

## MEMORANDUM

To: Rules Revision Commission

From: Sean M. SeLegue, Robert Kehr, Kurt Melchior

Date: January 17, 2006

Re: Proposed Commentary for Rule 1.7 [submission for 2/3/06 meeting]

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Bob and Sean have collaborated to combine their two prior drafts of 1.7 commentary, and the result is attached. Footnotes reflect differing opinions and thoughts by the co-drafters, including Kurt's views.

While there are some disagreements among the drafters, Bob and Sean agreed on an overall approach, which was to avoid being constrained by the structure of the Model Rule commentary. This choice flowed from the Commission's decision to use current CRPC 3-310 as the basis for the text of Rule 1.7, rather than using MR 1.7 as the basis. The structure of our proposed comment for 1.7 begins with an overview of key principles essential to conflicts analysis, followed by comment on specific paragraphs of the rule and, finally, discussion of some special topics.

This commentary covers a lot of ground, and we do not expect the Commission to be prepared to make final votes on this draft at the upcoming meeting. Rather, we want to gather as much feedback as we can on this preliminary draft so that we can be in a position to refine it for at least one additional meeting. You will see that we have identified some issues that we (or at least one of us) believes require additional study before the Commission decides them.

We have attached for your convenience a copy of the current draft of the text of Rule 1.7. To keep this process moving, we ask you to focus on the new draft commentary for the next meeting. However, there are some open issues concerning the text of the rule itself. The enclosed draft reflects changes approved at the 10/29/05 meeting; those changes are not redlined (see the footnotes for identification of changes). There is one proposed redlined change, to paragraph (a), to reflect the Commission's discussion at the 10/29/05 meeting. In addition, in the footnotes, we note some issues on which some members expressed concern; on those issues, the co-drafters do not propose new language but invite specific suggestions for amendment.

1 **Proposed California Rule 1.7**

2 **1/17/06 Draft**

3 **[incorporates changes at 7/22-23/05 and 10/29/05 RRC meetings]**

4 **[prepared for 2/3/06 meeting]**

5  
6 **RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS**

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7  
8 (a) **Representation directly adverse to current client.** A lawyer shall not accept or continue  
9 representation of a client in a matter in which the lawyer's representation of that client in that  
10 matter will be directly adverse ~~in that matter~~ to another client the lawyer currently represents in  
11 another matter, without informed written consent from each client.<sup>1</sup>

12 (b) **Joint representation of multiple clients in one matter.** A lawyer shall not, without the  
13 informed written consent of each client:<sup>2</sup>

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

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

18 (c) **Representing a client's adversary.** A lawyer shall not, while representing a client in a first  
19 matter, accept in a second matter the representation of a person or organization who is directly<sup>3</sup>  
20 adverse to the lawyer's current client in the first matter, without the informed written consent of  
21 each client.

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<sup>1</sup> Subtitle approved by RRC 7/22/05. Text approved 7/22/05 but may be reconsidered after comments drafted. At 10/29/05 meeting, co-drafters asked to revise 1.7(a) to exclude joint representations so that (a) does not overlap with (b). Some members favored adding "material limitation" language from the MR to our rule. The co-drafters believe that such an addition would be inconsistent with the Commission's choice to follow the California "check list" model.

<sup>2</sup> RRC approved 1.7(b) at 10/29/05 meeting.

<sup>3</sup> RRC inserted word "directly" at 10/29/05 meeting and approved paragraph (c) in its entirety.

22 (d) **Disclosure of relationships and interests.** A lawyer shall not accept or continue  
23 representation of a client without providing written disclosure to the client where:<sup>4</sup>

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

26 (2) The lawyer knows or reasonably should know that:

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

29 (b) the previous relationship would substantially affect the lawyer's representation; or

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

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

35 [to be put in "global" definitions section]<sup>5</sup> **Definitions of "disclosure" and "informed written**  
36 **consent."**

37 (1) "Disclosure" means informing the client or former client of the relevant circumstances  
38 and of the actual and reasonably foreseeable adverse consequences to the client or former  
39 client;

40 (2) "Informed written consent" means the client's or former client's written agreement to the  
41 representation following written disclosure;

42 (3) "Written" means any writing as defined in Evidence Code section 250.

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<sup>4</sup> At the 10/29/05, some members expressed concern that (d) is underinclusive. The co-drafters invite submissions of specific suggestions for revision.

<sup>5</sup> RRC voted on 7/22/05 to include these definitions in a global definitions section, subject to reconsidering whether certain definitions belong in particular rules.

1 **Rule 1.7 Comment**

2  
3 **[Bob Kehr and Sean SeLegue co-draft]**

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5 **For 2/3/06 RRC Meeting**

6  
7 **Scope of Rule**

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9 [1] This rule and the other conflict rules seek to protect a lawyer’s<sup>1</sup> ability to  
10 carry out the lawyer’s basic fiduciary duties to each client: loyalty, competent  
11 representation, confidentiality, and disclosure by lawyer to client of information and  
12 developments material to the lawyer’s representation of the client.<sup>2</sup>

13  
14 [2] This rule describes a lawyer’s duties to current clients. Additional specific  
15 rules regarding current clients are set out in Rules 1.8.1 to 1.8.x. For conflicts duties to  
16 former clients, see Rule 1.9. [For conflicts of interest involving prospective clients, see  
17 Rule 1.18.]<sup>3</sup> For definitions of “disclosure,” “informed consent” and “written,”<sup>4</sup> see  
18 [Rule 1.0(e) and (b)], and see Comments [22] – [24].

19  
20 **General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)<sup>5</sup>**

21  
22 [3] The first step in a lawyer’s conflict analysis is to identify his or her  
23 client(s) in a matter the lawyer is handling. Only then can the lawyer determine if a  
24 conflict rule prohibits the representation, or permits the representation subject to a

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<sup>1</sup> “Lawyer” in used throughout, including in language otherwise taken from the Discussion to our current 3-310. The change will not be noted again.

