c).  
91  
92 Paragraph (a)(1): Identifying Conflicts of Interest: Undivided Loyalty and Direct  
93 Adversity  
94

<sup>9</sup> Consultant's Question/Recommendation: MR 1.7, cmt. [5] concerns "thrust-upon" or "unforeseeable" conflicts, which the Commission voted not to address. See 9/28-29/07 KEM Meeting Notes, III.A., ¶. 30. Should we resurrect this issue or simply delete the Comment. I would place it before the Commission for another vote now that we are more closely tracking the Model Rule comment organization. I am not aware of any California authority on this precise issue. Would our deleting it suggest that we do not agree w/ the Gould v. Mitsui case?

Note: Randy Difuntorum has recommended that this Comment be subject to a new vote on whether the Commission should recommend its adoption. He notes that it provides useful guidance without dictating the result in a particular case.

**Note:** Mark has proposed the following revision of Comment [5]:

[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. Whether, depending on the circumstances, Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict is beyond the scope of this rule and is a matter of case law. The lawyer ~~must~~ must in any event, seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. If permission is granted, ~~the~~ lawyer must continue to protect the confidential information ~~confidences~~ of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Mark explains: I continue to be uncomfortable with the second sentence in Comment [5]. I know of no case law in California that follows Gould. The discussion in Truck Insurance is dictum. We need to leave this to the courts to decide in the proper case rather than in a comment to this rule. I have tried to make the comment more neutral, but I would also go along with a decision to delete it. I agree this issue should be raised with the Commission.

Dom prefers Comment [5] as drafted by the ABA.

**Attached:**

RRC - 3-310 [1-7] - 06-14-10 Senator (Munger) Letter re Thrust Upon Comment.pdf

**June 15, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:**

Kevin,

Additional comments in opposition or recommending modifications have been received for the following rules previously assigned and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

1.7 (Agenda Item III.J) Co-Lead w/Kehr (NOTE: We haven't added the synopsis for the Bradley Paulsen comment to the commenter chart yet, but will do so soon.)

7.1 (Agenda Item III.MMM)

7.3 (Agenda Item III.OOO)

If the drafters prepared and shared with staff an updated public commenter chart with proposed RRC responses, we have tried to use that version for this updated assignment.

Please note that the assignment deadline for these rules remains the same as previously stated  
-- **5:00 pm on Wednesday, June, 16, 2010.**

**Attached:**

RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc  
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc  
RRC - 3-310 [1-7] - Public Comment Complete - REV (06-15-10).pdf  
RRC - 1-400 [7-1] - Public Comment Complete - REV (06-15-10).pdf  
RRC - 1-400 [7-3] - Public Comment Complete - REV (06-15-10).pdf

**June 15, 2010 Snyder E-mail to Drafters, cc Staff:**

Since I favored inclusion of such a comment when the RRC voted not to address it, please count me again "in favor."

**June 15, 2010 Melchior E-mail to Drafters, cc Staff:**

Let's discuss at the meeting.

**June 15, 2010 Melchior E-mail to Drafters, cc Staff:**

As far as I can follow the back-and-forth, which is hard to do unless you stay with it every minute, I have no problems with the proposed responses, except that I find the following language in the response to San Diego probably useless and possibly misguided:

in part because of the ability to address narrow and particular class action issues in existing rules.

I voted against a class action conflicts rule (if I did: don't remember) not because we can deal with "narrow and particular" problems otherwise, but because the subject is too extensive, polyglot and incapable of cabining in narrow limits. So from my personal perspective, this excuse for not responding is not a good one. But be that as it may. Anyway, the reasons why various Commission members voted as they did, on the myriad questions on which we voted, are not a part of our legislative history. Or are they?

**June 15, 2010 Kehr E-mail to Difuntorum, cc Drafters & Staff:**

Would adoption of a new comment paragraph on thrust-upon conflicts require that it be exposed to public comment given the fact that we never have had public comment on this?

**June 15, 2010 Difuntorum E-mail to Kehr, cc Drafters & Staff:**

Most likely, yes. See below. –Randy D.

LINK TO THE STATE BAR PUBLIC COMMENT RULES:

[http://www.calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=14046&id=33561#Div2](http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=14046&id=33561#Div2)

**Rule 1.10** Public comment

- (A) Proposals for the Rules of the State Bar of California are circulated for public comment before adoption, amendment, or repeal by the Board of Governors. The State Bar also makes available for public comment its proposals for the California Rules of Court. Proposals are circulated for a forty-five day period, which can be shortened to a minimum of 30 days or extended to a maximum of 90 days, as designated by the board.
- (B) Public comment is not required
  - (1) to correct clerical errors; clarify grammar; improve organization; conform to specific changes in a law; update references or citations; or make similar editorial changes;
  - (2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal; or
  - (3) to add or modify an appendix to these rules.
- (C) The board may determine that an emergency requires it to adopt, amend, or suspend a rule on an interim basis without first circulating it for public comment. No interim measure may remain in effect for more than 120 days.
- (D) The adoption, amendment, or repeal of a rule becomes effective as of the date specified by the board. If it specifies no date, the date of its action is the effective date.

