

MEMORANDUM

To: Rules Revision Commission

From: Sean SeLegue

Date: May 12, 2005

Re: Rule 3-310

Please find the results of the collaboration by Bob Kehr, Kurt Melchior and me concerning proposed rules 1.7, 1.8 and 1.9. This draft reflects our attempt to place the current substantive content of California Rule 3-310 into the ABA rule format. We have included detailed drafters' notes in the document itself, and I won't elaborate further here on most points addressed in the footnotes.

Please note that due to the size of this task, we began by looking only at the black letter rules. We have not yet considered commentary. In addition, we did not attempt to address topics not covered by Rule 3-310, such as conflicts arising from a lawyer's fiduciary duty arising from activities other than the practice of law (*e.g.*, the *Raley* case which involved conflicts arising from a lawyer's service as corporate director). We are not intending to rule addressing such additional topics in the rules but just haven't gotten there yet. We welcome input on this point at the meeting as well on all the other issues presented by this draft.

Proposed California Rules 1.7, 1.8, 1.9
Using content of CRPC 3-310 as Starting Point

5/12/05

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) **No adversity 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 directly¹ adverse in that matter to another client the lawyer currently represents, without informed written consent from each client.²

(b) [reserved]³

(c) **Joint representation of multiple clients in one matter.** A lawyer shall not, without the informed written consent of each client:⁴

¹ Bob and Kurt favor deleting "directly" from the ABA draft. They believe the party adversity issue can be addressed in commentary. Also, Bob and Kurt note that the ABA rules do not consistently refer to "directly adverse" but in other places simply refer to "adverse." Kurt thinks the concept of "direct" adversity is a moving target under case law and should be left to further development under case law. Sean thinks that it is useful to include the word "direct" in the black letter to emphasize the significance of the party adversity concept and to avoid unnecessary divergence from the ABA rule. He thinks the Commission needs to provide guidance and clarity about the meaning of adversity. He also thinks other rules could be conformed to add the word "directly."

² Proposed 1.7(a) picks up the specific prohibition in MR 1.7(a)(1) and *Flatt* on direct adversity to a current client. There is presently no CRPC on point. Proposed 1.7(a) omits the more general, conceptual prohibition on conflicts found in MR 1.7(a)(2) pursuant to the approach of starting with CRPC 3-310's substance. The drafters have altered MR 1.7(a)'s language to make it more precise in specifying that adversity in the matter is what is prohibited. This drafting approach is consistent with current CRPC 3-310's inclusion the concept of a "matter" in the conflicts rules for analytical clarity. Bob and Kurt believe that consent from each client is necessary. Sean is not convinced that we should alter California law in this fashion; presently, if a current client agrees that its lawyer may accept a matter adverse to that client, the new client receives a written disclosure under Rule 3-310(B)(1). However, the result Bob and Kurt advocate seems to be consistent with the ABA Rules.

³ ABA 1.7(b) omitted in favor of including the requirement of written consent in (a). For clarity in comparing the new California rules to those of other states, the drafters suggest "reserving" the designation 1.7(b)

(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.(d) **Representing a client's adversary.** A lawyer shall not, while representing a client in a first matter, accept in a second matter the representation of a person or organization who is adverse to the lawyer's current client in the first matter, without the informed written consent of each client.⁵

(e) **Disclosure of relationships and interests.** A lawyer shall not accept or continue representation of a client without providing written disclosure to the client where:⁶

(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:

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

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

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

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

(f) **Definitions of "disclosure" and "informed written consent."** For purposes of this rule and Rules 1.8 and 1.9:⁷

⁴ Proposed 1.7(c) picks up verbatim the language found in present CRPC 3-310(C)(1) and (2), with three changes. First, the drafters added a title. Second, the drafters added "or continue" to proposed 1.7(c)(1) because the drafters see no reason why a lawyer should not obtain consent to continued joint representation when a potential conflict arises during the matter rather than at the outset. Third, the drafters changed "member" to "lawyer."

⁵ Proposed 1.7(d) restates the substance of current CRPC 3-310(C)(3). The drafters rewrote (C)(3) to try to increase clarity due to repeated problems in interpreting this rule. Also, the drafters changed the current rule's reference to "entity" to "organization" to conform with CRPC 3-600.

⁶ Proposed 1.7(e) is CRPC 3-310(B) verbatim, except that "member" has been changed to "lawyer."

⁷ Proposed 1.7(e) contains the substance of CRPC 3-310(A). Placing the definitions here is not ideal because they will need to be applied to 1.8 and 1.9 as well. The drafters see three

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

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

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

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) [this subsection analogous to CRPC 3-300]⁸

(b) [this subsection relates to using confidential information to the disadvantage of a client. Seandrafters recommends including this language, if at all, in Rule 1.6 or perhaps in Rule 1.7. Bob disagrees. This will be discussed at the meeting].

(c) [this subsection about testamentary gifts not analogous to CRPC 3-310]

(d) [this subsection contains an absolute prohibition on obtaining literary or media rights, contrary to present California Supreme Court authority. While the drafters feel the Commission should, when appropriate, recommend a rule that constitutes a change in current law established by case (with full disclosure of that fact, of course), the drafters do not recommend that course in this instance.]