<sup>2</sup> This is Sean’s version of Comment [1]. Bob disagrees with and recommends a fuller statement of the four duties along the following lines: “... 1) undivided loyalty (a part of which is the obligation 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); 2) the maintenance of client secrets; 3) the full and candid disclosure to the client of all information and developments material to the client’s understanding of the representation and control and direction of the lawyer; 4) and the competent representation of the client within the bounds of the law.” Sean replies that the details Bob proposes to add might better go in a later, more detailed section, leaving this first paragraph as a streamlined introduction. Kurt believes the Comment is too extensive and encompasses too much in the context of directions about conflicts. Kurt also question the attempt to capture much of the essence of the practice of law in four catch phrases but asks what happened to “zealous,” vs. “competent,” representation.

<sup>3</sup> Brackets have been used as placeholders when the existence or numbering of another Rule is uncertain.

<sup>4</sup> This choice of defined terms assumes that we will continue to use the definitions of CRPC 3-310(A), rather than the equivalent terminology of the Model Rules, although no vote was taken on that issue at the July 22-23, 2005 meeting. The Model Rule terminology is built on the lawyer’s obligation only to have the consent confirmed in writing, which is a materially diluted form of what California already requires.

<sup>5</sup> Particularly because of the movement of Comments required by our proposed restructuring of the conflicts Rules, which means that the Comment numbers will not track from the Model Rules to California’s version, we generally propose to keep these Model subtitles to assist in cross-referencing. However, our restructuring of the Rules means that some of the Comments need to be moved accordingly. For purposes of this initial draft, we have moved certain Comments out of 1.7 to be held for the 1.8 Comments where appropriate, but we also have reordered the Comments within 1.7 to limit repetition and cross-references. Kurt adds that he remains committed to using the current CA numbering system although he knows he will lose that battle. But the last dog has not been hung yet.

25 disclosure to the client and/or the client’s informed written consent. Determining  
26 whether a conflict exists may also require the lawyer to consult sources of law other than  
27 these Rules. [For guidance in determining whether a client-lawyer relationship exists or,  
28 having once been established, is continuing, see Comment to Rule 1.3 and Scope.]<sup>6</sup>  
29

30 [4] If the lawyer is required by this Rule or another Rule to make a disclosure,  
31 but the lawyer cannot do so without violating a duty of confidentiality, then the lawyer  
32 may not accept or continue the representation for which the disclosure would be required.  
33 <sup>7</sup> (See, e.g., Business and Professions Code section 6068, subdivision (e), Rule 1.6.)  
34

35 [5] When disclosure or informed written consent is required by the Rules, the  
36 lawyer cannot satisfy the duty to disclose or obtain consent if the person to whom the  
37 disclosure is made, or who grants consent, lacks capacity or authority. If the client has  
38 diminished capacity, see Rule 1.14. In some situations, Rule 1.13(g) limits who has  
39 authority to grant consent on behalf of an organization.<sup>8</sup>  
40

41 [5a] If a lawyer believes that the lawyer will not be able to fulfill all applicable  
42 duties in a matter, then the lawyer should not accept the matter or continue representation  
43 in the matter, even with client consent.<sup>9</sup>  
44

45 [6] Ignorance of relevant facts necessary to identify situations in which these  
46 Rules apply that are caused by a lawyer’s failure to institute or use reasonable conflicts-  
47 checking procedures will not excuse a lawyer’s violation of this Rule. A lawyer is  
48 responsible for taking appropriate steps to comply with these Rules.<sup>10</sup>  
49

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<sup>6</sup> Modified language from MR comments. This is bracketed because we don’t yet know if we will recommend a general diligence Rule or if we will have a Scope section.

<sup>7</sup> Note that this sentence is written broadly to include a duty to keep information confidential that arises other than from an attorney-client relationship, such as through a lawyer’s service on a board of directors. This in substance is the second paragraph of the Discussion to CRPC 3-310

<sup>8</sup> Kurt proposes to limit this comment to cross-references in the interests of simplicity and making the rule accessible to non-ethics specialists.

<sup>9</sup> Sean proposes this language in lieu of the language in comment 29 imposing a “reasonableness” standard on the lawyer’s belief. Sean believes the reasonableness standard derives from language in MR 1.7(a) and (b), which the Commission has rejected by choosing to use the substantive language of current CRPC 3-310 as the basis for new Cal. Rule 1.7.. Sean also believes that the formulation of this principle needs to be refined, if we include it, because “all applicable duties” is vague – by definition, this rule addresses situation in which some of a lawyer’s duties are limited or waived. This language might be too much of a practice pointer to be included in the commentary to the Rules.

<sup>10</sup> Bob recommends a more specific comment on conflicts checks. His proposed alternative is attached. Sean believes resolution of this issue should await the Commission’s consideration of whether to adopt MR 1.10 concerning imputed conflicts and that the language as written is perhaps too harsh and subject to potential abuse. On the merits, Sean notes that the ABA MRs have no language about conflict checks and believes that this new language may be too strong and invite abuse. The distinction between discipline and disqualification might be important here as well. Bob adds that this issue might be seen as one of whether conflicts checks should be an ethical obligation (as it is in N.Y. Rule 5-105(E)) or a standard of care obligation. Kurt asks, “Why does this comment need to be stated here? It could be said of every rule.”