*Rule 1.10 adopted effective July 20, 2007; amended effective March 7, 2008*

**June 15, 2010 Kehr E-mail to Drafters, cc Staff:**

I have attached a revised draft of the commenter chart, with these observations:

1. I have removed “narrow and particular” in response to Kurt’s message as, on reflection, they don’t seem to add anything to the Response. While it is my recollection that the general sense of the Commission was that there was no practical way of dealing broadly with class action issues, I think we also discussed the fact that certain of the issues fall comfortably within rules that would exist in any event, and that we are in a position to provide guidance on how those rules apply to class actions. I do want to point out that we have not overlooked class actions in our work, and I hope the attachment covers both points adequately.
2. I have commented in a separate email on the thrust-upon conflict issue. Any addition to the commenter chart will have to wait for the outcome of the meeting.
3. The Zitrin letter says nothing about this rule that we need to deal with.
4. The OCTC letter comments in some detail on 16 or 17 of the Comments. There is no way of addressing this before tomorrow’s deadline. I will deal with them before the meeting.

Unless I'm overlooking something, that covers it all.

**Attached:**

Rule 1.7 - Public Comment Chart - By Commenter - XDFT3 (06-15-10)RLK-KEM.doc

**June 15, 2010 Kehr E-mail to Difuntorum, cc Drafters & Staff:**

My current thinking is that the Commission should not be influenced by any perception of the Board's intended schedule but should give its best recommendation. If that recommendation has a consequence for the completion of the Rules, it properly is up to the Board to decide what to do. As a result, I will do my best to be ready to fully discuss a possible comment on thrust upon conflicts.

See **June 15, 2010 Difuntorum E-mail to Kehr, cc Drafters & Staff:**

**June 15, 2010 KEM E-mail to Drafters, cc Staff:**

I've attached Draft 3.3 (6/15/10), which incorporates your revisions re the response to SDCBA re class actions, but also includes the COPRAC comment and response that I added in Draft 3.2 (you're a draft or two behind, which is understandable given the unceasing e-mail traffic the last couple of days!).

I've also summarized Mr. Paulsen's (construction industry problems) and Mr. Senator's (thrust upon conflicts) comments, and provided a proposed response to Mr. Paulsen's comment. I have not attempted to respond to the Senator comment as its resolution will have to await the meeting.

I've also summarized the Zitrin et al. positions on the Rule and provided responses. I disagree with Bob that we need not address the last point that is made. We can discuss this at the meeting.

Like you, I have not attempted to either summarize or address the OCTC comments.

Please let me know if you have any questions.

**Attached:**

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-15-10)RLK-KEM-AT.doc

**June 16, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:**

Kevin,

It's finally your turn . . . you have exactly 40 minutes to complete this work J . . . I'm sure you're way ahead of me, but just in case . . .

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule> .

- 1.6 (Agenda Item III.I) OCTC (sent with Randy's 6/15/10 e-mail)
- 1.7 (Agenda Item III.J) Co-Lead w/Kehr - OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 1.8.2 (Agenda Item III.L) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.18 (Agenda Item III.FF) - 2 Comments: **COPRAC (attached)**; and OCTC (sent with Randy's 6/15/10 e-mail)
- 5.4 (Agenda Item III.DDD) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.1 (Agenda Item III.MMM) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.2 (Agenda Item III.NNN) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.3 (Agenda Item III.OOO) OCTC; and Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- 7.5 (Agenda Item III.QQQ) OCTC (sent with Randy's 6/15/10 e-mail)

**NOTE:** As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

**Attached:**

RRC - [1-18] - 06-14-10 COPRAC Comment.pdf

**June 16, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:**

Bob,

You may already be aware of these, but I just realized I didn't note the following comments in my earlier message to you. I'm really sorry, I know how difficult all of this must be to keep up with, especially under the time-constraints we're giving you. . . .

- 1.0.1 (Agenda Item III.B) – **ALSO:** OCTC; and, Zitrin/Law Professors (comment sent by Randy's 6/15/10 e-mail)
- 1.7 (Agenda Item III.J) – **Co-Lead w/Mohr – ALSO:** OCTC; and, Zitrin/Law Professors (comment sent by Randy's 6/15/10 e-mail)
- 1.8.7 (Agenda Item III.S) **ALSO:** OCTC (comment sent by Randy's 6/15/10 e-mail)
- 1.16 (Agenda Item III.DD) **ALSO:** OCTC (comment sent by Randy's 6/15/10 e-mail)
- 8.3 (Agenda Item III.VVV) **ALSO:** Law Practice Management & Technology Section (comment sent by Randy's 6/15/10 e-mail)

Fingers crossed that you have already picked up on these comments.

