

From: [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#); [Lee, Mimi](#)
Cc: [Robert L. Kehr](#); [Kurt Melchior](#); [Dominique Snyder](#); [Harry Sondheim](#); [Kevin Mohr G](#)
Subject: RRC - 1.7 [3-310] - 6/4/10 Meeting Materials
Date: Tuesday, May 25, 2010 8:40:08 AM
Attachments: [RRC - 3-310 \[1-7\] - Public Comment Chart - By Commenter - XDFT2.2 \(05-24-10\)RLK-KEM.doc](#)
[RRC - 3-310 \[1-7\] - Rule - Comment \[22\] - REV1.1 \(05-24-10\) - Cf. to PCD.doc](#)

Greetings Lauren:

I've attached the following:

1. Public Comment Chart, XDraft 2.2 (5/24/10)RLK-KEM;
2. Comment [22], REV1.1 (5/24/10), redline, compared to Pub Com Draft [#2.2A] (2/28/10).

Please use the attached as the materials for this agenda item for the 6/4/10 meeting.

I have not made any changes to the Rule itself, Dashboard, Introduction or Rule & Comment Chart pending the Commission's decisions on the proposed revisions to Comment [22].

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

Kevin

Attached:

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM.doc

RRC - 3-310 [1-7] - Rule - Comment [22] - REV1.1 (05-24-10) - Cf. to PCD.doc

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

TOTAL = ___ Agree = ___
Disagree = ___
Modify = ___
NI = ___

No.	Commenter	Position ¹	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. 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 on a disqualification motion.

¹ 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 ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					and inconsistent interests (see draft Comment [29A], ² 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. 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. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.	
1	MacNaughton, Richard		No	Comment generally	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	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.

² 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 ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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 Rules.	
2	San Diego County Bar Association	M	Yes	Comments [22] and [25] [formerly numbered Comments [33] and [34] in the initial public comment	Delete Comment [34] ³ regarding class representation because it should be addressed in a separate rule on class representation. Delete fourth sentence from the end of Comment [33] ⁴ regarding advance consent	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 of the ability to address class action issues in existing rules as is 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]. The Commission reconsidered the fourth sentence from the end of Comment [33] (now numbered

³ 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.

⁴ 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 ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				draft (3/1/08)	because it does not accurately state the status of current law.	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. ⁵ Nevertheless, the

⁵ **Drafters' Note:** It is not clear what sentence SDCBA is referring to when it refers to the "fourth sentence from the end of Comment [33]. SDCBA submitted its public comment on 4/22/08. It addressed Comment [33] in the initial public comment draft (circulated w/ Batch 3 Rules in March 2008). Comment [33] provided (I've bolded the fourth sentence from the end):

[33] 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 [30] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comment [30] 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 [29] (prohibited representations). [See Rule 1.0(g) ("informed consent").]

We think that sentence is accurate. However, it's possible that SDCBA interpreted the cross-reference to Rule 1.0(g) as a sentence, making the next sentence the fourth from the end:

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						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.

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.

If possible, it appears that this sentence is even “more accurate” than the preceding sentence. I am not at all sure what SDCBA is arguing. For what it’s worth, here is the Commission’s response to San Diego’s original submission of this public comment:

The fourth sentence of currently-numbered Comment [31] describes potentially important client protection, and the Commission did not make the requested revision.

Drafters’ Recommendation: That response does not appear to accurately reflect the Commission’s view on the sentence that begins “However, even a general and open-ended ...” I would interpret SDCBA’s public comment as being directed to the sentence that begins: “An advance consent normally will *not* comply ...” and substitute the Commission’s initial response. In addition, we have recommended some clarifying changes to Comment [22].

[22] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client’s consent must be “informed” to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not 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 Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer’s disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) 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 must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and 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 factors 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 in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully 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, depending upon the extent to which the other enumerated factors set forth above are present, even a general and open-ended advance consent can be in compliance when: the consent was given by an experienced user of the type of legal services involved; and that the client was independently represented regarding the consent 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. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent.

RRC – Rule 1.7 [3-310]

Comment [22] – Rev1.1 (5/24/10) – COMPARED TO to PCD [2.2A] (2/28/10)
June 4, 2010 Meeting; Agenda Item III.J.

A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Rule 1.7 – Public Comment – File List

X-2010-417 Richard MacNaughton [1.7]	1
X-2010-425-10j SDCBA [1.7]	6
X-2010-430a Glenn Alex [1.7]	9

Hollins, Audrey

From: Richard MacNaughton [abramsrl@gmail.com]
Sent: Monday, May 03, 2010 4:02 PM
To: Hollins, Audrey
Subject: Conflict of Interest for L.A. City attorney
Attachments: 4-8-10 FBI probes David Rubin L.A. Housing Dep.pdf; 4-29-10 OurLA re Gilmore w Zwartz comment.pdf

Dear Ms. Hollis,

My question is not intended to be a personal criticism of any person who is or was L.A. City Attorney, now or in the past.

Unlike L.A. County where there is the DA 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 (see attached about David Rubin) who engage in questionable and illegal conduct. It strikes me that the City Attorney has an inherent conflict of interest. Allow me to use a current example.

Councilman LaBonge wanted to add 138 acres of wilderness to Griffith Park. He joined with Trust for Public Land (TPL) and together they gathered endorsements and donations from many well known and wealth persons. This was fine; in fact it was admirable.

Then in February 2010, the fund raising campaign, called Save Cahuenga Peak, turned into a huge fraud. The TPL web page falsely identified the Cahuenga Peak as home of the Hollywood Sign. They draped huge letters over the Hollywood Sign saying "SAVE the PEAK" and Councilman LaBonge held news conferences beneath the Hollywood Sign, and out of sight of most if not all of Cahuenga Peak, urging people around the world to donation \$12.5 Million to save the peak from development. The TPL web sign posted hundreds, perhaps thousands of comments and Tweets calling for people to save the Hollywood Sign. It was in no danger of being torn down nor of any development around it. Nonetheless TPL and Councilman LaBonge continued to promote the false idea that the Hollywood Sign was in danger.

The City Attorney, however, has provide legal advise to LaBonge and the City and to defend them when sued. The City Attorney has a serious conflict of interest in investigating and/or prosecuting his own clients. Suppose Trutanich had told LaBonge to stop the fraud and LaBonge ignored him. How could Trutanich then investigate LaBonge? That leaves the public with no one to protect their interests.

It seems to me that the structure of the City Attorneys Office conflicts with the rules on professional conduct, but the rules do not address this conflict. The 4-8-10 article on the FBI's investigation of David Rubin may reflect the inherent conflict with the City Attorneys Office in that it took the FBI to investigate corrupt behavior right under the city Attorney's nose. The problems with CRA/LA, which is part of the City, are also significant, see. OUR LA on-line article on Gilmore and CRA/LA.

I do not expect you to deal with any specifics of any case. I mention these examples to highlight the type of conflict that seems to be inherent in the City Atty Office. If my observation is correct, it seems that the state bar should have some comment in the new rules.

Richard MacNaughton

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FBI probes L.A. Housing Department's actions in apartment project for homeless seniors

April 8, 2010 | 2:29 pm

The FBI is investigating an affordable-housing deal in which Los Angeles officials channeled \$26 million to a developer who they knew was under criminal investigation for alleged misuse of public funds, city officials said Thursday.

The developer, David Rubin, was indicted last fall in New York for alleged bid-rigging and fraud, charges unconnected to the L.A. project.

The \$26 million went toward construction of a 92-unit apartment building near downtown L.A. for disabled homeless seniors. It has sat empty since October while its prospective tenants live in shelters or substandard housing.

The city's Housing Authority, concerned about irregularities in the deal, has refused to release money that would pay the tenants' rent. Without that rental income, the developer could be forced into default. In turn, the city could be on the hook for millions of state and federal dollars that it helped arrange for the developer, City Controller Wendy Greuel said in an interview Thursday.

The controversial deal came to light in an audit released by Greuel's office. FBI agents have requested notes and documents gathered during the audit, the controller's office said.

The agency involved in the deal is the Housing Department, which oversees compliance with rent control laws and aids construction of privately run, affordable apartments. The Housing Authority, a separate agency, manages federal Section 8 rental vouchers and city-owned housing projects.

The audit found that in 2008, Housing Department officials "blatantly disregarded information that ... one of the partners was under federal investigation."

Officials "then chose not to share this information with the city attorney or other stakeholders," Greuel said in a letter to Mayor Antonio Villaraigosa and other city leaders.

The audit does not accuse any city officials of criminal behavior, or allege that the \$26 million was misspent.

Doug Guthrie, the newly appointed head of the Housing Department, said he was working to find a way to "get these people housed."

Guthrie succeeded Mercedes Marquez, who headed the agency when the deal was made.

"We are left today with a much-needed project [that] sits empty," Greuel said, calling it "a fiasco."

Officials in the housing department, she added, "appeared to act in the developer's best interest, as opposed to the best interest of the city and the taxpayers."

Rubin could not be reached for comment. His attorney, Donald Etra, was not immediately available.

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Marc Gelman, chief executive of Enhanced Affordable, said the company had done nothing wrong, adding that it has severed ties with Rubin. Gelman blamed squabbling city agencies for keeping homeless seniors from moving in to the new building, and said he might sue the city for not releasing the rent money.

"I have an empty building that every day costs money to operate, pay the debt ... a minimum of a few thousand dollars a day," Gelman said. "And these poor homeless people, we have them coming to our office, our building, on a daily basis."