50 **Paragraph (a): Representation Directly Adverse to Current Client**<sup>11</sup>  
51

52 [7] A lawyer owes a duty of undivided loyalty to each current client. This  
53 duty prohibits the lawyer from accepting or continuing a representation directly adverse  
54 to a client without that client's informed written consent, even when the matters are  
55 wholly unrelated. The reason for this rule is that the client as to whom the representation  
56 is directly adverse is likely to doubt the lawyer's loyalty, and the resulting damage to the  
57 client-lawyer relationship is likely to impair the lawyer's ability to represent the client  
58 effectively and to damage the reputation of lawyers and the legal system. The principles  
59 described in this paragraph are intended to protect the reasonable expectation of clients  
60 and apply without regard to the integrity or good faith of the lawyer.<sup>12</sup>  
61

62 [8] The duty of undivided loyalty means that, without the informed written  
63 consent of each affected client, a lawyer may not act as an advocate or counselor<sup>13</sup> in a  
64 matter against a person or organization the lawyer represents<sup>14</sup> in another matter. The  
65 duty of loyalty reflected in paragraph (a) applies equally in transactional and litigation  
66 matters.<sup>15</sup> For example, a lawyer may not represent the seller of a business in  
67 negotiations when the lawyer represents the buyer in another, unrelated matter, without  
68 the informed written consent of each client. Paragraph (a) would apply even if the parties  
69 to the transaction expect to, or are, working cooperatively toward a goal of common  
70 interest to them. For purposes of these Rules, parties who are negotiating an agreement  
71 with one another are deemed to be adverse concerning that transaction. (If a lawyer  
72 proposes to represent both parties to an agreement, the situation should be analyzed under  
73 paragraph (b), not paragraph (a).)<sup>16</sup>  
74

75 [9] Paragraph (a) applies only to engagements in which the lawyer's work in a  
76 matter is *directly* adverse to a current client in any matter. Generally speaking, if a  
77 lawyer's client in another matter is not a party to the first matter, the lawyer's work on  
78 that matter will not be directly adverse to the non-party client. If the non-party client's  
79 *interests* could be affected adversely by the outcome of the matter, then the adversity is  
80 indirect, not direct. However, the lawyer's work in the first matter would be *directly*  
81 adverse to another client that is the identifiable target of a litigation or non-litigation  
82 representation, or competitor for a particular transaction (as would occur, for example, if  
83 the two clients were in competition to purchase or lease an asset or acquire an exclusive

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<sup>11</sup> At the July 22, 2005 meeting the Commission voted to utilize "directly" adverse in 1.7(a) with direction to the drafters to include an explanation of the concept in the Comments. That is the purpose of this section.

<sup>12</sup> Sean is concerned that this last sentence may invite hyperbolic and overly technical motions to disqualify. Kurt suggests that this comment is too abstract and professorial and does not provide useful guidance.

<sup>13</sup> This corresponds to the second sentence of Model Comment [6]. We have added "or counselor" to emphasize the application of the Rule in non-litigation settings.

<sup>14</sup> Sean: I propose this change to avoid mingling the comments to paragraphs (a) and (b), which I think is needed under your reorganization into paragraph-specific order (which I so far think is a real improvement).

<sup>15</sup> Kurt believes this sentence is valuable but that the rest of the comment is too professorial.

<sup>16</sup> Kurt observes that this Comment might be read as inconsistent with *Buehler v. Sbardaletti*, which is not Bob's or Sean's intention. We will need to look at this more carefully when time permits.

84 license). Similarly, *direct* adversity can arise when a lawyer is required to cross-examine  
85 a client who appears as a witness in a lawsuit involving another client, even though the  
86 lawyer does not represent the witness in the matter, if the examination is likely to harm or  
87 embarrass the client-witness. See [Hernandez v. Paicius \(2003\) 109 Cal.App.4th 452,](#)  
88 [463-469 \[134 Cal.Rptr.2d 756, 764-767\]](#).  
89

90 [10] Not all representations that might be harmful to the interests of a client  
91 create *direct* adversity governed by paragraph (a). The following are among the instances  
92 that ordinarily would not constitute direct adversity: 1) the representation of business  
93 competitors in unrelated matters, even if a positive outcome for one might strengthen its  
94 competitive position against the other; 2) a representation adverse to a non-client where  
95 another client of the lawyer is interested in the financial welfare or the profitability of the  
96 non-client, as might occur, *e.g.*, if a client is the landlord of or a lender to the non-client;  
97 3) working for an outcome in litigation that would establish precedent economically  
98 harmful to another current client who is not a party to the litigation; and 4) representing  
99 clients having antagonistic positions on the same legal question that has arisen in  
100 different cases, unless doing so would interfere with the lawyer’s ability to represent  
101 either client competently, as might occur, *e.g.*, if the lawyer were advocating inconsistent  
102 positions in front of the same tribunal.<sup>17</sup>  
103

104 [11] Adversity is judged on a matter-by-matter basis. Thus, there is no  
105 prohibition on a lawyer representing two clients who have a dispute with one another if  
106 the lawyer’s work does not relate to the dispute.  
107

108 [12] Developments that the lawyer could not reasonably have foreseen when  
109 accepting a representation, such as changes in corporate and other organizational  
110 affiliations or the addition, change or realignment of parties, witnesses or opposing  
111 counsel in litigation, might create a conflict under paragraph (a) during a representation.  
112 If that occurs, the lawyer normally must obtain informed written consent as required by  
113 paragraph (a) to continue the representation. However, the lawyer might<sup>18</sup> have the  
114 option, depending on the circumstances, to withdraw from one of the representations in  
115 conformity with Rule 1.16 in order to avoid the conflict. For example, an opposing party  
116 in litigation might be bought by another client represented by the lawyer in an unrelated  
117 matter.<sup>19</sup> If a conflict arises during a representation, the lawyer must in all events

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<sup>17</sup> The preceding is an expanded paraphrase of the first paragraph of the current 3-310 Discussion that is intended to make its thought more specific and complete but without any change in substance. It is, however, substantively different from corresponding Model Comment [24] by entirely eliminating issues conflicts except with regard to competence. This also moves Model Comment [24] from the section titled Conflicts in Litigation to this section because it helps define direct adversity. Kurt would discuss the now-vacated *GATX* case; he believes that case’s analysis is correct.

<sup>18</sup> Kurt would make this word stronger, substituting “may” or “may well.” Sean agrees that, under current California law, a stronger statement would be appropriate. In fact, reading this comment fresh in light of Kurt’s comment, Sean is concerned that the language is not a correct statement of current law. Sean and Bob agree that this particular issue requires special attention by the Commission at a future meeting after the drafting team provides a summary of the various options the ABA and other the law of other jurisdictions suggest.