**June 16, 2010 Kehr E-mail to Drafters (Melchior, Snyder, KEM), cc Chair, Vice-Chairs & Staff:**

Dom, Kurt, and Kevin: Here are my thoughts on OCTC's many comments on the Rule 1.7 Comments at pp. 9 – 11 of its 6/15/10 letter ---

1. This is an overall criticism of the Comments based on the premise that the Rule is simple. I best move on.
2. OCTC objects to the use of the term "directly adverse" and recommends the use of "adverse" alone. Yes, the meaning of "directly adverse" is not intuitively obvious and, yes, lawyers, courts, and disciplinary authorities will have to pay attention. However, removing "directly" would cause paragraph (a) (in any version of the Rule) to apply to all degrees and kinds of adversity, including economic adversity. This would mean, as an example, that a lawyer would violate paragraph (a) by representing a client who is suing another client's tenant and whose success might injure the economic interests of the other client. This cannot be done.
3. This follows the prior criticism in saying that Comments [6] and [7] may not provide adequate guidance. I have reviewed both paragraphs carefully. The second sentence of Comment [7] could be shortened, but the major problem is in Comment [6], which now contains MR description of the theoretical underpinnings of paragraph (a)(1). I recommend that we respond to OCTC by simplifying the comment as follows:

[6] The duty of undivided loyalty ~~to a client~~ prohibits undertaking a representations directly adverse to ~~that a client whom the lawyer represents in another matter,~~ without that client's informed written consent. ~~Thus, absent consent, a lawyer may not act as an advocate against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the lawyer-client relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the representation is undertaken reasonably may fear the lawyer will pursue 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 client. Thus, a directly adverse representation arises, for example, when a lawyer~~

~~accepts representation of a client that is directly adverse to another client the lawyer represents in another matter. See *Flatt*, etc. Similarly, a directly adverse representation under paragraph (a)(1) occurs when a lawyer, while representing a client, in another matter accepts the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. A directly adverse conflict may also arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client. On the other hand ....~~

4. OCTC says (with respect to the last complete sentence in the portion just quoted) that a lawyer is not directly adverse to a client unless the cross examination affects the client in the matter in which the lawyer represents the client. I disagree. As said in an earlier version of the Comment: 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. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].) I recommend that this sentence be used in place of the one quoted above.
5. OCTC recommends striking the second sentence of Comment [6], thinking that it applies only if the client is a party to the matter. It does not (the client might be an identified target of the lawyer's work without being a party), but in any event I have recommended that the second sentence be removed.
6. OCTC says about Comment [8]:
  - a. It is too long and confusing, and sentences 2-4 should be dropped. I disagree. These three sentences come from MR Comment [6], with some improvement in language, and I think are necessary to the material limitation concept. However, I do think that the balance of the paragraph, which attempts to capture what currently is 3-310(B) would be better placed in a separate Comment [8A]. Adding this to the MR language creates a paragraph of excessive length.
  - b. Sentence 5 places in a Comment an expanded version of 3-310(C), and it would be better to say that the new rule does not change the current rule (which clearly is not correct) or place the comment in the rule. I'm lost on this one. My best guess is the OCTC does not intend to refer to the fifth sentence but to the 3-310(B) language. If so, I agree but have lost that argument.
7. Comment [9] is unnecessary in light of Rule 1.9 and the language in proposed Rule 1.7(a)(2), and suggests that (a)(2) be expanded by adding "or the attorney's duties as a fiduciary to others." I disagree and recommend no change.
8. This paragraph covers multiple comments:
  - a. Comment [10] is unnecessary in light of proposed Rule 1.7(a)(2). I disagree and recommend no change. Explanation of material limitation is vital.
  - b. Comment [12] is unnecessary in light of proposed Rule 1.8.10. This is merely a cross-reference to Rule 1.8.10. It could be handled differently but is not important enough to take any time on at this late hour.

- c. Comment [13] is unnecessary in light of proposed Rule 1.8.6. I disagree and recommend no change. Rule 1.8.6 addresses client consent to the fact of payment by another while Rule 1.7 addresses the lawyer's conflict. I would keep both.
- d. Comment [34] is unnecessary in light of proposed Rule 1.13(a). I disagree and recommend no change. The first sentence of this Comment is a cross-reference that I would keep. The balance is an explanation that is not found in Rule 1.13(a).
- e. Comment [38] is unnecessary in light of proposed Rules 6.3 and 6.4. These are cross-references. As I said in one of my messages during the past day or so, these cross-references seem to me to be highly desirable given the substantial increase in the complexity of the Rules.

9. Again, multiple references:

- a. Comments [14] – [17A] should be reduced and tightened. I see only minor possible improvement, none of which is worth taking the time to accomplish. These Comments in general provide important guidance.
- b. Comments [23] - [25] are too long and confusing. I think there is some repetition here of points made in earlier Comments, but I don't have the time or ability to focus on that kind of detail at the moment. Perhaps over the weekend.
- c. Ditto Comments [26] and [27]. Ditto.
- d. Ditto Comments [29] and [29A]. I recommend no change.
- e. Ditto Comments [32] and [33]. There might be a bit too much said here, but I don't recommend that we take the time to tinker.