Added Rudolf Montiel, the head of the Housing Authority: "It is reprehensible that public officials would aid and abet in the misuse of federal dollars. ... Unfortunately, the tenants are the ones who are bearing the brunt of the misdeeds of this developer."

— Jessica Garrison at Los Angeles City Hall

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Developer Tom Gilmore Owes City \$5.3 Million on Old Loan and Now Wants \$4 Million More

Written by Jerry Sullivan, Garment & Citizen
Thursday, 29 April 2010 16:42

Developer Tom Gilmore is seeking another loan from the city under a plan to refinance an estimated \$35 million in debt with the Federal Housing Administration (FHA) -- a deal that appears to be necessary in order to make ends meet for his firm's residential and commercial properties in the Old Bank District of Downtown.



Gilmore serves as chief executive officer as well as a partner in Gilmore Associates, a pioneer of Downtown's recent trend of residential development. Gilmore Associates owns several apartment buildings with ground-floor commercial space in the Old Bank District, a neighborhood centered at 4th and Main streets. The firm also counts various nearby properties in its portfolio.

Gilmore Associates is counting on a short-term loan of \$4 million from the city's Community Development Department to complete the deal to refinance its \$35 million debt load. The short-term loan meet FHA requirements that Gilmore Associates pay off "unrecorded debt incurred to make significant capital improvements, according to city officials.

Unrecorded debt is a term used to describe borrowings made without the sort of documentation standards typically mortgages or other deals secured by property or other collateral. City officials said that a payoff on the unrecorded debt on Old Bank District properties would clear up Gilmore Associates' financial picture in advance of the refinancing proposal to the FHA, an entity of the federal government.

City officials have not disclosed the identities of any individuals or entities in line for a payoff of unrecorded debt by under the plan.

Gilmore did not return calls seeking comment on the plan.

The costs of servicing the unrecorded debt along with payments on various other borrowings have apparently left Gilmore Associates in a financial jam.

The refinancing plan, meanwhile, is could rely in part on how FHA officials perceive the viability of renovations of some of Gilmore Associates' properties to commercial uses such as shops, restaurants and art galleries. Those planned renovations are believed to be the "significant capital improvements" for which the developer took on the unrecorded debt.

Any hopes tied to basement commercial space could run into difficulty based on the current state of marketplace in general and Gilmore Associates' properties in particular. Ground-floor space is generally considered to be a premium for retailers and many other commercial tenants. Basement space is typically viewed as less valuable to tenants due to its distance from street level and other factors. The market for commercial space is feeling the effects of the economic downturn of Downtown, however, and Gilmore Associates' properties appear to have some vacant commercial space on the ground floor.

Those concerns don't necessarily spell doom for the refinancing plan, which would call for Gilmore Associations to pay unrecorded debt, repay the short-term loan from the Community Development Department, and settle other obligations borrowings from the city. The plan would apparently leave the FHA as the main lender to Gilmore Associates.

Such deals typically lower costs for borrowers by offering more attractive terms on interest rates and the length of the loan. For example, Gilmore Associates is currently being assessed a rate of approximately 6.5% on its loan from the city, and the FHA would likely charge several percentage points less.

The interest rates of Gilmore Associates' other debts likely vary, but the difference of two percentage points on a \$3 million consolidated under one lender could make a difference of \$800,000 a year or more, depending on the length of the loan.

Gilmore Associates' financial pinch is a matter of public record because of the \$5.1 million loan it obtained from the city in 1991, which included terms that offer an insight on the developer's operations. The terms call for the developer to make payments if and when it can afford to do so, according to city officials. The terms also require the developer to demonstrate sufficient earnings or cash flow to make a payment for any given quarter as a prerequisite for skipping a periodic payment.

Gilmore Associates has demonstrated a lack of ability to make quarterly payments on a number of occasions, including according to city officials, and the balance due on the loan has grown to approximately \$5.3 million.

The terms of the city loan also call for interest to continue to accrue until 2015, when payment of the entire balance is due.

The terms of the loan also put the city last in line behind various other creditors for repayment if Gilmore Associates goes bankrupt or forecloses, city officials said. That means the refinancing plan, if approved, would ensure the city gets shifted the risk to the FHA and the federal government.

(READ GARMENT & CITIZEN)

Comments (1)

Scott Zwartz - Risk is inherent in capitalism

| 76.217.22.xxx |

Risk is inherent in capitalism. When a business compounds risk by taking out unrecorded loans which the market deems unacceptable and the developer needs to revise his plans. Many people could have told Gilmore in 1991 that the project had unacceptable risks -- but for CRA's history of bankrolling folly. CRA money comes from the property tax received \$217.8 M in incremental property tax revenue. But for the CRA, these tax dollars would have gone to the state treasury. It is still tax income and private money that CRA throws around so carelessly. If Gilmore's \$5.1 M balance of \$5.3 M, Gilmore is clearly a bad risk. It is time for the City (CRA/LA) to stop bailing out improvident developers. The FBI needs to set up shop in City Hall or at CRA headquarters. Then, we might have fewer David Rubins.

[Reply](#)

Write comment

Your Contact Details:

Name:

Email: do not notify

Comment:

Title:

Message:

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

RULE	TITLE
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4	Communication
Rule 1.4.1	Disclosure of Professional Liability Insurance *BATCH 6*
Rule 1.5	Fee for Legal Services
Rule 1.5.1	Financial Arrangements Among Lawyers
Rule 1.6	Confidential Information of a Client
Rule 1.7	Conflict of Interests: Current Clients
Rule 1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client
Rule 1.8.2	Use of a Current Client's Confidential Information
Rule 1.8.3	Gifts from Client
Rule 1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client
Rule 1.8.6	Payments Not From Client
Rule 1.8.7	Aggregate Settlements
Rule 1.8.8	Limiting Liability to Client
Rule 1.8.9	Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review
Rule 1.8.10	Sexual Relations with Client
Rule 1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)
Rule 1.9	Duties to Former Clients
Rule 1.11	Special Conflicts for Former and Current Government Officers and Employees *BATCH 6*
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
Rule 1.13	Organization as Client
Rule 1.14	Client with Diminished Capacity
Rule 1.15	Handling Funds and Property of Clients and Other Persons
Rule 1.16	Declining or Terminating Representation
Rule 1.17	Purchase and Sale of a Law Practice *BATCH 6*
Rule 1.18	Duties to Prospective Clients *BATCH 6*
Rule 2.1	Advisor
Rule 2.4	Lawyer as a Third-Party Neutral
Rule 2.4.1	Lawyer as a Temporary Judge
Rule 3.1	Meritorious Claims
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer As A Witness

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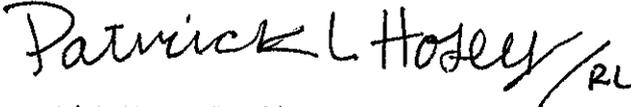
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,



Patrick L. Hosey, President
San Diego County Bar Association

MEMORANDUM

Date: April 22, 2008

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the
State Bar of California

**Subject: Proposed Rule 1.7 -- Conflicts of Interest
[Existing CRPC Rule 3-310]**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.7 but modify to delete entirely Comment 34 regarding class representation.

Rationale For Comment 1: Proposed Rule Comment 34 is too complicated a subject to be addressed in any manner other than a separate rule on class representation, which is why the ABA did not include class representation in its Model Rule 1.7.

Comment 2: Approve Proposed Rule 1.7 but modify to delete entirely the 4th sentence from the end of Proposed Rule Comment 33 regarding advance consent.

Rationale For Comment 2: Proposed Rule Comment 33 does not accurately state the status of current law.

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Comments on proposed new or amended rules of Professional Conduct:
adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.

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 long-term, continuing basis to one or more other, 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 a material limitation on the scope of the representation to one entity or the other. The

Ms. Audrey Hollins
Comments on Draft Rules of Professional Conduct

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.

The first question in these situations is, who is the attorney’s client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?

These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities—for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential “masters,” each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act “on the record”; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.

While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], 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. 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 inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.

- ~~2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.~~

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Comments on Draft Rules of Professional Conduct

~~Not all governmental agencies in California are subject to “whistleblower” statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.~~

- ~~3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term “a representation.”~~

~~In-house governmental attorneys are sometimes pushed, by their own entities or by “control agencies” into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: “making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.”) The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from “a representation” in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney’s full-time career employment with his or her agency. In other words, the term “a representation” should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.~~

- ~~4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term “proceeding.”~~

~~Under subdivision (a), “[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . .” Official comment [4] states that “[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings.” But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines “proceeding.” (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an “adjudicative proceeding”; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: “A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . .”~~

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~~(Emphasis added.) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).~~

- ~~5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.~~

~~Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not “communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . .” Subdivision (C)(1) provides an exception for “Communications with a public officer, board, committee, or body[.]” Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.~~

~~Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that “a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . .” Subdivision (c) states that the rule “shall not prohibit: (1) Communications with a public official, board, committee or body[.]” Unlike the existing rule, which does not define “public officer,” the proposed rule then defines “public official” in subdivision (g) as a “public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).” Subdivision (b), in turn, identifies a “person” as: “(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]”~~

~~The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-~~

Ms. Audrey Hollins
Comments on Draft Rules of Professional Conduct

~~attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."~~

~~Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.~~

- ~~6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.~~

~~Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.~~

Ms. Audrey Hollins
Comments on Draft Rules of Professional Conduct

~~Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."~~

~~Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.~~

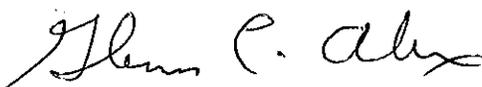
~~Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.~~

~~The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.~~

- ~~7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6].
Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.~~

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,



Glenn C. Alex

Proposed Rule 1.7 [3-310]

“Conflicts of Interest: Current Clients”

(ALT1, Draft # 2.2, 2/28/10)

Summary: Proposed Rule 1.7 is based on Model Rule 1.7 and states the basic conflict of interest standard for a lawyer in dealing with current clients. Provisions of the Rule are incorporated by reference in several other conflicts rules, including proposed Rule 1.9, which defines a lawyer’s duties to former clients, and proposed Rule 1.11, which concerns special conflicts of interest involving former and current government lawyers.