<sup>19</sup> The RRC should discuss how to handle thrust-upon conflicts. California law now seems to follow the *Gould* case, which provides that the lawyer may drop one client to cure a conflict that has arisen due to

118 continue to protect the confidential information of each affected client and former client.  
119 Regarding former clients, see Rule 1.9(c).

120

121 **Paragraph (b): Joint Representation of multiple clients in a matter<sup>20</sup>**

122

123 [13] Paragraphs (b)(1) and (b)(2) are intended to apply to the joint  
124 representation of clients in all types of legal employment, including the representation of  
125 multiple parties in a single or interrelated litigation<sup>21</sup> and/or transactions, or in some other  
126 common enterprise or legal relationship. Examples of a common enterprise include the  
127 formation of a business organization for several investors and the representation of both  
128 spouses in the preparation of a pre-nuptial or ante-nuptial agreement, joint or reciprocal  
129 wills, or an “uncontested” marital dissolution. In such situations, the parties might prefer  
130 to employ a single counsel for the sake of convenience or economy, but paragraphs (b)(1)  
131 and (b)(2) require the lawyer to make a disclosure to, and to obtain informed written  
132 consent from, each client whenever the joint representation is of clients whose interests in  
133 the matter are in potential or actual conflict.

134

135 [14] A potential conflict exists when the lawyer can reasonably foresee an  
136 actual conflict arising among the joint clients in the future. An actual conflict arises  
137 when the interests or goals of the joint clients in the matter differ, such that a lawyer  
138 representing each client individually would recommend for the client’s consideration  
139 actions that could be adverse or detrimental to the other proposed joint clients. A  
140 lawyer’s required disclosure to joint clients should include an explanation that the lawyer  
141 cannot favor one joint client over another joint client in that same matter.

142

143 [15] Examples of issues on which joint clients can have potential actual or  
144 actual conflicts include the following: (1) the lawyer receives conflicting instructions  
145 from the clients and lawyer cannot follow one client’s instructions without violating  
146 another client’s instruction; (2) the clients have inconsistent objectives so that it becomes  
147 impossible for the lawyer to advance one client’s objectives without detrimentally  
148 affecting another client’s objectives; (3) the lawyer is called upon to advocate  
149 inconsistent positions; (4) the clients have inconsistent expectations of confidentiality  
150 because one client expects the lawyer to keep secret information the lawyer possesses  
151 that is material to the matter and which the lawyer is obligated to disclose to the other  
152 client(s); (5) the lawyer has a preexisting relationship with one client that affects the

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circumstances beyond the lawyer’s control. The DC rule 1.7(d), by contrast, allows the lawyer in such a situation to continue representing both clients unless the representation would violate 1.7(b)(2), (3), or (4). See D.C. Opn. 292. Recent N.Y. City Eth. Op. 2005-5 recommends a balancing test.

<sup>20</sup> What follows in this portion of the Comments is a heavily edited version of Model Comments [29] – [31] into which we have integrated the seventh paragraph of the current California Discussion. We have moved this topic forward to here so this paragraph (b) topic follows the paragraph (a) topic. This roughly is in the place of Model Comment [8], which we have removed entirely because it is directed to the “materially limited” language of MR 1.7(a)(2) that the Commission has rejected. Throughout the Comments, we have used “joint” instead of “common” in order to track the title to paragraph (c), which employs the language we normally have used in California. See Cal. State Bar Opn. 1999-153.

<sup>21</sup> Sean thinks the concept of “interrelated” litigation needs to be clarified because it is too open-ended.

153 lawyer’s independent professional judgment on behalf of the other client(s); and (6) the  
154 clients make inconsistent demands for the original file.<sup>22</sup>

155

156 [16] Before accepting or continuing a joint representation, the lawyer should  
157 consider the limitation on the attorney-client privilege created by Evid. C. section 962,  
158 and possibly by applicable provisions of the law of other jurisdictions. The lawyer must  
159 assume that each joint client will be entitled to all communications made to the lawyer  
160 during the joint representation about the subject of the representation if there is any later  
161 litigation between the joint clients. The lawyer should explain this limitation on  
162 confidentiality to the joint clients before accepting the representation as it can present a  
163 potential conflict among the joint clients.<sup>23</sup>

164

165 [17] If a lawyer obtains the consent of joint clients to a joint representation  
166 notwithstanding the existence of a potential conflict under paragraph (b)(1), the lawyer  
167 must obtain the further informed written consent of each client pursuant to paragraph  
168 (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a previously  
169 unanticipated or unidentified potential or actual conflict arises, the lawyer must obtain  
170 consent of each joint client under paragraph (b)(1).

171

172 [18] In some situations, the risk of jeopardizing the joint clients’ respective  
173 interests is so great that the lawyer should not accept a joint representation. For example,  
174 a lawyer cannot undertake joint representation of clients with regard to<sup>24</sup> a subject on  
175 which contentious negotiations or litigation between them is likely. Moreover, because  
176 the lawyer is required to be impartial between jointly represented clients, representation  
177 of multiple clients is improper when it is unlikely that impartiality can be maintained.  
178 Generally, if the relationship between the parties already is antagonistic, the possibility  
179 that each client’s interests can be adequately served by joint representation is not good.  
180 However, even if the joint clients have a dispute about one aspect of the matter, there  
181 often remain issues about which the joint clients have aligned interests. In litigation, for  
182 instance, joint clients might have an interest in presenting a unified front to the opposing  
183 party, and in reducing attorney’s fees for handling those issues on which the joint clients’  
184 interests are aligned, but have an actual conflict about allocation of the proceeds of the  
185 litigation (for plaintiffs) or of liability (for defendants). By excluding from the scope of  
186 the litigation the issues on which joint clients have a dispute or difference of interest, a  
187 lawyer can continue provide the clients with joint representation on issues on which the

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<sup>22</sup> This Comment is intended to replace the Model Rule’s reference to reconciling adverse interests because it misleads as to the proper role of a lawyer with joint clients, and substitutes ideas taken from Cal. State Bar Opn. 1999-153.