10. Comment [19] should be stricken b/c it is confusing and could send the wrong signal to attorneys that they may fail to make the disclosure necessary to obtain consent. I suppose the point of this comment is that we are to add the statement, if a lawyer cannot make the disclosure needed to obtain consent, the lawyer cannot accept the representation. I hardly think we need to say so given the content of the Rule. I recommend no change.

11. The first sentence of Comment [20] should be stricken and the balance of the paragraph should be amended to explain whether any one of these factors requires find a conflict. This makes no sense to me. I think a reference to another Comment was intended, but I cannot sort out which one.

12. I think this comment means that the definition of informed written consent should include a written explanation of the confidentiality concepts discussed in Comment [30]. There is something to this, and I will look at it over the weekend when I am fresher.

13. Recommends that advance waivers be prohibited. The scope of a proper advance consent is debatable, but I think not that they are and should be permitted in some situations. I recommend no change.

**June 21, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:**

Bob,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

**If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22<sup>nd</sup>.**

***Attached:***

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-21-10).doc  
RRC - [5-7] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)-RD.doc  
RRC - 3-310 [1-8-6] - Public Comment Chart - By Commenter - XDFT2 0(6-21-10)ML.doc  
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc  
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 4-210 [1-8-5] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**June 21, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:**

Kevin,

The moment you've been anticipating . . .

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

**If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22<sup>nd</sup>.**

***Attached:***

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (#)  
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc (A)  
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc  
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (A,#)

**RRC – Rule 1.7 [3-310]  
E-mails, etc. – Revised (6/21/2010)**

RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.3 (06-21-10).doc  
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc  
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.4 (06-21-10).doc  
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc  
**RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc** (A, R)  
RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT3.2 (06-21-10)KEM.doc

**June 21, 2010 Sapiro E-mail to RRC List:**

1. The following comments respond to Bob's suggestions.
2. I agree with most of the changes Bob proposes for Comment [6]. However, I would not delete the sentence that follows the citation of *Flatt*. Although it could be reworded, I think the illustration of a direct conflict is not obvious from the first sentence, even as the first sentence is rewritten. I would not delete the next to last sentence in Bob's rewrite at page 23 of the agenda materials.
3. At page 24 of the agenda materials, second line, in Bob's proposed rewrite, I think the phrase "is likely to" should be replaced by the word "might." To me, the probability of whether the lawyer will have to harm or embarrass his or her client on cross-examination gives too much leeway to the lawyer. If that is a possibility, then the lawyer should have to seek the client's informed consent.
4. In Bob's paragraph 5, at page 24 of the agenda materials, I think that Bob is correct and that the second sentence of Comment [6] should not be deleted. However, what Bob points out in the second sentence of his paragraph 5 in parenthesis ["the client might be an identified target of the lawyer's work without being a party"] is an important distinction that does not appear in the Comment, itself. I think it should be added to the Comment.
5. I agree with the rest of Bob's comments.

**June 21, 2010 Kehr E-mail to Difuntorum & McCurdy, cc Melchior, Sapiro, Sondheim, Lee & KEM:**

I have attached a commenter chart for this Rule. Also, I want to respond to Jerry's comments in his email of earlier today (Jerry: Thank you for your careful review of my earlier suggestions):

1. Jerry recommended that, in Comment [6], we keep the sentence following the cite to *Flatt*, but said the sentence might be revised. I'm ok with keeping that sentence, but I want to underline that this would treat what now is a (C)(3) conflict as an (a) conflict. As stated in Comment [7B], the current rule (C)(3) situation is not covered by the material limitation component of the proposed new rule. As for a possible revision of the sentence that Jerry wants to preserve, I suggest: "As one example, a directly adverse representation under paragraph (a)(1) occurs when a lawyer, while representing a client in one matter, in another matter accepts the representation of a person or organization who is an identified adversary of the client in the first matter."

2. Jerry recommends that “is likely to” in the revision suggested in paragraph 4 of my 6/16 email be changed to “might” – see paragraph 3 of Jerry’s 6/21 email. I prefer the higher threshold and ask that the Commission resolve this.
3. I accept Jerry’s paragraph 4 recommendation. I suggest adding after what would be the first sentence of Comment [6] (assuming the Commission approves the revision at paragraph 3 of my 6/16 email), a new second sentence, as follows: “This is true even if the client is not a party to the matter so long as the client is an identified target of the lawyer’s representation.”

Please note that, while my 6/16 email deferred replying to the OCTC recommendation on Comment [30], the attached chart does contain a proposed RRC Response on this.

Finally, I have not included in the commenter chart any response to the Stuart Senator letter urging us to address thrust-upon conflicts. The Commission will need to make this decision. To summarize for the Commission the email exchanges on this that are not part of the agenda materials: Dom voiced support for the Senator letter. In response to my inquiry, Randy has said the Commission’s adoption at this point of a thrust-upon conflicts Comment most likely would require that it go out for public comment. I replied to Randy that I believe the Commission should not be influenced by any perception of the Board’s intended schedule but should give its best recommendation. If that recommendation has a consequence for the completion of the Rules, it properly is up to the Board to decide what to do.