Comparison with ABA Counterpart	
Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rules

RPC 3-310

Statute

Bus. & Prof. Code § 6131.

Case law

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption 6

Opposed Rule as Recommended for Adoption 4

Abstain 1

Approved on Consent Calendar

Approved by Consensus

Stakeholders and Level of Controversy

Minority/Position Included on Model Rule Comparison Chart: Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Representatives of a large law firm urged the adoption of a provision concerning advance waivers of conflicts. See “Public Comment” paragraph in Introduction.

Very Controversial – Explanation:

A minority of the Commission favors retaining the current California Rule approach. See Introduction. In addition, concerns have been expressed over the inclusion of Comment [22], regarding advance waivers of conflicts.

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.7* Conflict of Interest: Current Clients

March 2010

(Draft rule following consideration of Public and RAC comment)

INTRODUCTION:

Proposed Rule 1.7, which is based on Model Rule 1.7, is the basic conflicts of interest rule. It addresses conflicts of interest in the representation of current clients, and it is the point of reference for several other conflicts rules, including possible conflicts of interest that might arise because of continuing duties to former clients (Rule 1.9) and conflicts of interest affecting current and former government lawyers (Rule 1.11). After consideration of public comment and concerns expressed by the Board committee at its November 2009 meeting, and after reconsidering the interjurisdictional implications of national practices, the Commission has come to agree with the Model Rule's identification of situations that create potential or actual conflicts of interest for a lawyer in representing current clients. The Commission recommends that the Board reject the public comment version of the Rule (which carries forward current California Rule 3-310's "checklist" approach to conflicts) and for the most part recommends adoption of the Model Rule. The Commission has concluded that the format and certain of substantive elements of the Model Rule, as supplemented by language and law developed in California case law, statutes and regulations, will act to protect vital client interests. Specifically, the Commission recommends the nearly verbatim adoption of the black letter of the Model Rule, with the only change being the substitution of the heightened California "informed written consent" standard for the Model Rule's less client protective "informed consent, confirmed in writing." The Commission also recommends the adoption of the structure and organization of the Model Rule, with a number of changes made for clarification and to provide better guidance for lawyers to apply the Rule and be in compliance with their professional obligations.

The Commission notes that few issues face lawyers more often than conflicts of interest. Thus, public policy strongly favors having a consistent rule on conflicts that is coherent, complete and is in accord with California law and with the rules in other jurisdictions. Most jurisdictions, including California, recognize that a conflict on interest exists where the particular circumstances present a significant risk that

* Proposed Rule 1.7, ALT1, Draft 2.2 (2/28/10)

the lawyer's representation of a client will be materially and adversely affected by the lawyer's responsibilities to another client, a former client, or to a third party or by the lawyer's own interests. Restatement Third, The Law Governing Lawyers, section 121 (ALI 2000); *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal. App. 4th 275, 282. Model Rule 1.7(a) correctly reflects that standard. The standard articulated in the Model Rule has been developed through case law and is the standard adopted in the rules of most jurisdictions. The Commission has recommended following the Model Rule when it comes to former client conflicts. Similarly, there is no good reason for departing from the widely accepted rule on current client conflicts.

The Commission also notes that current California Rule 3-310 has a complex structure that is confusing to lawyers and difficult to understand and apply. Model Rule 1.7 is more concise and covers the same ground as the current California rule with more clarity. situations. Moreover, although the current rule might be drafted with more specificity, it does not cover all conflict situations. While the checklist approach of the current rule might appear preferable in concept, it misses the mark in terms of comprehensiveness. For example, current rule 3-310(B)(2) is limited to a lawyer's relationships with a "party or witness" rather than duties to any third party that would materially and adversely affect the lawyer's independent judgment and loyalty to the client. Current rule (B)(3) is limited to relationships with a third person where the third person, rather than the client, would be "affected substantially by resolution of the matter." The paragraph provides no protection where the lawyer's duties to the third person will materially limit the client's representation. Proposed Rule 1.7(a)(2), which is identical to the Model Rule, provides a more coherent and complete standard that requires client consent where there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. See proposed Rule 1.7, Comments [7B] and [8]. This is an objective and enforceable standard by which to assess the effect on the risk of adversity and materiality on the representation. See Rest. Section 121, Comment c.; and see, e.g., *Fiandaca v. Cunningham* (1st Cir.1987) 827 F.2d 825. The Commission takes the position that lawyers in California should have the same consistent and accepted standard as lawyers in other jurisdictions for determining the existence of a concurrent conflict of interest.

Moreover, the Commission has not completely discarded the current rule. Instead, it has recommended including in the Comment language from the current black letter rule (that was carried forward in the public comment version of the Rule), as well as language from State Bar ethics opinions, to help lawyers analyze actual and potential conflict situations. The Commission's approach thus provides the more comprehensive Model Rule standard *and* the specific guidance the minority claims is present in the current rule and public comment version but is lacking in the proposed Rule.

Minority. A minority of the Commission has submitted a dissent to the Commission’s decision to recommend adoption of a Rule patterned on Model Rule 1.7. The minority takes the position that “[t]his represents a sea change that will radically reduce client protection.” The full minority dissent, together with the minority’s proposed Rule draft which the minority states addresses the concerns expressed at the Board Committee’s meeting in November 2009, is attached below following the Rule & Comment Comparison Chart.

Public Comment. The Commission received a substantial amount of public comment, much of it addressed to Comment [31] (now renumbered Comment [22] as in Model Rule 1.7), concerning advance waivers of conflicts of interest, and much of it opposing the proposed comment. The proposed comment uses Model Rule 1.7, cmt. [22] as its starting point, but has been heavily edited to make it more specific and less discursive in order to provide better guidance to lawyers. The Commission carefully considered the opposing viewpoints but ultimately concluded that omitting Comment [31] would not add to lawyers’ understanding of this important subject, and recommends that it be adopted. Instead, the Commission has made a number of revisions that are intended to more explicitly state the requirements for obtaining client consent, thereby enhancing client protection.

Variations in other jurisdictions: All other jurisdictions have rules based on the Model Rule format but with a number of variations. Some of these correspond to aspects of the proposed Rule. For example, Maine’s Rule requires disclosure of the lawyer’s own relationships and interests along the lines of proposed paragraph (d). The District of Columbia has added paragraph (b)(4), which also is along the lines of proposed paragraph (d), and its Comment section, which uses the 1983 version of the Model Rule as its starting point, diverges markedly from either the 1983 or the 2002 version of the Model Rule. Alaska has defined client to exclude class members (see proposed Comment [34]). Florida and Ohio also have added a provision regarding a lawyer’s relationship with another lawyer in a matter that is along the lines of California’s rule 3-320 (proposed Rule 1.8.11). Idaho includes a brief reference to a lawyer’s personal interests and family relationships that is a highly diluted version of proposed paragraph (d) and of proposed Rule 1.8.11. North Dakota and Ohio also add Rule references to the lawyer’s personal interests, but overlook the lawyer’s personal relationships.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:</p> <p>(1) the representation of one client will be directly adverse to another client; or</p> <p>(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.</p>	<p>(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:</p> <p>(1) the representation of one client will be directly adverse to another client; or</p> <p>(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.</p>	<p>Paragraph (a) is identical to Model Rule 1.7(a).</p>

* Proposed Rule 1.7, ALT1, Draft 2.2 (2/28/10). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.7 Conflicts of Interest: Current Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:</p> <ol style="list-style-type: none"> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing. 	<p>(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:</p> <ol style="list-style-type: none"> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed <u>written</u> consent, confirmed in writing. 	<p>Paragraph (b) is identical to Model Rule 1.7(b), except that California's heightened "informed written consent" standard has been substituted for the Model Rule's "consent, confirmed in writing" standard.</p>