<sup>23</sup> None of the changes in what was Model Comment [30] is intended to be substantive. These changes make specific to California law the general statement in the Model Comment about the loss of the privilege as between jointly represented clients and make active what was a passive sentence.

<sup>24</sup> The corresponding Model Comment uses “where”, which we have changed to “with regard to a subject on which”. This purpose of the change is to be consistent that a lawyer may represent clients who are contentious with each other so long as the scope of the representation excludes the issues in contention.

188 clients have aligned interests, subject to the informed written consent requirements of  
189 paragraph (b).<sup>25</sup> [See Rule 1.2 (c) (limiting the scope of representation).]  
190

191 [19] A client who has given consent to a joint representation under paragraph  
192 (b) despite the lawyer’s potential or actual conflict may revoke the consent and, like any  
193 other client, may terminate the lawyer’s representation at any time, with or without  
194 reason. A client’s revocation of consent as to the lawyer’s representation of that client  
195 precludes the lawyer from continuing to represent the other client(s) in the matter unless  
196 all the clients in the matter then give their informed written consent or previously did so  
197 as described in Comment [32] (advance consent to future conflict).<sup>26</sup>  
198

199 **Paragraph (c): Representing a Client’s Adversary.**<sup>27</sup>  
200

201 [22] This rule applies when a lawyer represents client A in a matter adverse to  
202 B, and B proposes to retain the lawyer on another matter, even if it is not adverse to A.  
203 (If B were to seek to retain the lawyer in a matter adverse to A, then paragraph (a) would  
204 apply, not paragraph (c).) The purpose of this rule is (1) to ensure that client A’s  
205 relationship with and trust in the lawyer is not disturbed by lawyer accepting the  
206 representation of client A’s adversary, B, without A’s informed written consent; (2) to  
207 ensure B understands that lawyer will continue to owe all of his duties in the first matter  
208 solely to A, notwithstanding the lawyer’s representation of B on another matter; and (3)  
209 to apprise both clients of lawyer’s obligation to protect the confidential information of  
210 both clients.  
211

212 **Paragraph (d): Disclosure of Relationships and Interests**  
213

214 [23] Paragraph (d) requires disclosure to a current client of certain of a  
215 lawyer’s present or past relationships with other parties or witnesses, or with persons who  
216 might be affected by the resolution of the matter, and of the lawyer’s present interest in

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<sup>25</sup> SeLegue comment: The first four sentences of this comment originate in the MRs and may not be consistent with current California law. Our rules expressly allow joint representation of clients in the same matter, even if they have actual conflicts. However, *Flatt v. Superior Court* states in dicta that some conflicts may be unwaivable and identifies a “zero sum” game among the clients as one such situation. I think the language in this paragraph should be tailored around this structure, rather than the MR commentary that does not synch well with California law. We need to bear in mind that California generally accords clients more freedom to consent to representations than the MR do, provided that the clients are apprised of the relevant facts and possible adverse consequences.

<sup>26</sup> This is a major change from Model Comment [21] – is there any disagreement to this? [SeLegue comment: I am concerned about this change. If the clients have agreed that any information they transmit to lawyer is not secret from the other joint clients, then what is the basis for precluding the lawyer from continuing to represent the remaining joint clients? Perhaps the key variable is whether the lawyer’s continuing work for the remaining joint clients is adverse to the former joint client. But even then, Rule 1.9 is intended to protect confidentiality as, as noted above, there is no real confidentiality concern, is there? I realize that this line of reasoning may not reflect current law, but my question is whether this should be the correct analysis.]

<sup>27</sup> N.B. that (c) uses “adverse” rather than “directly adverse.” Is this distinction correct?

217 the subject matter of the representation.<sup>28</sup> The purpose of this disclosure is to permit the  
218 client to decide whether the client wishes to retain, or continue to employ, the lawyer in  
219 light of the relationships and interests that must be disclosed pursuant to paragraph (d).  
220 Paragraph (d) applies in litigation and in non-litigation representations.

221  
222 [24] A lawyer should not allow his or her own interests to have an adverse effect  
223 on the representation of a client. Paragraph (d)(4) requires a lawyer to make a disclosure  
224 to the client when the lawyer has an interest in the *subject matter* of the representation,<sup>29</sup>  
225 for example: 1) if the lawyer represents a client in litigation with a corporation in which  
226 the lawyer is a shareholder; 2) if the lawyer represents a landlord-client in lease  
227 negotiations with a professional organization of which the lawyer is a member; 3) if the  
228 subject of the representation suggests questions about probity of a lawyer’s own conduct;  
229 or 4) if the lawyer has discussions concerning possible employment with an opponent of  
230 the lawyer’s client or with a law firm representing the opponent. See Rule 1.8 for specific  
231 Rules pertaining to a number of personal interest conflicts, including business  
232 transactions with clients.

233  
234 [25] Paragraph (d) applies only to a lawyer’s own relationships and interests,  
235 unless the lawyer knows that a partner or associate in the same firm as the lawyer has or  
236 had a relationship with another party or witness or has or had an interest in the subject  
237 matter of the representation.<sup>30</sup> [See also Rule 1.10 (personal interest conflicts under Rule  
238 1.7 ordinarily are not imputed to other lawyers in a law firm).]

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240 [26] Paragraph (d) does not apply to the relationship of a lawyer to another  
241 person’s lawyer. See [Rule 1.8. \_\_\_].<sup>31</sup>

242  
243 [27] Paragraph (d) does not require the disclosure to a former client.  
244 Disclosure to, and consent of, former clients is governed by Rule 1.9.<sup>32</sup>

245  
246 [28] Paragraph (a) governs in place of paragraph (d)(1) or (3) whenever a  
247 representation is directly adverse to another current client of the lawyer. See Comment  
248 [9].<sup>33</sup>

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<sup>28</sup> This is from the fifth paragraph of the Discussion to CRPC 3-310, but deleted the comment relating to 1.7(d) and 1.9 being “complementary” as it’s not clear what that means. The remaining text is more specific and, thus, more helpful in our view.