(e) [this section concerning financial assistance to a client not analogous to CRPC 3-310]

(f) **Accepting compensation from someone other than the client.** A lawyer shall not accept compensation for representing a client from one other than the client unless:⁹

ways of dealing with defining these terms. As in the current draft, the terms can be defined here in 1.7 and then 1.8 and 1.9 can refer expressly back to 1.7(c). Alternatively, the terms could be defined in a separate rule (*e.g.*, 1.7.1) or in a more general rule containing definitions that carry through all of the rules, not just 1.7, 1.8 and 1.9. Finally, Bob Kehr has an idea for putting the definitions at the beginning of Rule 1.7. He will circulate a memorandum on this.

⁸ The drafters seek guidance about whether to break down ABA 1.8 into smaller pieces by using the 1.8.1, 1.8.2, etc. numbering convention. The potential benefit of this would be to allow for easy identification of potentially applicable rules that otherwise might prove more difficult to locate if hidden under a general title of the sort used in M.R. 1.8. By giving descriptive titles to 1.8.1, 1.8.2 and so on, each would including in the table of contents.

(1) the client gives informed written consent, provided that no disclosure or consent is required if:¹⁰

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

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

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;¹¹ and

(3) information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e).¹²

(g) Advising on an aggregate settlement or plea. A lawyer who represents two or more clients shall not advise or advocate on behalf of any of those clients concerning an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.¹³ [The lawyer's

⁹ Identical language from CRPC 3-310(F) and MR 1.8(f). The three subparts of the rule (*i.e.*, subsections (1) to (3)), are addressed in a different order in the CRPC and the MR. The drafters chose the MR order to avoid unnecessary differences with other state and to make it easier to compare the California rule to the rules of other states. The drafters also added a title.

¹⁰ The first part of proposed 1.7(f)(1), up to the word “provided,” is identical to the ABA MR, except that the drafters have required written consent pursuant to current the current CRPC. The language beginning with “provided,” including subsections (A) and (B), is not in ABA MR 1.7(a). This language is drawn verbatim from CRPC 3-310(F).

¹¹ Existing ABA and CRPC language is identical, except for CRPC’s use of “member” rather than “lawyer.”

¹² This language identical to existing CRPC. ABA language is substantially identical, except that the ABA rule refers to Model Rule 1.6 as the source of the duty of confidentiality rather than our section 6068(e).

¹³ The CRPC is, with minor stylistic differences, similar to the ABA rule up to the point of this footnote. Since the differences are stylistic, the drafters began with the ABA version and added a title. The drafters propose one key substantive change in which the verb “participate” in the ABA rule will be replaced with “advise or advocate” in describing the lawyer’s conduct that this rule regulates. The reason for this change is that the rule does not seek to regulate lawyers as participants in settlements – *i.e.*, as parties to a settlement. Rather, the rule regulates advice and advocacy concerning settlement. (CRPC 3-310(D) refers to the lawyer “entering” into a settlement, which seems equally if not more incorrect than the ABA’s regulation of lawyers “participating” in aggregate settlements.) A second substantive issue is how to handle additional language the ABA includes concerning criminal matters. We have included this additional language in its original form in the interests of avoiding unnecessary difference with the ABA rules. However, the drafters believe that if

disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.]¹⁴

(h) **[this subsection relating to release of lawyer’s liability not analogous to 3-310]**

(i) **[this subsection relates to proprietary interests in litigation and is not analogous to 3-310, except perhaps as it presents a 3-310(B)(4) issue relating to disclosure of interest in the subject matter of the representation]**

(j) **[this subsection relating to sex with clients not analogous to 3-310]**

(k) **[drafting on this subsection deferred until Commission addresses the question of imputation]** While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENTS¹⁵

(a) A lawyer shall not, without the informed written consent of the client or former client, accept employment adverse to a former client in the same or a substantially related matter to that on which the lawyer formerly represented the former client.¹⁶

the language is retained, then it should probably be split off into another sentence because the first sentence of proposed 1.8(g) is now too long and unwieldy.

¹⁴ The bracketed language comes from the ABA rule and is absent from CRPC 3-310(D). The drafters recommend against including this language in the California rule. The ABA language is vague and underinclusive. In addition, the language may require unnecessary and repetitive disclosures in situations in which a lawyer has already provided a detailed analysis of the matter to the clients. The general topic covered in the bracketed language should be addressed in commentary, not in the black letter rule. **[Note: Kurt has some policy concerns about 1.8(g) and will convey them to the Commission by separate memo or e-mail]**

¹⁵ The ABA rule is titled “Duties to Former Clients.” The drafters changed the title to track the title of ABA Rule 1.7. In addition, “duties to former clients” is misleading because this rule does not, for instance, address the duty of confidentiality found in ABA MR 1.6 and Bus. & Prof. Code § 6068(e).