***Attached:***

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.4 (06-21-10)RLK-KEM-AT.doc

**June 22, 2010 KEM E-mail to McCurdy re 1.7, 1.8.2, 5.4 & 7.5:**

I’ve reviewed the charts you sent and updated them where necessary. Please substitute the following files for the files you sent me:

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc [Draft # should have been #2].

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT2.doc [document you sent me was not alphabetized, which I’ve done; also note that I will review Bob’s revisions to the chart and send in my responses later].

RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc [Draft # should have been #2 and it’s been alphabetized].

RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.3 (06-22-10).doc [Draft # should have been 2.3, also alphabetized and response to LACBA Access to Justice Committee].

**June 22, 2010 KEM E-mail to Kehr, cc Drafters, Chair & Staff:**

I've attached a revised Comment chart, XDFT3.5 (6/22/10)AT-RLK-KEM, that alphabetizes the chart and adds a response to OCTC's comment, para. 22 re Comment [1] (In turquoise).

I also disagree in part w/ Bob's proposed revisions to Comment [6] but will speak to that in an e-mail later this afternoon or during the meeting.

Finally, I'm in accord w/ Bob re the thrust upon conflict issue, i.e., his "finally" paragraph, below.

***Attached:***

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.5 (06-22-10)AT-RLK-KEM.doc



**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Alex, Glenn C.	M	No	Comment [29A]	Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a <u>long-term, or continuing basis</u> to one or more <u>other</u> , especially small, agencies that lack or cannot afford their own counsel—a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking material limitation on the scope of the representation to one entity or the other. The conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an “informed” consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent. While the draft Comments do mention conflicting instructions	The Commission recommends no change to Rule 1.7 in response this comment. The Rules generally apply to governmental lawyers as they do to all other lawyers. See <i>People ex rel. Deukmejian v. Brown</i> (1981) 29 Cal.3d 150. <b>This is true both in general and with respect to the challenging topic of a client's advance consent to a future conflict of interest (see proposed Comment [22], which has been the subject of numerous comments to the Commission).</b> Even if otherwise warranted, the Commission does not believe it is possible to draft an exception to address this specific concern that reliably could cover the wide variety of governmental relationships and representations. Any exception should come within a specific factual setting, either by the consent of the clients involved or by a court ruling. <b>Also, the potential problem can arise outside of the governmental context, for example, where a client directs one of its lawyers to provide legal advice to a joint venture in which the client is involved.</b>

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

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>and inconsistent interests (see draft Comment [29A],<sup>2</sup> for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity.</p> <p>As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to <u>inform</u> the two agencies in writing generally about the types of conflicts that could arise.</p> <p>The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.</p>	<p>This suggestion apparently is intended to permit governmental lawyers to accept conflicting representations by providing information that falls short of the standard needed to obtain a client's informed consent (as defined in Rule 1.0.1(e)). The Commission does not agree that this would be appropriate in any situation. There are two additional problems with this proposal: (1) there does not seem to be any workable definition of a "small public agency" and (2) it is not in the interest of governmental lawyers or their clients to suggest through a dilution of standards that governmental lawyers are in any sense secondary to other lawyers.</p> <p>The Commission believes that conflicts of interest are no less important in non-litigation situations as they can involve a client's most important values and interests and can lead to or be intertwined with litigation.</p>

<sup>2</sup> Although the commenter referred to Comment [29], the specific comment referenced is draft Comment [29A].

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	COPRAC	A	Yes		<p>We fully support the rule as drafted as a significant improvement of the prior draft and over the current Rule 3-310. Adopting a rule that is fundamentally consistent with the ABA Model Rule will benefit firms and practitioners who are dealing with conflicts of interest across jurisdictions by providing uniformity.</p> <p>We understand the concerns of the dissent, but do not agree that the proposed rule will reduce client protection. We believe the key terminology in the rule, along with the extensive comments, are adequately explained to enable the practitioner to understand and apply the rule.</p>	No response required.
1	MacNaughton, Richard		No	Comment generally	<p>Unlike Los Angeles County, where there is the District Attorney and County Counsel, there is only one City Attorney for the City of Los Angeles. There are members of the City Council and other city officials (attached two articles and provided an example in his letter) who engage in questionable and illegal conduct. It strikes me that the City Attorney has an inherent conflict of interest. For example, the City Attorney has to provide legal advice to members of the City Council, and the City, and defend them both when sued. The City Attorney has a serious conflict of interest in investigating and/or prosecuting his own clients. If a City Council member is</p>	<p>The Commission recognizes that city attorneys sometimes face challenging conflict of interest issues. See, e.g., Cal. State Bar Opn. 2001-156. However, the Commission is unable to see what Comment might be added to Rule 1.7 to provide additional guidance in this area. The Commission proposes no change as a result of this comment.</p>