<sup>29</sup> The first two examples are those given in the 1991 submission to the Supreme Court as the explanation of current (B)(4) (at p.15), but the “subject matter” concept remains fuzzy to us. In that state, we have included within this (d)(4) Comment two examples from the Model Comment. The last of these overlaps *Stanley v. Richmond*, a case that was decided before the existence of the current (B)(4) but which seems to come within it because of the references in the opinion to the lawyer’s personal interests.

<sup>30</sup> This sentence is based on the sixth paragraph of the Discussion to current 3-310. Note that the “partner or associate” language appears to exclude lawyers who are of counsel to the firm. *Q*: does the Commission want to continue this distinction?

<sup>31</sup> This sentence is based on the third paragraph of the Discussion to current 3-310, but collapsed into a single sentence and with “person” instead of “party.”

<sup>32</sup> This sentence is based on the fourth paragraph of the Discussion to current 3-310, but collapsed into a single sentence.

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## Prohibited Representations

[29] The question of whether a lawyer properly may seek informed written consent to accept or continue a representation despite a potential or actual conflict of interest requires the lawyer to determine in the first instance whether he or she will be able to fulfill all duties owed to each affected client and former client. For example, the lawyer may not seek the informed written consent of a client or former client if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to fulfill all applicable duties.<sup>34</sup> The lawyer also must consider if each affected client is capable of giving consent when that is required under this Rule<sup>35</sup> and if consent is prohibited by any other law or regulation.<sup>36</sup> While Rule 1.7(b)(2) permits representation of multiple clients in a matter despite an actual conflict among them concerning that matter, the courts have identified some joint representations that a lawyer may not undertake even with client consent. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal. Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal. Rptr. 592].)<sup>37</sup>

## Disclosure and Informed Written Consent

[30] Informed consent requires the lawyer to disclose to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client or former client.<sup>38</sup> [See Rule 1.0(e) (informed written

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<sup>33</sup> Proposed 1.7(d)(1) and (3), like current Rule 3-310(B)(1) and (3), cover situations in which a lawyer has a professional relationship with another person who is a party or witness in a matter or who would be substantially affected by the resolution of the matter. The reference to a professional relationship, whatever else it might mean, is broad enough to include a second current client of the lawyer. In these situations, the lawyer's only duty is to make a disclosure to the first client unless, according to the fourth paragraph of the current Discussion, Rule 3-310(E) requires more. In other words, our current Discussion recognizes only the confidentiality duty to the second client. This is inconsistent with the *Hernandez* decision, which recognizes a loyalty issue based on the *Flatt*. There is a question as to how broadly to read the *Hernandez* decision, but under its facts it at least means that a lawyer violates the duty of undivided loyalty by cross-examining a current client when "... the bulk of counsel's argument was devoted to destroying her own client's professional reputation." We recommend treating only as a gap in the current Discussion what might instead be seen as a gap in the Rule, and we do this by adding this single sentence. The suggested jump cite in the new sentence is to pages that include the language just quoted.

<sup>34</sup> [See discussion regarding paragraph [5a]

<sup>35</sup> Although stated here without citation, this is intended to deal with the client who lacks the capacity to understand and evaluate, as discussed in L.A. Opn. 471.

<sup>36</sup> This change is an edited version of Model Comment [15]. We have removed its reference to diligence on the assumption that will be covered by Rule 1.1.

<sup>37</sup> The last sentence of this Comment in substance is the tenth paragraph of the Discussion to CRPC 3-310. Sean would add parentheses to the cases to assist readers in issue-spotting; Kurt thinks the cases are too complicated. Bob is open to the idea. The co-drafters will address this in the next draft.

<sup>38</sup> There are two separate changes here from Model Comment [18]. First, this sentence in the Model version is passive, suggesting that the source of the client's knowledge is irrelevant for disciplinary purposes. The redrafting is intended to mean that the lawyer has an affirmative obligation for disciplinary purposes to make the required "disclosure" and that other pertinent information the client has from other sources would be relevant for civil purposes, if at all. Second, we have altered the disclosure language to

273 consent).] The information required depends on the nature of the potential or actual  
274 conflict and the nature of the risks involved for the client or potential client. When  
275 undertaking the representation of multiple clients in a single matter, the information  
276 must include the implications of the joint representation, including possible effects on  
277 loyalty, confidentiality and the attorney-client privilege, and the advantages and risks  
278 involved. See Comment [16 (effect of joint representation on confidentiality and  
279 privilege).

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281 [31] A disclosure and an informed written consent are sufficient for purposes  
282 of this Rule only for so long as the material facts and circumstances remain unchanged.  
283 With any material change, the lawyer may not continue the representation without  
284 making a new disclosure and, under paragraphs (a), (b) and (c), obtaining the informed  
285 written consent of each affected client. As was true before seeking the original consent,  
286 the lawyer must consider if it is proper to request client consent in the current situation,  
287 and whether the affected clients can provide that consent. See Comment [29] (prohibited  
288 representations).<sup>39</sup>

### 289 290 **Consent to Future Conflict**

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292 [32] Lawyers ordinarily may ask clients to give advance consent to conflicts  
293 that might arise in the future, but whether a client’s advance consent is “informed” is a  
294 fact-specific inquiry.<sup>40</sup> Whether an advance consent is “informed” will depend on the  
295 factors discussed in Comment [30](informed written consent) and on such things as the  
296 following: 1) the comprehensiveness of the explanation of the types of future conflicts  
297 that might arise and of the reasonably foreseeable adverse consequences to the client; 2)  
298 the client’s familiarity with the types of conflicts; 3) the narrowness and specificity or the  
299 generality and open-endedness of the consent; 4) the degree of client’s experience as a  
300 user of the type of legal services involved; 5) whether the client is independently  
301 represented by other counsel in giving consent; 6) whether the consent is limited to future  
302 conflicts unrelated to the subject of the representation[; and 7) whether the lawyer  
303 institutes and adheres to a screening system that complies with Rule \_\_\_\_]. In any case,  
304 advance consent cannot be effective in the circumstances described in Comment [29]  
305 (prohibited representations).<sup>41</sup>

### 306 307 **Representation of a Class**<sup>42</sup>

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conform to CRPC 3-310(A)(1). We recommend that the Model language be considered, particularly its use of “material,” which we have omitted.