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<p>General Principles</p> <p>[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).</p>	<p>General Principles</p> <p>[1] <u>Undivided</u> Loyalty and independent <u>professional judgment</u> are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. <u>See Comments [6]-[7], [8], [9], [10]-[12]. This Rule and the other conflict rules (1.8, 1.9, 1.10, 1.11, 1.18) seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. In addition to the duty of undivided loyalty and the duty to exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to disclose to the client all material information and significant developments; and (3) the duty to represent the client competently and diligently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client.</u> For specific Rules<u>rules</u> regarding certain concurrent conflicts of interest, see Rule 1.8<u>Rules 1.8.1 through 1.8.11</u>. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing<u>informed written consent</u>," see Rule 1.0(e) and (be-1), <u>and Comments [6] and [7] to that Rule.</u></p>	<p>Comment [1] is based on Model Rule 1.7, cmt. [1], with the beginning and end of the Comment nearly identical to the Model Rule. Although there is no counterpart for it in the Model Rule, the Commission recommends including the middle section of the Comment, which identifies other duties besides loyalty and independent judgment, that factor into conflicts analysis. As Rule 1.7 is the first of four rules concerning conflicts, its placement in the first comment of the first rule in the series is appropriate.</p> <p>In addition to the middle section, the Commission recommends substituting "undivided loyalty" and "independent professional judgment" for the corresponding "loyalty" and "independent judgment," respectively. California case law repeatedly refers to a lawyer's "duty of undivided loyalty" and the term "independent professional judgment" is used throughout the proposed Rules.</p> <p>In the last part of the Comment, the term "Rules 1.8.1 through 1.8.11" has been substituted for "Rule 1.8" because the the Board has adopted, the Commission's recommended numbering convention of assigning each counterpart provision to Model Rule 1.8 a separate rule number and title ("1.8.x"). The Commission recommended the foregoing approach because Model Rule 1.8 is largely a collection of unrelated provisions and the Commission's approach provides ease of reference and indexing.</p> <p>Finally, California's heightened "informed written consent" standard is substituted for the Model Rules "consent, confirmed in writing."</p>

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<p>[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).</p>	<p>[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) <u>determine the scope of each relevant representation of a client or proposed representation of a client</u>; (3) determine whether a conflict of interest exists; 3(4) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable<u>can be waived by the client</u>; and 4(5) if so, consult with the clients affected under paragraph (a) and obtain their informed <u>written</u> consent; confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).</p>	<p>Comment [2] is based on Model Rule 1.7, cmt. [2], the principal change being to include an additional factor in the analysis, i.e., the scope of the representation or proposed representation. This factor has particular relevance in light of the Board's Resolution on limited scope representation.</p> <p>The term "consentable" has been replaced throughout the Rule because that term is not a word. The Commission has substituted language to identify the concept that "consentable" presumably is intended to communicate, i.e., the lawyer's ability to obtain the client's consent to the conflict. See also Explanation of Changes for Comments [14]-[17A].</p> <p>Finally, California's heightened "informed written consent" standard is substituted for the Model Rules "consent, confirmed in writing."</p>
<p>[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship</p>	<p>[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed <u>written</u> consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether <u>Whether a client-lawyer-client</u></p>	<p>Comment [3] is based on Model Rule 1.7, cmt. [3]. The word "written" has been added to track California's heightened consent standard. The last sentence of the Comment has been revised for two reasons. First, the Commission has not recommended adoption of the specific provisions referred to in the Model Rule comment. Second, and more importantly, the question of whether an attorney-client relationship has been formed or is continuing often requires a complex analysis that is not easily susceptible to a simple rule. See, e.g., State Bar Formal Ethics Opn. 2003-161.</p> <p>Finally, "lawyer-client" is substituted for "client-lawyer" throughout the Rules to better track the phraseology in the Business &</p>

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<p>exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.</p>	<p>relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope is beyond the scope of these Rules.</p>	<p>Profession and Evidence Codes.</p>
<p>[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].</p>	<p>[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed written consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the a client who becomes a former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and Comment [29].</p>	<p>Comment [4] is based on Model Rule 1.7, cmt. [4]. The word "written" has been added to track California's heightened consent standard.</p> <p>The second sentence has been revised for clarification; no change in meaning is intended.</p> <p>Finally, the reference to Comment [5], concerning "thrust upon" or "unforeseeable conflicts," has been stricken because the Commission does not recommend adoption of that Comment.</p>
<p>[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The</p>	<p>[5] [RESERVED]—Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to</p>	<p>The Commission does not recommend adoption of Comment [5], concerning "thrust upon" or "unforeseeable conflicts," because the Commission is not aware of any California authority on this issue. The Commission determined that the development of the law in this area is better left to development by the courts.</p>

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<p>lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).</p>	<p>avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).</p>	
<p>Identifying Conflicts of Interest: Directly Adverse</p> <p>[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is</p>	<p><u>Paragraph (a)(1): Identifying Conflicts of Interest: Directly Adverse</u></p> <p>[6] Loyalty<u>The duty of undivided loyalty</u> to a current client prohibits undertaking representation directly adverse to that client without that client's informed <u>written</u> consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer-client relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. <u>Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer currently represents in</u></p>	<p>The Commission recommends adding "Paragraph (a)(1)" to the title of this section of the Comment to call readers' attention to its applicability to that provision of the Rule.</p> <p>The Commission recommends substituting "undivided loyalty" "loyalty" because California case law repeatedly refers to a lawyer's "duty of undivided loyalty".</p> <p>The word "written" has been added to track California's heightened consent standard.</p> <p>The term "lawyer-client" is substituted for "client-lawyer" throughout the Rules to better track the phraseology in the Business & Profession and Evidence Codes.</p> <p>A middle section has been added to (i) include the holding of a seminal California Supreme Court case, Flatt v. Superior Court, involving a directly adverse conflict; and (ii) carry forward another example of direct adversity from current rule 3-310(C)(3).</p> <p>The Commission also recommends deleting language in the Model Rule's sentence concerning a lawyer cross-examining a client as too limiting. The lawyer would also violate his or her duty of undivided loyalty to the client being cross-examined, for</p>

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<p>represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.</p>	<p>another matter. See <i>Flatt v. Superior Court</i> (1994) 9 Cal.4th 275. Similarly, a directly adverse conflict under paragraph (a)(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. 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, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (1) 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, for example, if a client is the landlord of, or a lender to, the non-client; (2) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so</p>	<p>example, if the testimony elicited on cross-examination were advantageous to the client being represented in the law suit but damaging to the client being cross-examined. See, e.g., <i>Hernandez v. Paicius</i> (2003) 109 Cal.App.4th 452, 134 Cal.Rptr.2d 756, disapproved on other grounds in <i>People v. Freeman</i> (2010) 47 Cal.4th 993, 103 Cal.Rptr.3d 723, 733 n.4.</p> <p>Finally, the Commission has recommended including the section at the end of the Comment which provides numerous other examples of situations that would not constitute "direct adversity". The Commission believes that including these examples will assist lawyers in identifying those situations in which they are required to obtain a client's informed written consent, enhancing both the administration of justice and client protection.</p>

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	<p>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. See Comments [14]-[17A)].</p>	
<p>[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.</p>	<p>[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed <u>written</u> consent of each client. Paragraph (a)(1) applies even if the parties to the transaction have a common interest or contemplate working cooperatively toward a common goal.</p>	<p>Comment [7] is based on Model Rule 1.7, cmt. [7]. The word "written" has been added to track California's heightened consent standard.</p> <p>The last sentence has been added to emphasize that paragraph (a)(1) applies (and thus informed written consent of each affected client must be obtained) even if the parties on different sides of a transaction have a common goal or interest.</p>
	<p>[7A]If a lawyer proposes to represent two or more parties on the same side of a negotiation or lawsuit, the situation is analyzed under paragraph (a)(2), not paragraph (a)(1). See Comments [29]-[33].</p>	<p>Comment [7A] has no counterpart in the Model Rule. It has been added to direct the reader's attention to paragraph (a)(2) and related comments when the lawyer seeks to represent two or more parties on the same side of a matter.</p>
<p>Identifying Conflicts of Interest: Material Limitation</p>	<p>Paragraph (a)(2): Identifying Conflicts of Interest: Material Limitation</p> <p>[7B]Conflicts of interest that create a significant risk that a lawyer's representation of one or more clients will be materially limited as provided in paragraph</p>	<p>The Commission recommends adding "Paragraph (a)(2)" to the title of this section of the Comment to call readers' attention to its applicability to that provision of the Rule.</p> <p>Comment [7B] has no counterpart in the Model Rule. It has been added to call readers' attention to the fact that several kinds of</p>

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	<p>(a)(2) can arise from: (1) duties owed a former client or a third person (see Comment [9]); (2) a lawyer's personal interests (see Comments [10]-[12]); or (3) a lawyer's joint representation of two or more clients in the same matter (see Comments [29]-[33]).</p>	<p>distinctly different situations require analysis under paragraph (a)(2), and directs the reader to the specific sections of the Comment that concern those situations. Comment [7B] acts as a "bridge" to the sections that elaborate and clarify paragraph (a)(2) and Comment [8].</p>
<p>[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.</p>	<p>[8] Even where there is no direct adverseness adversity, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent two or more clients in the same matter, such as several individuals seeking to form a joint venture, is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the othersother clients. The conflict in effect forecloses alternatives that would otherwise be available to each of the clientclients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent. The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of actionactions that reasonably should be pursued on behalf of theeach client. See Comments [29]-[33]. Depending on the circumstances, various relationships a lawyer</p>	<p>Comment [8] is based on Model Rule 1.7, cmt. [8].</p> <p>The word "adversity" has been substituted for "adverseness" because the former is the term more commonly used in California case law.</p> <p>A number of clarifying changes have been made to the Model Rule comment and "informed written" has been added to modify "consent" to reflect California's heightened consent standard.</p> <p>A cross-reference to Comments [29]-[33] is provided to direct the reader to the Comments clarifying a lawyer's duties when jointly representing clients.</p> <p>Finally, a lengthy section, derived from the black letter of current rules 3-310(B) and 3-320, has been added to elaborate on the kinds of relationships or situations that can require compliance with paragraph (a)(2).</p>