¹⁶ Proposed Rule 1.9(a) is an amalgam of MR 1.9(a) and CRPC 3-310(E). The drafters omitted Rule 3-310(E)’s reference to current clients as that prohibition is unneeded if proposed Rule 1.7(a) is adopted. The drafters omitted the qualifier “materially” before the word “adverse” in the ABA version. The drafters view that change as non-substantive and this should be noted in commentary. The drafters have used the ABA standard of

(b), (c): [These subsections relate to imputation. The Commission has not yet discussed whether and how to address imputation in the California rules. Without implying a position on this one way or another, the drafters have omitted these subsections until the Commission charts its course on the question of imputation]

“substantial relationship” rather than 3-310(E)’s focus on actual possession of material confidential information. The drafters seek input on this decision. The drafters’ reasoning is that a lawyer should not be insulated from discipline for taking on a matter from which the lawyer would be disqualified. In other words, the drafters see no basis for a divergence in application of the former client conflicts rule in the context of disqualification versus discipline. *See* COPRAC 1998-152 (lawyer cannot be disciplined based on imputed conflict but “should not” take on matter in which lawyer is subject to disqualification). **[check]** CRPC 3-310(E)’s focus on actual possession of confidential information is appropriate to a civil action for breach of fiduciary duty, because if the lawyer did not actually possess and divulge or use confidential information, then the lawyer’s work adverse to a former client would cause no actual harm. Since causation and damage are not elements of disciplinary offenses, the ABA approach is more appropriate for the disciplinary rule. The drafters recommend that commentary explain the choice to use the substantial relationship standard and the reasoning for changing the California rule to use the substantial relationship test for disciplinary purposes.

MEMORANDUM

TO ROBERT KEHR

Re Rules 1.7, 1.8, 1.9

Comments on your 4/18/05 Draft

(Written with only the new materials on hand: no RPC, no Model Rules (I am only responding to the material provided: no attempt at original thought or creation))

Para. (a): I would change the title to “Adversity to Current Client Prohibited Unless Waiver Obtained” or similar language, so that people will understand this is not a statement but a prohibition.

The language seems wordy and complex, also very awkward in places (e.g., “the client against whom the lawyer proposes to act adversely”), without any reason to have it so.

“Matter” and “work” appear to be used coextensively here. Any way of avoiding that confusing surplusage?

I’m not sure what is meant by “directly” adverse”: The boundaries of what is adverse are always moving, as in the Morrison-Knudsen case or the GATX case. A court might think that we are trying to change that situation and to create a precise, static rule. I would not want to go in that direction.

The present language which features the fact that informed written consent vitiates any conflict should be put up front. Also, both parties need to provide consent, not just the first client. The second client is as much affected by the lawyer’s possible divided loyalties as the first one.

Other differences with 1.7 (see KEM comparison chart, p. 1: Our rule (Box 1, p.1) is simply easier to read and apply. Also, the “significant risk” language of the MR is inherently ambiguous. A conflict is a conflict is a conflict – though I spend a fair amount of my time trying to determine whether one exists, or whether it can be avoided or distinguished away. Let’s not go into this woolly pasture!

And we’re not tinkering with what is now 3-310(B) for now. Right?

I’m glad we’re not going into the “reasonably believes” area. Kudos!

Ditto concerning the academic discussions in the many MR Comments we have not proposed. I do think that in due course we may want to tackle the issue of a duty to withdraw, which is again complex and can become very awkward. (When we do, I think we should make a specific reference to *Zador*, which postdates adoption of the present RPC and is one of the handiest

practice tools there are. (Failure at least to refer to it might lead some courts to believe that we meant to change the rule so as to eliminate the *Zador* option.)

Para. (c): For consistency and for the same reason stated under (a), I suggest a more revealing title, such as “Representation of multiple clients with [potential or actual] conflicts prohibited unless conflict is waived.” A lot of words, however!

Para. (g): I’ve always thought that the practical circumstances of a joint representation (which presumably has previously been undertaken with the requisite informed written consent) really often **require** a joint or common set of negotiations for disposition of the matter. Opposing parties will not, for instance, settle an automobile accident case (to pick a simple situation) in part: they need the entire case settled. The widow and the children may fight between themselves about the amount of the settlement and its allocation; but having them separately represented simply provokes controversy and makes the case very difficult to settle. Nor is it very effective for the plaintiff’s lawyer to be prevented from arguing the respective merits of all plaintiffs’ damages separately as well as in toto. This is not my line of work; but I think we should recognize and discuss this as a policy issue.

Class actions can be certified despite a need for individual proof of damages, though that is difficult. In such a case, the lawyer must follow one of two (or more) paths: she can try to collect damages according to a uniform formula or maybe a few variations, or she must try to prove individual damages. In employment class actions, it is often possible to find the common denominator which makes out the violation, but different employees are quantitatively impacted quite differently even by a standard formula.

In short, I think that the draft is much too restrictive. I acknowledge the point which the draft intends and do not have a handy substitute formula. Maybe we should omit this provision entirely? In any event I think we should debate it.

Cc: Sean SeLegue, Esq.
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