<sup>39</sup> The Model Comments do not address the possibility that there will be change in circumstances after the affected clients’ original consent. The Restatement picks it up in §122 Comment *d*. It seems to us not just to be important, but to be necessary given our distinction between potential and actual conflicts, which is one example of a change in circumstances that requires new client consent.

<sup>40</sup> The second independent clause is lifted from State Bar Opn. 1989-115 and supplies the topic sentence that is missing from Model Comment [22].

<sup>41</sup> Sean needs to review the law in this area and has not assessed this paragraph for content.

<sup>42</sup> Although there are correct statements in Model Comments [23] and [24], we believe they are covered elsewhere either expressly or by implication, and that therefore there is no need to further extend the length of these Comments by including them here even in a modified form. We have preserved from this section

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309 [33] This Rule applies to a lawyer's representation of named class  
310 representatives. A lawyer who represents a class of plaintiffs or defendants in a class  
311 action does not, by virtue of that representation, represent unnamed members of the class  
312 for purposes of this Rule. A lawyer representing a class may owe civil duties to unnamed  
313 class members, and this Comment is not intended to alter those civil duties in any respect.

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### 315 **Organizational Clients**

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317 [34]<sup>43</sup> A lawyer who represents an organization does not, by virtue of that  
318 representation, represent any constituent of the organization. See Rule 1.13(a). The  
319 lawyer for an organization also does not, by virtue of that representation, represent any  
320 affiliated organization, such as a subsidiary or organization under common ownership.  
321 The lawyer nevertheless could be barred under case law from accepting a representation  
322 adverse to a constituent or an affiliate of an organizational client, even in a matter  
323 unrelated to the lawyer's representation of the client, if the client reasonably believes the  
324 lawyer will not accept any representation adverse to the client's constituents or  
325 affiliates,<sup>44</sup> or the lawyer's obligations either to the organizational client or the new client  
326 would create a potential or actual conflict of interest under this Rule.

327

328 [35] A lawyer for a corporation who also is a member of its board of directors  
329 (or a lawyer for another type of organization who also is a member of its governing body)  
330 should determine whether it is reasonably foreseeable that the responsibilities of the two  
331 roles might conflict,<sup>45</sup> for example, because, as its lawyer, he or she might be called on to  
332 advise the corporation on matters involving actions of the directors. The lawyer should  
333 consider such things as the frequency with which these situations might arise, the  
334 potential materiality of the conflict to the lawyer's performance of his or her duties as a  
335 lawyer,<sup>46</sup> and the possibility of the corporation obtaining legal advice from another

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only Model Comment [25] in edited form and have changed the heading from "Conflicts in Litigation" to "Representation of a Class" to reflect the current narrow content of this section.

<sup>43</sup> This Comment appears to mix disqualification and discipline. Should it be removed or strictly limited to discipline?

<sup>44</sup> We have removed the Model Comment [34] reference to an "understanding" between lawyer and client because that puts the lawyer's perception on a par with the client's. This is inconsistent with California law, which affirmatively obligates the lawyer to avoid any misunderstanding as to the formation, scope and termination of a lawyer-client relationship and as to the terms of any agreement between lawyer and client. Because the burden is on the lawyer, the lawyer must suffer from any reasonable understanding he or she has allowed to exist. [SeLegue comment: in its current form, the comment adopts the ABA view on parent/sub 4onflicts. There is a split of authority on this issue in California (*Morrison-Knudsen and Brooklyn Navy Yard*). I think this is an issue the Commission needs to address]

<sup>45</sup> Model Comment [35] words this as "may conflict." We have eliminated the "may" because it is intended to mean "might" or "could" rather than "is permitted to." We also have added the "foreseeable" standard because it is not the theoretical possibility of an actual conflict that creates a potential conflict. This change is consistent with proposed Comment [14].

<sup>46</sup> We have removed the "intensity of the conflict" language of the Model Comment because of its inherent vagueness and under the idea that the individual's duties as a lawyer are paramount and therefore should not be comprised by whatever inconvenience there might be to the corporation if the lawyer does not serve as a director. If the director role is more important to the corporation, then the lawyer should determine if the other listed factors dictate that the lawyer should not serve as the corporation's legal counsel.

336 lawyer in these situations. If there is material risk that the dual role will compromise the  
337 lawyer's ability to perform any of his or her duties to the client, the lawyer should not  
338 serve as a director or should cease to act as the corporation's lawyer when a conflict of  
339 interest arises. The lawyer should advise the other members of the board whenever  
340 matters discussed at board meetings while the lawyer is present in the capacity of director  
341 might not be protected by the attorney-client privilege, and that conflict of interest  
342 considerations might require the lawyer to withdraw as a director or might require the  
343 lawyer and the lawyer's firm to decline representation of the corporation in a matter.  
344 [See Rule 5.7.]<sup>47</sup>

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### 346 **Lawyer Acting in Dual Roles**

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348 [21] A lawyer might owe fiduciary duties in capacities besides that of lawyer that  
349 could conflict with the duties the lawyer owes to clients or former clients, such as  
350 fiduciary duties arising from a lawyer's service as a trustee, executor or corporate  
351 director. [See Rule 5.7] It is possible for a lawyer to have a conflict by representing a  
352 client who acts in more than one capacity. See *Borisoff v. Taylor & Faust* (2004) 33  
353 Cal.4th 523, 533-35 [lawyer represented fiduciary in personal and fiduciary capacities].  
354 When a conflict can arise between duties owed to a single person, this Rule does not  
355 permit consent by that person; to avoid the potential conflict, the lawyer should limit the  
356 representation to the client's interests and activities in a single capacity.<sup>48</sup>

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<sup>47</sup> Sean would omit this paragraph because it is a practice pointer and not appropriate for inclusion in commentary to disciplinary rules.