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	<p>has may likewise create a significant risk that the lawyer's representation will be materially limited, for example, where (1) the lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (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; (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; (4) a lawyer or law firm representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; and (5) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.</p>	
<p>Lawyer's Responsibilities to Former Clients and Other Third Persons</p> <p>[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former</p>	<p>Lawyer's Responsibilities to Former Clients and Other Third Persons</p> <p>[9] In addition to conflicts with other current clients, a lawyer's duties of undivided loyalty and independence of professional judgment may be</p>	<p>Comment [9] is based on Model Rule 1.7, cmt. [9]. See Explanation of Changes for Comment [1]. The Comment also includes a citation to an important California Court of Appeal</p>

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<p>clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.</p>	<p>materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director. See, e.g., <i>William H. Raley Co., Inc. v. Superior Court</i> (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].</p>	<p>case.</p>
<p>Personal Interest Conflicts</p> <p>[10]The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).</p>	<p>Personal Interest Conflicts</p> <p>[10]The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give atthe client detached advice. A lawyer's legal, business, professional or financial interest in the subject matter of the representation might also give rise to a conflict under paragraph (a)(2), where, for example, (1) the lawyer is a party to a contract being litigated; (2) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; or (3) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to</p>	<p>Comment [10] is based on Model Rule 1.7, cmt. [10]. A middle section has been added to provide specific examples of the kinds of personal interest relationships that can require compliance with paragraph (a)(2).</p> <p>As to the substitution of "1.8.1 through 1.8.11," see Explanation of Changes for Comment [1].</p> <p>A reference to Rule 3.7 has also been added to call lawyers' attention to the fact that that specific rule might be applicable and not paragraph (a)(2).</p>

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	<p>affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8Rules 1.8.1 through 1.8.11 for specific Rulesrules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 3.7 concerning a lawyer as witness and Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).</p>	
<p>[11]When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.</p>	<p>[11]When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, <u>or when there is an intimate personal relationship between the lawyers</u>, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer <u>who is</u> related to another lawyer, e.g., as parent, child, sibling or spouse, <u>or who is in an intimate personal relationship with another lawyer</u>, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed <u>written</u> consent. The disqualification<u>prohibition on representation</u> arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.</p>	<p>Comment [11] is based on Model Rule 1.7, cmt. [11]. The addition of "intimate personal relationship" has been added to track language used in other California statutes and rules requiring disclosure and/or consent in fiduciary relationships.</p> <p>The word "written" has been added to track California's heightened consent standard.</p> <p>The term "prohibition on representation" has been substituted for "disqualification" because this Rule applies in transactional situations as well as litigation. See Comments [26]-[27], below.</p>

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<p>[12]A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).</p>	<p>[12]A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer<u>client</u> relationship. See Rule 1.8(j)<u>1.8.10</u>.</p>	<p>Comment [12] is identical to Model Rule 1.7, cmt. [12], except that “lawyer-client” has been substituted for “client-lawyer” and “Rule 1.8.10” has been substituted for “1.8(j),” the Model Rule counterpart for proposed Rule 1.8.10.</p>
<p>Interest of Person Paying for a Lawyer's Service</p> <p>[13]A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.</p>	<p>Interest of Person Paying for a Lawyer's Service</p> <p>[13]A lawyer may be paid from a source other than the client, including a co-client, if the client is<u>gives</u> informed of that fact and consents<u>written consent</u> and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f)<u>1.8.6</u>. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer<u>payor</u> who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict<u>is consentable</u> <u>lawyer has the ability to obtain the client's consent to the representation</u> and, if so, that<u>whether</u> the client has adequate information about the material risks of the representation. <u>See Comments [14]-[17A].</u></p>	<p>Comment [13] is based on Model Rule 1.7, cmt. [13].</p> <p>The term “written consent” has been added to track California's heightened consent standard.</p> <p>“Rule 1.8.6” has been substituted for “1.8(f)” because that is the rule number assigned the counterpart to Model Rule 1.8(f).</p> <p>“Payor” is the term traditionally used in California Rules.</p> <p>For an explanation of the language substituted for “consentable,” see Explanation of Changes for Comment [2].</p>

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<p>Prohibited Representations</p> <p>[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.</p>	<p>Prohibited Representations</p> <p>[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), in some conflicts are nonconsentable, meaning that the situations a lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability <u>consent</u> must be resolved as to each client.</p>	<p>Comment [14] is based on Model Rule 1.7, cmt. [14].</p> <p>For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2].</p>
<p>[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).</p>	<p>[15] Consentability <u>A lawyer's ability to obtain consent</u> is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed <u>written</u> consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).</p>	<p>Comment [15] is based on Model Rule 1.7, cmt. [15].</p> <p>For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2].</p> <p>The word "written" has been added to track California's heightened consent standard.</p> <p>The cross-reference to Rule 1.3 (diligence) has been stricken because the Commission has recommended and the Board adopted the inclusion of the concept of diligence in Rule 1.1.</p>
<p>[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a</p>	<p>[16] Paragraph (b)(2) describes conflicts that are nonconsentable <u>to which a client cannot consent</u> because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may</p>	<p>Comment [16] is based on Model Rule, cmt. [16].</p> <p>For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2].</p>

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<p>capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.</p>	<p>not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain <u>certain</u> representations by a former government lawyer are <u>also</u> prohibited, despite the informed consent of the former client. In addition <u>See, decisional law in some states limits the ability of a governmental client e.g., such as a municipality, to consent to a conflict of interest</u> <u>Business & Professions Code section 6131.</u></p>	<p>Most of the remainder of the Model Rule language has been stricken because it is simply generally guidance on what might be the law in some jurisdictions. It has been replaced by a specific example of a representation prohibited by California statutory law.</p>
<p>[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).</p>	<p>[17] Paragraph (b)(3) describes conflicts that are nonconsentable <u>for which client consent cannot be obtained</u> because of the institutional interest <u>interests of the legal system</u> in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. <u>See, e.g., Woods v. Superior Court (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action); Klemm v. Superior Court (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict).</u> Although this <u>paragraph (b)(3)</u> does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is</p>	<p>Comment [17] is based on Model Rule 1.7, cmt. [17].</p> <p>For an explanation of the language substituted for "consentable," see Explanation of Changes for Comment [2].</p> <p>The phrase "interests of the legal system" has been substituted for "institutional interest" to clarify what is intended and also to better track the language adopted in proposed Rule 1.0(a)(3), which states a purpose of the Rules is "To protect the integrity of the legal system and to promote the administration of justice."</p> <p>A middle section has been added to the Comment to provide two specific examples from California case law. See also <i>Forrest v. Baeza</i> (1997) 58 Cal.App.4th 65 [67 Cal.Rptr.2d 857] [lawyer 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].</p>

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	<p>not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).</p>	
	<p>[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a representation that is prohibited under paragraph (a). If the lawyer cannot make the disclosure requisite to obtaining informed written consent, (see Rules 1.0.1(e) and 1.0.1(e-1)), without violating the lawyer's duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. See Business and Professions Code section 6068(e)(1) and Rule 1.6. A lawyer might also 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 directors, or because of contractual or court-ordered restrictions. In addition, effective client consent cannot be obtained 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.</p>	<p>Paragraph [17A] has no counterpart in the Model Rule. It has been added because there are two other important situations in which a lawyer is not able to obtain consent to a conflict: (i) when the lawyer is precluded by confidentiality obligations from providing sufficient disclosure to support informed consent; or (ii) the client lacks capacity or authority to give consent. Although the Model Rule addresses the former concept in Comment [19] to that Rule, the Commission concluded it was better placed in this section on "Prohibited Representations," with a cross-reference in Comment [19] to Comment [17A].</p>

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<p>Informed Consent</p> <p>[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).</p>	<p><u>Disclosure and Informed Written Consent</u></p> <p>[18] Informed <u>written</u> consent requires that <u>the lawyer communicate in writing to</u> each affected client be aware of the relevant circumstances and of the material<u>actual</u> and reasonably foreseeable ways that adverse consequences of the conflict could have adverse effects on the <u>client's</u> interests of<u>and the lawyer's representation and that the client thereafter gives his or her consent in writing</u>. See Rule 4-0<u>Rules 1.0.1(e) (informed consent) and 1.0.1(e-1) (informed written consent) and Comments [6] and [7] to that Rule</u>. The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common<u>joint</u> representation, including possible effects on loyalty, confidentiality and the attorney<u>lawyer</u>-client privilege and the advantages and risks involved. See Comments [30] and [31]<u>Comment [30]</u> (effect of common<u>joint</u> representation on confidentiality).</p>	<p>Comment [18] contains the same concept as Model Rule 1.7, cmt. [18], but has been substantially revised to incorporate the different protocol required for California's heightened "informed written consent" standard.</p> <p>The word "joint" has been substituted for "common," as the former term is used in California case law.</p> <p>The cross-reference to Comment [31] has been stricken because the Commission does not recommend adoption of that Comment.</p>
<p>[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.</p>	<p>[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. <u>See Comments [14]-[17A]</u>. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot</p>	<p>Comment [19] retains only the first sentence of Model Rule 1.7, cmt. [19]. See Explanation of Changes for Comment [17A].</p>