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					engaged in a fraud or wrongdoing, how does the City Attorney investigate the City Council member? That leaves the public with no one to protect their interests. It seems to me that the structure of the City Attorney's Office conflicts with the Rules of Professional Conduct, but the Rules do not address this conflict. I do not expect you to deal with any specifics of any case. I mention the examples to highlight the type of conflict that seems to be inherent in the City Attorney's Office. If my observation is correct, it seems that the State Bar should have some Comment in the new Rules.	
8	Office of Chief Trial Counsel	D	Yes		1. OCTC believes this rule is an improvement from the original proposal, but still has significant concerns about the rule and especially its 38 Comments. It says that there are too many Comments and many are too long and incorporate other Proposed Rules and Comments, making this rule overly complicated and confusing. This rule is simple: an attorney shall not without informed written consent represent a client when to do so will involve a conflict of interest with another current client or the lawyer's personal interests (or other fiduciary duties). The Proposed Rule and its Comments, however, make complex this simple proposition.	1. The Commission respectfully disagrees that conflicts of interest are simple. It further believes that attempting to state conflicts principles as generalities would leave lawyers without guidance, which would leave lawyers and their clients less protected.

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comments [6] & [7]	<p>2. The Proposed Rule's use of the term "directly adverse" is vague, ambiguous, and potentially too limiting and confusing. We believe that the term "directly adverse" will be subject to a great deal of interpretation and, therefore, litigation. The use of the modifier "directly" may pose problems for the lawyer trying to comply with the rule. Lawyers may not understand the distinction between an "adverse" as opposed to "directly adverse" interest and may, therefore, fail to seek the appropriate client consent. The use of the term "directly" may also pose problems for OCTC, the State Bar Court, and the Supreme Court as they attempt to evaluate possible violations on the Proposed Rule. Using the term "adverse" without the modifier "directly" may be clearer, less ambiguous and more appropriate.</p> <p>3. OCTC recognizes that the Commission has tried to explain the term "directly adverse" in Comments [6] and [7]. However, those Comments may not provide adequate guidance in distinguishing the difference, if any, between "adverse" and "directly adverse" interests and may, instead, add to the problems with enforcement of the rule. If the word "directly" is stricken from the Proposed Rule, then Comments [6] and [7] should also</p>	<p>2. This comment provides a good example of the complexity of conflicts of interest. Removing "directly" as requested would cause paragraph (a) to apply to all degrees and kinds of adversity, including economic adversity. This would mean, as an example, that a lawyer would violate paragraph (a) by representing a client who is suing another client's tenant and whose success might injure the economic interests of the other client. It is essential that the Rule not permit this interpretation.</p> <p>3. The Commission agrees that that Comment [6] can be shortened and has edited it accordingly. It does not believe that material change to Comment [7] is possible without affecting its accuracy or utility.</p>

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [6]	<p>be deleted.</p> <p>4. Comment [6] defines an attorney's cross-examination of his or her own client, even if the client is not a party to the particular action, as directly adverse. OCTC understands that the cross-examination of one's own client is an example of an adverse situation, but, contrary to this Comment, it does not seem directly adverse where the cross-examination does not affect the client in the representation for which the client hired the attorney. If a client is not a party to the action, then one must examine the client's reasonable expectations, as well as the impact of such cross-examination on the client's interests and on the attorney's duty of loyalty and confidentiality to that client. Such analysis is necessary regardless of whether the modifier "directly" is included in the Proposed Rule.</p>	<p>4. The Commission disagrees. A lawyer's violation of the duty of loyalty does not depend on whether the lawyer's conduct affects the quality of the lawyer's representation of the client. The Commission has slightly revised Comment [6] to clarify this.</p>
				Comment [6]	<p>5. OCTC recommends striking the second sentence of Comment [6] because, if a client is adversely affected by an attorney's work on the matter, even if the client is not a party to the matter, it may still raise the issue of whether the attorney adhered to his or her duty of undivided loyalty and, if not, create a direct conflict of interest.</p>	<p>5. The Commission disagrees and has added a new second sentence to Comment [6] to clarify this.</p>

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [7]	6. OCTC recommends striking the modifier directly before adverse in Comment [7].	6. See the second paragraph of the RRC Response to the OCTC comments.
				Comment [8]	7. Comment [8] is too long and confusing. OCTC recommends striking sentences 2-4.	7. Sentences two - four are borrowed from the Model Rule Comment with some sharpening of language and are important in understanding the "material limitation" standard. However, the Commission has added additional language that makes the Comment excessively long, and it therefore has broken out the additional language as a separate Comment [8A].
					8. Sentence 5 is placing in a Comment an expanded version of the current version of 3-310(C). If the Commission wants to state that this rule is not intended to change the Current Rule, it should just state that. If it believes the language in the Comment is preferable to the language in the Proposed Rule, it should adopt the language in the Comment as the rule. It, however, should not attempt to do so by a Comment.	8. The Commission is not able to follow this comment and therefore has made no change on its account.
				Comment [9]	9. Comment [9] appears unnecessary in light of Proposed Rule 1.9 and the language in Proposed Rule 1.7(a)(2). If the Commission is concerned about a conflict of interest created by an attorney's other fiduciary duties (such as when he or she is acting as trustee, executor or corporate director), it should	9. The Commission believes that this topic is better handled by the Comment discussion and citation rather than in Rule format and has made no change.