<sup>48</sup> Sean comment: are we sure we want to prohibit consent completely, even if informed and even if persons affected by the conflict, other than the client, give consent?

## RLK Alternative Comment [6] to Rule 1.7

[6] To determine whether a conflict of interest exists, a lawyer should<sup>1</sup> adopt reasonable conflicts-checking procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons<sup>2</sup> involved. See also Rules 5.1 and 5.2<sup>3</sup>. Ignorance caused by a failure to institute or use reasonable conflicts-checking procedures will not excuse a lawyer's violation of this Rule. [As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.]<sup>4</sup>

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<sup>1</sup> The Model Comment's use of "should" is troubling. Rule 5.1(a) would require certain individual lawyers to ensure that a conflicts-checking system is in place in the law firm, and Rules 5.1(b) and 5.2 would require that the system be followed. Q: would this sentence be better stated as – "Rule 5.1(a) requires lawyers to adopt reasonable conflicts-checking procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved., and Rules 5.1(b) and 5.2(a) require lawyers to utilize that system." ?

<sup>2</sup>The identification of "issues" might sometimes be significant, *e.g.*, in cross-examining a current client. But I believe that the generalized reference to "issues" as part of a conflicts checking system is more likely to be misleading than to help because conflicts generally are client specific and are not based on interests or issues.

<sup>3</sup> I have added the reference to Rule 5.2 because I would expand the Comment so it discusses both the institution and the use of an appropriate conflicts-checking system. I eliminated the reference to the Comment to Rule 5.1 under the theory that a reference to a Rule includes its Comments, and that we therefore should not cross-reference the Comments unless there is a particular Comment paragraph that is pertinent.

<sup>4</sup> This bracketed because we don't yet know if we will recommend a general diligence Rule or if we will have a Scope section.

-----Original Message-----

From: smelchior@sbcglobal.net [mailto:smelchior@sbcglobal.net]

Sent: Mon 1/16/2006 9:59 PM

To: rlkehr@ksellp.com; Sean SeLegue

Cc: kmelchior@nossaman.com

Subject: Latest 1.7 Draft

Working from home again: this draft is quite good. Thank you for incorporating so many of my observations. I have only a few comments at this late hour.

1. In the definition of “written,” if “written” includes “electronic,” which reference to Ev. C. 250 would do, there are several potential issues, by no means all of which I am competent to discuss. Two which come to mind are the question of authenticity of an electronic signature, which in fact may be provided by any third party, and the issue of preservation (which is of course at the forefront of much thinking these days, with Zubulake and all that).

2. In comment 3, line 2, I believe that the correct usage is “whether,” not “if.” A quibble.

3. Comment 11 is quite good, but doesn’t it override the Buehler comment at fn 18? Maybe I just didn’t read far enough the other evening: if so, I apologize.

4. I like comment 13. In the current comment, don’t we have a reference to one of the Oregon cases which develop this subject much further than anything I know of in California, and which caution that where the sides have a common interest but are not “equal,” problems can develop?

5. I agree with Sean’s comment (fn. 23). There is quite a bit of CA law, such as Tracinda, dealing with this subject. At the same time I feel that this topic, in particular, presents so many potential variables that I hesitate, either to put it into Rule or even Comment form or to fancy that we can close these “open ended” loops, or should try to do so.

6. Comment 17 bites off a large subject, but misses the point that without such waivers, the lawyer cannot continue. I would therefore add to the Comment the following: “In either case, if such waiver is not obtained, the lawyer must withdraw from the engagement.”

7. I also think that as long as we propose to provide such an encyclopedic review of the options facing lawyers and their clients, we should definitely mention the possibility of Zador waivers. That probably requires a separate comment so as not to make the existing comments too long and complicated. I don’t have the case text here but would go to it for a better statement of the solution than I could make up out of my head.

8. This is my major comment to this draft: I believe that Comment 19 would give

the dissenting client(s) too much power. Other clients will have made their commitments to a joint engagement in consideration of the mutual agreement of them all. To recognize the right to withdraw such consent would give dissenters too great a power over the common undertaking. They could break it up at very inconvenient times and use that power to have their way unreasonably. Let them withdraw from the joint engagement if they will; but let's not void the entire common undertaking. What I have done in such situations – for instance, I once represented a large number of members of a voting trust which was the key to control of a significant enterprise, and which some others sought to have voided by the court – is to have all clients consent that some formula (majority vote, etc.) would govern their decision making but that anyone who was dissatisfied could opt out and go their own way. I find that this works very well and don't recall anyone ever dropping out.

9. I also disagree with giving the client veto power over the representation of interests adverse to some component of the corporate structure (Comment 34). The Brooklyn Navy Yard case draws a clear line between parent and sub, and its logic seems unassailable to me, even if it is unrealistic in terms of major corporate structures. I deal with this issue often. Clients' beliefs in this area are convenience driven rather than real: my practice is to caution lawyers who have such a problem that they may risk bad feelings and adverse reactions from existing clients if they take an engagement against such client's parent or sub; but that is a business and not a legal consideration in my view. I think that Morrison-Knudsen and a couple of cases which follow it reflect special situations. In short, I agree with Sean that this subject needs discussion by the Commission.

10. Finally (since this concerns the very last words in the draft), this business about the consent of a disinterested decision maker is absolutely right in theory and in the general run of situations; but it does not fit any number of spats in closely held contexts. To my knowledge, *Forrest v. Baeza* comes closest to trying to deal with this problem; but as a realistic matter, if all the parties involved have taken sides, why should not the lawyer who represents the currently controlling parties be able also to represent the enterprise, which is likely to be the football and not one of the players? Occasionally, the enterprise may have a position of its own in the matter, but usually that "separate" situation is more tactical on the part of one side or the other than real. There may be good reasons, among others from the perspective of D&O coverage assuming the insured vs. insured exclusion is not on the table which it usually would be, to have different counsel represent the enterprise and those who control it; but in my view that decision should be left to the players and there is no need to control it through the Rules.

Thank you. Kurt.