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<p>In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.</p>	<p>properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.</p>	
<p>Consent Confirmed in Writing</p> <p>[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the</p>	<p>Consent Confirmed in Writing</p> <p>[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing<u>written disclosure, (see Comment [18]),</u> 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</p>	<p>The heading has been deleted because California does not follow the Model Rules' less-protective standard.</p> <p>Comment [20] is based loosely on Model Rule 1.7, cmt. [20]. Most of the first part of the Model Rule comment has been stricken because the Commission determined that California's more robust consent protocol should be described in the first comment to this section on informed written consent (Comments [18]-[20].)</p> <p>However, the Commission recommends adoption of the last part of the Model Rule comment because it provides valuable guidance.</p>

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<p>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.</p>	<p>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.</p>	
	<p><u>Duration of Consent</u></p> <p><u>[20A] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the relevant 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.</u></p>	<p>Comment [20A] has no counterpart in the Model Rule. It provides a critical reminder that a consent conforms to the Rule only so long as there is no material change in the facts and circumstances on which the consent is based.</p>
<p>Revoking Consent</p> <p>[21]A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.</p>	<p>Revoking Consent</p> <p>[21]A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation <u>of that client</u> at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and, whether material detriment to the other clients or the lawyer would result, <u>and the lawyer's confidentiality obligations to the client revoking consent.</u></p>	<p>Comment [21] is nearly identical to Model Rule 1.7, cmt. [21], with two clarifying changes.</p>

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<p>Consent to Future Conflict</p> <p>[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such</p>	<p>Consent to Future Conflict</p> <p>[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such</p>	<p>Comment [22] shares much with the substance of Model Rule 1.7, cmt. [22]. However, the proposed Comment has been heavily edited to make it more specific and less discursive in order to provide better guidance to lawyers.</p> <p>It was further edited after Board members expressed concerns about the Comment's discussion of advance waivers. The changes are intended to more explicitly state the requirements for obtaining client consent, thereby enhancing client protection.</p>

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<p>as would make the conflict nonconsentable under paragraph (b).</p>	<p>as would make the conflict nonconsentable under paragraph (b). <u>Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not 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 Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) 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 must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and 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</u></p>	

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	<p><u>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 in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully 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 that was independently represented regarding the consent or was advised in</u></p>	

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	<p>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. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.</p>	
<p>Conflicts in Litigation</p> <p>[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to</p>	<p>Conflicts in Litigation</p> <p>[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to</p>	<p>Comment [23] is nearly identical to Model Rule 1.7, cmt. [23], except that the word "joint" has been substituted for "common," as the former term is used in California case law, two other non-substantive word changes were made.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.</p>	<p>represent more than one codefendant. On the other hand, common<u>joint</u> representation of persons having similar interests in civil litigation is proper<u>permitted</u> if the requirements of paragraph (b) are met<u>satisfied</u>.</p>	
<p>[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.</p>	<p>[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised<u>informed</u> of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed <u>written</u> consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters <u>to the extent permitted by Rule 1.16</u>.</p>	<p>Comment [24] is based on Model Rule 1.7, cmt. [24]. The word "informed" was substituted for "advised" to track the language in the definition of "informed consent," Rule 1.0.1(e).</p> <p>The word "written" has been added to track California's heightened consent standard.</p> <p>Finally, a cross-reference to Rule 1.16 has been added to point the reader to the Rule governing termination of a representation.</p>

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	<p>[24A] If permission from a tribunal to terminate a representation is denied, the lawyer is obligated to continue the representation notwithstanding the provisions of this Rule. See Rule 1.16(c).</p>	<p>Comment [24] has no counterpart in the Model Rule. It has been added in recognition that, notwithstanding this Rule, a court has inherent authority to control the conduct of persons appearing before it.</p>
<p>[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.</p>	<p>[25] When 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 a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person an unnamed class member before representing a client suing the who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter. 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.</p>	<p>Comment [25] is based on Model Rule, cmt. [25]. Several clarifying changes have been made.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Nonlitigation Conflicts</p> <p>[26]Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].</p>	<p>Nonlitigation Conflicts</p> <p>[26]Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters <u>that are prohibited by paragraph (a)(1)</u>, see Comment [7]. Relevant factors in determining whether there is significant potential<u>risk</u> for material limitation <u>as provided in paragraph (a)(2)</u> include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].</p>	<p>Comment [26] is based on Model Rule 1.7, cmt. [26]. References to specific sections of the Rule have been added for clarification.</p>
<p>[27]For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.</p>	<p>[27]For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.</p>	<p>Comment [27] is identical to the first two sentences of Model Rule 1.7, cmt. [27]. The balance of the Comment has been stricken as a potentially misleading statement of California law.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.</p>	<p>[28] [RESERVED] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.</p>	<p>The Commission is recommending that Model Rule 1.7, cmt. [28] not be adopted because it is an inaccurate statement of California law.</p>
<p>Special Considerations in Common Representation</p> <p>[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails</p>	<p>Special Considerations in Common Joint Representation</p> <p>[29] When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients can interfere with the performance of the lawyer's</p>	<p>The heading for this section has been changed, with the word "joint" substituted for "common," as the former term is used in California case law. The same change has been made throughout this section of the Comment.</p> <p>Comment [29] is based on Model Rule 1.7, cmt. [29]. The first</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.</p>	<p><u>duties to the other clients.</u> In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the commonjoint representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the commonjoint representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake commonjoint representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by commonjoint representation is not very goodlikely. Other relevant factors areinclude whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.</p>	<p>sentence has been added to identify the basic concern underlying a lawyer's acceptance of a joint representation.</p> <p>The sentence beginning with "Moreover" has been deleted because it is a misleading statement of the duty of loyalty.</p> <p>Two grammatical changes have been made in the last and next-to-last sentence.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[29A] <u>Examples of conflicts that arise under paragraph (a)(2) from representing multiple clients in the same matter and that will likely preclude a lawyer from accepting or continuing a joint representation unless the lawyer complies with paragraph (b) include the following situations: (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 is obligated to advise each client about how to advance that client's position relative to the other's position; (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); (6) the clients make inconsistent demands for the original file.</u></p>	<p>Comment [29A] has no counterpart in the Model Rule. The substance of this comment derives from State Bar Formal Ethics Opn. 1998-153, which described the kinds of conflict situations that might exist or arise in a joint representation. The Commission concluded that including a description of these comments would provide valuable guidance and better enable lawyers to identify representations that present a serious risk of a conflict.</p>
<p>[30]A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between</p>	<p>[30]A particularly important factor in determining the appropriateness of commonjoint representation is the effect on client-lawyer-client confidentiality and the attorneylawyer-client privilege. With regard to the attorneylawyer-client privilege, <u>although each</u></p>	<p>Comment [30] is based on Model Rule 1.7, cmt. [30]. It has been revised to include a discussion of specific California law, and also to clarify a lawyer's confidentiality duties in joint representations under California law.</p>

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<p>commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.</p>	<p>client's communications with the prevailing rule is that <u>lawyer are protected as to third persons</u>, as between commonly <u>jointly</u> represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates <u>results</u> between the <u>joint</u> clients, the privilege will not protect any such communications. <u>See Evidence Code sections 952 and 962.</u> <u>In addition, because of the clients</u> lawyer's obligations under Rule 1.4, the lawyer must inform each jointly represented client in writing of that fact and also that the client should normally expect that his or her communications with the lawyer will be so advised <u>shared with other jointly-represented clients. See also Comments [18]-[20].</u></p>	
<p>[31]As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the</p>	<p>[31][RESERVED] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the</p>	<p>The Commission recommends that Model Rule 1.7, cmt. [30] not be adopted as duplicative of other Comments. See, e.g., Comment [17A].</p>

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<p>representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.</p>	<p>representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.</p>	
<p>[32]When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).</p>	<p>[32]When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common<u>joint</u> representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).</p>	<p>Comment [32] is identical to Model Rule, cmt. [30], except that it substitutes "joint" for "common."</p>
<p>[33]Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.</p>	<p>[33]Subject to the above limitations, each client in the common<u>joint</u> representation has the right to loyal and diligent representation<u>the lawyer's undivided loyalty</u> and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.</p>	<p>Comment [33] is based on Model Rule 1.7, cmt. [33], with "joint" substituted for "common" and the emphasis placed on the duty of undivided loyalty.</p>

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<p>Organizational Clients</p> <p>[34]A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.</p>	<p>Organizational Clients</p> <p>[34]A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.</p>	<p>Comment [34] is identical to Model Rule 1.7, cmt. [34].</p>
<p>[35]A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is</p>	<p>[35]A lawyer for a corporation or other organization who is also 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 the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the</p>	<p>Comment [35] is identical to Model Rule 1.7, cmt. [35], except that a parenthetical has been added in place of the phrase "or other organization" to clarify it is the fiduciary duties the lawyer might owe the organization that should be the focus of the lawyer's analysis.</p>

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<p>material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.</p>	<p>possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorneylawyer-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.</p>	
	<p><u>Insurance Defense</u></p> <p><u>[36]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 (a) 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, paragraph (a) does 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.</u></p>	<p>Comment [36] has no counterpart in the Model Rule. It carries forward verbatim current rule 3-310, Discussion ¶. 9, which was inserted following lengthy deliberations among stakeholders pursuant to legislation (Assembly Bill 2069).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[37] Paragraph (a)(2) 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 significant risk that the representation of the insured, insurer, or both will be materially limited under paragraph (a)(2).</p>	<p>Comment [37] has no counterpart in the Model Rule. It carries forward current rule 3-310, Discussion ¶. 11, as revised.</p>
	<p><u>Public Service</u></p> <p>[38] 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.</p>	<p>Comment [38] has no counterpart in the Model Rule. It has been added to the Rule to call the reader's attention to the fact that special rules govern certain kinds of work in which a lawyer might engage when performing public service.</p>