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					include in 1.7(a)(2) after the words “representation of one or more clients” words such as “or the attorney’s duties as a fiduciary to others.”	
				Comment [10]	10. Comment [10] is unnecessary in light of Proposed Rule 1.7(a)(2).	10. The Commission believes this is an important part of the needed explanation of “material limitation” and has made not change.
				Comment [12]	11. Comment [12] is unnecessary in light of Proposed Rule 1.8.10.	11. This is a cross-reference to Rule 1.8.10. The Commission believes that cross-references of this kind are important in such a long and complex body of rules and has not made the requested changed.
				Comment [13]	12. Comment [13] is unnecessary in light of Proposed Rule 1.8.6.	12. The Commission disagrees and has made no change. Rule 1.8.6 addresses the fact of payment by someone other than the client, and Rule 1.7 addresses the lawyer’s potential conflict. The two are complementary.
				Comment [34]	13. Comment [34] seems unnecessary in light of Proposed Rule 1.13(a).	13. The Commission disagrees and has made no change. The first sentence is a cross-reference to Rule 1.13, provided for guidance, and the balance is an explanation not found in Rule 1.13.
				Comment [38]	14. Comment [38] seems unnecessary in light of Proposed Rules 6.3 and 6.4.	14. This Comment provides helpful cross-references. The Commission has retained them as previously explained.
				Comments		

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				[14]-[17A]	15. Comments [14]-[17A] could be reduced and the language tightened.	15. These Comments provide important guidance on the Rule, and the Commission does not believe they can be materially shortened.
				Comments [23]-[25]	16. Comments [23]-[25] are too long and confusing.	16. See the preceding RRC Response.
				Comments [26]-[27]	17. Comments [26]-[27] are too long and confusing.	17. See the preceding RRC Response.
				Comments [29]-[29A]	18. Comments [29]-[29A] are too long and confusing.	18. See the preceding RRC Response.
				Comments [32]-[33]	19. Comments [32]-[33] are too long and confusing.	19. See the preceding RRC Response.
				Comment [19]	<p>Many of these Comments seem unnecessary or duplicative of other Comments. They should be reduced and tightened up.</p> <p>20. Comment [19] is confusing and could send the wrong signal to attorneys that they may fail to make the disclosure necessary to obtain consent. If the attorney cannot make the disclosure necessary to obtain consent, the attorney should not represent the client. Further, if the drafters reduce and tighten the language in Comments [14]-[17A], then the reference to Comments [14]-[17A] in Comment [19] could be stricken.</p>	20. This comment seems to be that the Commission should add a statement that a lawyer who cannot make the disclosure needed to obtain consent cannot accept the representation. The Commission believes the Rule and Comment already say this, and that there is not valid reason to lengthen the Comment by saying so again.

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [20]	21. OCTC recommends striking the first sentence of Comment [20], but supports the rest of the Comment.	21. The Commission is unable to understand this comment, which might have intended to reference a different paragraph, and accordingly has made no change.
				Comment [1]	22. Comment [1] lists the duties the conflict rules are concerned with. It could be understood to suggest that, if one concern exists and another does not, there may or may not be a conflict. It should be amended to explain whether any one of these factors require finding a conflict. In addition, it cites several conflict rules, including 1.8. This could be confusing because technically there is no Rule 1.8, but several separate rules under the 1.8 category. (See Rule 1.8.1 through 1.8.11.)	22. The Commission disagrees. The sentence the commenter objects to refers to the "conflicts rules" in the plural, meaning that collectively the conflicts rules are concerned with the described duties. One would not have to violate every conflict rule to have a conflict of interest, so the Commission has made no change. The Commission agrees that the reference to Rule 1.8 is incorrect and has changed it.
				Comment [30]	23. OCTC believes Comment [30] is an improvement and concurs that Rule 1.4 requires the attorney to advise the clients of the potential adverse consequences of joint representation. However, Comment [30] does not specifically require this in order to have informed consent.	23. OCTC recommends that, in order for a lawyer to obtain informed consent to a joint representation that presents a potential conflict of interest, the lawyer be obligated to disclose the confidentiality issues discussed in Comment [30]. The Commission has not made this change because it is not prepared to say that this should be an absolute requirement in all such representations. It is satisfied, as stated in Comment [30] that this is a "particularly important factor", and that consultation with the client is required under Rule 1.4.