Proposed Rule 1.7 [3-310]
Conflicts of Interest: Current Clients
Comment [22] Excerpt (re: Consent to Future Conflict)
Clean Draft

Consent to Future Conflicts

[22] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not 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 Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) 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 must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and 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 in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen

was timely and effectively instituted and fully 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 that was independently represented regarding the consent 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. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Proposed Rule 1.7 [3-310]
Conflicts of Interest: Current Clients
Comment [22] Excerpt (re: Consent to Future Conflict)

Redline/Strikeout Version Showing Changes to Draft Presented at RAC's November, 2009 Meeting

Consent to Future Conflicts

[3422] 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. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not 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~~Comments [2618]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation ~~Comment~~Comments [2618]-[20] ordinarily requires. ~~Whenever seeking an advance consent, the~~A lawyer's disclosure to ~~the~~a client ~~should~~must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) 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 shouldmust disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, ~~including~~whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, orand 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 in the current representation; (3) whether the client has consented to

the use of an adequate ethics screen and whether the screen was ~~adequately~~timely and effectively instituted and fully 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 that was independently represented regarding the consent 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. In any case, advance consent will not be in compliance in the circumstances described in ~~Comment~~Comments [2414]-[17A] (prohibited representations). See Rule 1.0.1(ge) ("informed consent") and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Proposed Rule 1.7 Conflicts of Interest: Current Clients

Minority Dissent

At its November 2009 meeting, RAC referred Rule 1.7 back to the Revision Commission to address three principle issues: (i) the advance consent discussion in the Comment to Rule 1.7, (ii) to clarify paragraph (c) in the November draft Rule (which is currently embodied in Rule 3-310(C)(3)), and (iii) to clarify the rule regarding a lawyer's interest in the subject matter of a representation. In response, a majority of the Commission voted to use the language in ABA Model Rule 1.7 in place of the draft rule that was before RAC last November.

This represents a sea change that will radically reduce client protection. Here is one of many possible examples: Imagine a situation in which a lawyer represents a client in a lawsuit, and one of the other parties is the lawyer's oldest friend, brother-in-law or lover, or someone to whom the lawyer owes money. Under the current California rules, the lawyer is absolutely prohibited from accepting that representation without first fully disclosing the facts to the client. This disclosure puts the client in complete control of the situation, by requiring the lawyer to disclose the relationship and its impact on the representation and allowing the client to decide whether to accept the lawyer, and if so with what limitations and protections. Under the proposed rule, it is highly unpredictable whether the client will receive this information. To the extent the disclosure occurs at all, it frequently will be too late to avoid injury to the client.

The revised rule replaces all of the rules currently in Rule 3-310 (and continued in the draft of Rule 1.7 RAC last saw), with two rules - Rule 1.7(a)(1) to which the minority does not dissent and Rule 1.7(a)(2) to which the minority dissents.

Paragraph 1.7(a)(2) states:

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

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

The minority dissent to Rule 1.7(a)(2) because the proposed Rule adopts an ABA Model Rule formula that focuses on the likelihood that a conflict of interest will affect a representation enough to hurt a client. Rule 1.7(a)(2) applies only when there is a "significant risk" that the circumstance will "materially limit" the lawyer's representation of a client. "Significant risk" and "materially limited" are not defined. There is no uniform standard for their application nationally. The terminology focuses not on what is reasonably possible but on what is very likely or predictable. The difference is important for client protection. Requiring informed written consent as

early in the representation as possible not only informs clients about potential problems but also allows lawyers and clients to structure the engagement to avoid those problems. The current California rule provides that client protection by requiring informed written consent in defined situations that are the most frequent sources of conflicts of interest. The Model Rule delays the requirement until the risk of client injury becomes significant, which in many cases will occur when it is too late to avoid injury to the client. Because the "significant risk" standard focuses on the predictability of the harm, it will be extremely difficult, if not impossible, for the State Bar to enforce a preventative standard, which the current California rule affords.

There cannot be any question that allowing a lawyer to defer disclosure until the risk of client harm becomes significant will reduce the likelihood that the lawyer will make what the minority believes should be an absolutely required disclosure. There also cannot be any question that the lawyer's assessment of the risk often will be influenced by the lawyer's own financial interest and other personal concerns. There also cannot be any question that the proposed rule would alter the nature of the lawyer-client relationship by placing the lawyer in charge of the relationship, robbing the client of protection and control that the client should have.

In addition, Rule 1.7(a)(2) will upset twenty years of California jurisprudence involving conflicts of interest and will require years of litigation to resolve at the expense of clients. While creating new avenues of litigation may be a boon for the legal community, clients will bear the cost of that litigation, which would become necessary only because of the sea change this Rule will create.

To assist RAC in its deliberations on Rule 1.7, the minority are providing the following redraft of the version of Rule 1.7 that was before RAC last November. The minority has revised the prior draft of the Rule in response to the comments from RAC at the November 2009 meeting.

RULE 1.7 MINORITY DRAFT RULE

Rule 1.7: Conflict Of Interest: Current Clients

- (a) **Representation of directly adverse clients.** A lawyer shall not, without the informed written consent of each client
 - (1) accept or continue representation of a client if the representation will be directly adverse to another client the lawyer currently represents in another matter; or
 - (2) while representing a client, accept in another matter the representation of a person or organization who is directly adverse to the client in the matter in which the lawyer represents the 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) **Personal relationships and interests.** A lawyer shall not accept or continue representation of a client without providing written disclosure to the client 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:
 - (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 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
- (d) **Relationships with another Lawyer.** A lawyer shall not accept or continue representation of a client without the client's informed written consent where the lawyer knows that:
- (1) a lawyer or law firm representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; or
 - (2) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has a cohabitational or intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.

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 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; and (5) the duty to represent the client competently within the bounds of the law. 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 [1.8.12]. 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 Adverse to Current Client

[5] A lawyer owes a duty of undivided loyalty to each current client, which prevents a lawyer from represent one client against another. These situations also may involve a conflict between a lawyers duty to inform one of the clients about information that the lawyer owes a duty to the other client to keep confidential. Paragraph (a) identifies two scenarios. Paragraph (a) (1) prevents a lawyer from representing a client against another current client of the lawyer, without first obtaining both clients' informed written consent. Paragraph (a)(2) provides that while a lawyer represents a client in a matter directly adverse to a non-client, the lawyer cannot take on the representation of the non-client in another matter without first obtaining both clients' informed written consent.

[5a] Paragraph (a)(1) encompasses those situations in which a lawyer is asked to 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. For example, under paragraph (a)(1), a lawyer cannot accept or continue to representation A against B, if B is a client of the firm when the adverse representation arises. Paragraph (a)(1) 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)(1) 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)(1) 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)(1). 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.

[8A] Paragraph (a)(2) applies in a situation where a lawyer represents A in a matter against B, a non-client, and while that matter is pending, B seeks to hire the lawyer to represent B in another matter. If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a)(1) would apply, not paragraph (a)(2). As with paragraph (a)(1), paragraph (a)(2) applies to both litigation and transactional matters. The same considerations that determine whether a representation is directly adverse under paragraph (a)(1) apply to paragraph (a)(2).

[8B] Relevant considerations under paragraphs (a)(1) and (a)(2) include (i) whether the lawyer can faithfully represent and exercise independent judgment on behalf of client A in the matter adverse to B in light of the lawyer's representation of B, (ii) whether the lawyer's representation of A against B would undermine B's trust in the lawyer-client relationship, and (iii) whether the lawyer would be placed in a situation where the lawyer receives confidential information in connection with

representing B that the lawyer has a duty to reveal to A, such that the lawyer could not fulfill the duty to inform A without breaching the lawyer's duty to B to not reveal the information.

[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] When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients often can interfere with the full performance of the duties the lawyer owes to the other clients. As a result, 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.

[16] Reserved.

Paragraph (c): Lawyer Relationships and Interests

[17] A lawyer's personal relationships and interests might interfere with the lawyer's full performance of the duties owed to a client. As result, paragraph (c) 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 (c) 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 (c)(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) a lawyer would have a legal interest if the lawyer is a party to a contract being litigated; (2) a lawyer would have a business and financial interest if the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; and (3) a lawyer would have a professional interest if the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. Some situations might come within more than one of the paragraph (c) categories, such as when the subject of a representation might raise questions about the lawyer's own conduct, including questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by paragraph (c)(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 1.8.12 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 (c)(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 (c)(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 (c) 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. 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 (c) 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)(1) applies, rather than paragraph (c)(1) or (c)(3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [5] to this Rule.)

Prohibited and Required 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 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 a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not 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 Comments [26] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and

reasonably foreseeable consequences; and (ii) 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 must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and 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 in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully 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 that was independently represented regarding the consent 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. In any case, advance consent will not be in compliance in the circumstances described in Comment[24] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

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.