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [22]	24. Comment [22] is too long and confusing. There are no reported disciplinary cases on advanced waivers. Some civil courts have held that an attorney may have an advanced conflict waiver, but those have been in very limited situations. OCTC is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. Under these circumstances, an advanced waiver could easily be abused. Furthermore, even the attorney cannot fully understand or be able to adequately explain the ramifications of a potential conflict. For these reasons, OCTC recommends that advanced conflict waivers be prohibited.	24. Advanced waivers are permitted by several reported appellate decisions, and the Commission does not believe that it cannot outlaw them as requested by OCTC (nor does the Commission believe this would be appropriate). The Commission received extensive public comment for and against Comment [22] and believes that the current proposal provides important guidance to lawyers.
5	Paulsen, Bradley		No	1.7(a)(2) 1.7(b)(4)	The commenter has submitted a lengthy letter with attachments complaining about the conduct of certain plaintiffs' lawyers in the construction industry are violating the law and certain Rules of Professional Conduct in soliciting client homeowners. The commenter specifically refers to certain Rules of Professional Conduct, including proposed Rule 1.7(a)(2) and 1.7(b)(4), and asserts that the subject lawyers are in violation of these provisions. The commenter, however, does not suggest any revisions to the identified paragraphs of the Rule, instead noting that	The Commission has considered the commenter's submission and determined that his concerns lie not with the substance of the Rules, but rather with their enforcement, which is beyond the purview of the Commission's charge.

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>“random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 claims.”</p>	
2	San Diego County Bar Association	M	Yes	<p>Comments [22] and [25] [formerly numbered Comments [33] and [34] in the initial public comment draft (3/1/08)]</p>	<p>Delete Comment [34]<sup>3</sup> regarding class representation because it should be addressed in a separate rule on class representation.</p> <p>Delete fourth sentence from the end of Comment [33]<sup>4</sup> regarding advance consent because it does not accurately state the status of current law.</p>	<p>The Commission carefully considered the possible adoption of a separate rule on class actions (although there is no such Model Rule) but voted against doing so, in part because the topic is too extensive and varied to be handled in a rule format, and in part because of the ability to address some class action issues in existing rules. Doing so provides valuable guidance within the context of rules that apply – or do not apply - in class actions. This has been done in Comment [34] (now numbered Comment [25]). Also see Rule 1.4, Comment [4], Rule 1.8.7, Comment [1], and Rule 7.2, Comment [4].</p> <p>The Commission reconsidered the fourth sentence from the end of Comment [33] (now numbered Comment [22]) (stating: “An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar.”) and has concluded that it is an accurate statement of the law. Nevertheless, the</p>

<sup>3</sup> The subject comment was numbered Comment [34] in the initial public comment draft (3/1/08). It is now numbered Comment [25] in the current draft.

<sup>4</sup> The subject comment was numbered Comment [33] in the initial public comment draft (3/1/08). It is now numbered Comment [22] in the current draft.

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Commission has revised Comment [22] to clarify with even more precision the factors to be considered in determining whether an "open-ended" consent complies with the Rule.
6	Senator, Stuart N. (Alston & Baird LLP, Duane Morris LLP, Morgan Lewis & Bockius LLP, and Munger Tolles & Olson LLP)	M	Yes	ABA Comment [5]	<p>The commenters urge the adoption of Comment 5 to the ABA Model Rule 1.7, regarding "thrust upon" or "unforeseeable" conflicts because Comment 5 would provide guidance for attorneys who are faced with conflicts that arise during the course of a representation and that were unforeseeable at the outset.</p> <p>Thrust upon conflicts often are discussed in the case of changing corporate ownership, e.g., the firm's client's adversary is acquired by another client of the firm during litigation, such as in the context of third-party discovery. The adoption of Comment 5 would provide some guidance as to how the firm should handle this and other thrust-upon, unforeseeable conflicts by providing that the attorney may have the option of withdrawing from one of the representations to avoid the conflict of interest. Because Comment 5 provides that the lawyer must maintain and protect the confidences of the client from whose representation the lawyer has withdrawn, there are no confidentiality issues. The comment essentially adopts the "thrust</p>	

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					upon defense" established by case law from other jurisdictions. Under that case law, when a conflict arises through no fault of the attorney, the attorney may withdraw from one representation so as to convert the current client into a former client and avoid compromising the duty of loyalty. See <i>Gould, Inc. v. Mitsui Min. &amp; Smelting Co.</i> , 738 F. Supp. 1121 (N.D. Ohio, 1999).	
7	Zitrin, Richard (on behalf of law professors)	M	Yes		<p>We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate.</p> <p>This letter does not address the issue of whether Comment [22] of Rule 1.7, on advanced waivers, is or is not appropriate. The June 2008 Letter from Ethics Professors addressed this issue, and opposed the adoption of the Comment paragraph, then enumerated ¶ 33.</p> <p>The comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised were not as carefully vetted. Accordingly, we encourage the Board to carefully review these comments and re-refer to the Commission those comments that are unclear, overly dense,</p>	<p>No response required.</p> <p>No response required.</p> <p>The Commission disagrees with the commenters' assertion that the comments to the proposed rule were not carefully vetted.</p>

**Rule 1.7 Conflicts of Interests: Current Clients.  
[Sorted by Commenter]**

TOTAL = 8    Agree = 1  
 Disagree = 1  
 Modify = 4  
 NI = 2

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					puzzling, or otherwise lacking. We believe more study of the verbiage of these comments, including some simplification, would be helpful to guide the average practitioner, and would ensure clarity and harmony between the rule and the comments.	