Rule 1.7 Conflict of Interest: Current Clients

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- ~~(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 in that matter 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) 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 directly adverse to the lawyer's current client in the first matter, without the informed written consent of each client.~~
- ~~(d) Disclosure of relationships and interests. A lawyer shall not accept or continue representation of a client without providing written disclosure to the client 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:~~
- ~~(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 lawyer 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.~~
- ~~[To be placed in a "global" definitions section:~~
- ~~Definitions of "disclosure" and "informed written consent."~~
- ~~(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances 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.~~

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

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

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed written consent.

Comment

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

[1] Undivided Loyalty and independent professional judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interests. See Comments [6]-[7], [8], [9], [10]-[12]. This rule and the other conflict rules (1.8, 1.9, 1.10, 1.11, 1.18) 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 in addition to a client or other person could impair the lawyer’s ability to fulfill the lawyer’s duties to another client, it is helpful to consider the following: (1) the duty of undivided loyalty (including and the duty to handle client funds and property as directed by exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to exercise independent professional judgment for the client’s benefit, not influenced by the lawyer’s duties disclose to or relationships with others, and not influenced by the lawyer’s own interests; client all material information and significant developments; and (3) the duty to maintain the confidentiality of client information; (4) the duty to represent the client competently and diligently 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. For specific rules regarding certain concurrent conflicts of interest, see Rules 1.8.1 through 1.8.11. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of “informed consent” and~~

"informed written consent," see Rule 1.0.1(e) and (e-1), and Comments [6] and [7] to that Rule.

[2] Resolution of a conflict of interest under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine *the scope of each relevant* representation of a client or proposed representation of a client; (3) determine whether a conflict of interest exists; (4) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether lawyer has the ability to obtain the client's consent to the conflict; and (5) if so, consult with the clients affected under paragraph (a) and obtain their informed written consent. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[23] ~~The first step in a lawyer's~~ A 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* interest may exist before representation of a client or proposed representation of a potential client. Only then can the lawyer determine whether a conflict rule prohibits is undertaken, in which event the representation must be declined, or permits unless the representation subject to a disclosure to the client or lawyer obtains the informed written consent of the each client or a former client under the conditions of paragraph (b). Determining To determine whether a conflict exists may also require the lawyer to consult sources of law other than these Rules. [For guidance in determining whether interest exists, a client-lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. Whether a lawyer-client

relationship exists or, having once been established, is continuing, ~~see Comment 4 to Rule 1.3~~ is beyond the scope of 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 [1.8.12]. [For conflicts duties to former clients, see Rule 1.9.] [For conflicts of interest involving prospective clients, see Rule 1.18.] [For definitions of "disclosure," "informed consent" and "written," see Rule 1.0(e) and (b), and see Comments [18]–[20].]~~

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

[5] [RESERVED]

Paragraph (a)(1): Representation Identifying Conflicts of Interest: Directly Adverse to Current Client

[4] ~~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).)~~

[5] ~~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.~~

[6] ~~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. If the non-party's interests could be affected adversely by the outcome of the matter, then the adversity is indirect, not direct. 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].)~~

[7] ~~Not all representations~~The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that ~~might be harmful~~client without that client's informed written consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the ~~interests~~lawyer-client relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client ~~create direct adversity governed by that is~~ directly adverse to another client the lawyer currently represents in another matter. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. Similarly, a directly adverse conflict under paragraph (a). ~~The following are among~~(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. 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, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated

litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (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. for example,~~ 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;~~ (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute; (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.~~ See Comments [14]-[17A].

[8] **[RESERVED]**

[9] ~~If a conflict 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. 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's full performance of the duties owed to one of the joint clients might or does interfere with the lawyer's full performance of the duties owed to another of the joint clients. See Comment [38] with respect to the application of paragraph (b) to an insurer's appointment of counsel to defend an insured.~~

[11] ~~A potential conflict exists when one can reasonably foresee an actual conflict arising among the joint clients in the matter in the future.~~

[12] ~~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.~~

[13] ~~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, subdivision (e), Rule 3-100, 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.~~

[147] ~~If directly adverse conflicts can also arise in transactional matters. For example, if a lawyer obtains the consent of multiple clients is asked to represent the lawyer's representation of them in a matter notwithstanding the existence of a potential conflict under paragraph (b)(1) business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer must obtain could not undertake the further representation without the informed written consent of 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 must obtain consent of each client in the matter under paragraph (b)(1). Clients may provide such consents in advance of applies even if the conflict arising, subject parties to the criteria set forth below in Comment [33] transaction have a common interest or contemplate working cooperatively toward a common goal.~~

[15] ~~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)].~~

[7A] ~~If a lawyer proposes to represent two or more parties on the same side of a negotiation or lawsuit, the situation is analyzed under paragraph (a)(2), not paragraph (a)(1). See Comments [29]-[33].~~

[16] ~~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 (a)(2): Identifying Conflicts of Interest: Material Limitation

[7B] ~~Conflicts of interest that create a significant risk that a lawyer's representation of one or more clients will be materially limited as provided in paragraph (a)(2) can arise from: (1) duties owed a former client or a third person (see Comment [9]); (2) a lawyer's personal interests (see Comments [10]-[12]); or (3) a lawyer's joint representation of two or more clients in the same matter (see Comments [29]-[33]).~~

Lawyer Acting in Dual Roles

[8] ~~Even where there is no direct adversity, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend~~

or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent two or more clients in the same matter, such as several individuals seeking to form a joint venture, is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The conflict in effect forecloses alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent. The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of actions that reasonably should be pursued on behalf of each client. See Comments [29]-[33]. Depending on the circumstances, various relationships a lawyer has may likewise create a significant risk that the lawyer's representation will be materially limited, for example, where (1) the lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (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; (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; (4) a lawyer or law firm representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; and (5) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has an

intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[179] ~~A lawyer might owe fiduciary~~lawyer's duties in capacities other than as a lawyer that could conflict with the duties the lawyer owes of undivided loyalty and independence of professional judgment may be materially limited by responsibilities to clients or former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director. (See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].)

Personal Interest Conflicts

~~Paragraph (c) - Representing a Client's Adversary.~~

[18] ~~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. (If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a) would apply, not paragraph (c).) The purpose of paragraph (c) is (1) to ensure 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; (2) to ensure 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; and (3) to apprise B of the lawyer's obligation to disclose to A all information that is material to the representation of A even if that information otherwise is the confidential information of B. Paragraph (c) applies in litigation and in non-litigation representations.~~

Paragraph (d)– Disclosure of Relationships and Interests

[19] Paragraph (d) requires a lawyer to disclose to a potential or current client certain of the lawyer's present or past relationships with others, and the lawyer's own interest in the subject matter of the representation. The purpose of this disclosure 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.

[20] ~~A lawyer should not allow his or her~~ The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. ~~Paragraph (d)(4) requires a lawyer to make a disclosure to~~ For example, if the client when probability of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer ~~has an~~ to give the client detached advice. A lawyer's legal, business, professional or financial interest in the subject matter of the representation. ~~Examples of this include the following:~~ might also give rise to a conflict under paragraph (a)(2), where, for example, (1) the lawyer is a party to a contract being litigated; (2) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; and/or (23) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. ~~In addition~~ Similarly, the subject of when a representation might raise questions about the lawyer's own conduct, such as questions about the correctness lawyer has discussions concerning possible employment with an opponent of the lawyer's ~~earlier advice to client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client; this situation would be governed by Paragraph (d)(4) unless the lawyer and client have agreed to take.~~ In addition, a ~~common position in compliance with Rule 1.4, as might occur~~ lawyer may not allow related business interests to affect representation, for example, ~~in response~~ by

referring clients to a motion for discovery sanctions an enterprise in which the lawyer has an undisclosed financial interest. ~~{See Rule~~ Rules 1.8.1 through 1.8.12 1.8.11 for additional Rules specific rules pertaining to ~~other~~ a number of personal interest conflicts, including business transactions with clients, ~~and.~~ See also Rule 3.7 concerning a lawyer as witness and Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).}

[21] Paragraph (d)(4) ~~does not require a lawyer to investigate whether mutual funds or similar investment vehicles in which the lawyer holds an interest own interests in parties to a matter. However, if the lawyer knows that a mutual fund in which the lawyer owns an interest in a party to a matter the lawyer is handling, paragraph (d)(4) would apply.~~

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

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the lawyer-client relationship. See Rule 1.8.10.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client gives informed written consent and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8.6. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payor who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the lawyer has the ability to obtain the client's consent to the representation and, if so, whether the client has adequate information about the material risks of the representation. See Comments [14]-[17A].

Prohibited Representations

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

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

~~[22] Paragraph (d)(4) requires disclosure describes conflicts to the lawyer's which a client if cannot consent because the representation is prohibited by applicable law. For example, certain representations by a former government lawyer has been having are also prohibited, or when despite the lawyer decides to have, substantive discussions concerning possible employment with an opponent informed consent of the lawyer's former client or with a lawyer or law firm representing the opponent. See, e.g., Business and Professions Code section 6131.~~

~~[23] Paragraph (d) applies only to a lawyer's own relationships and interests, unless the lawyer knows that another lawyer in the same firm as the lawyer has or had a relationship with another party, witness or has or had an interest in the subject matter of the representation. [See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).]~~

~~[24] Paragraph (d) does not apply to the relationship of a lawyer to another person's lawyer. [See Rule 1.8.12].~~

~~[25] Paragraph (d) requires disclosures only to current clients. Rule 1.9 specifies when a lawyer must obtain informed written consent from a former client.~~

~~[26] Paragraph (a) applies, rather than paragraph (d)(1) or (3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [4].)~~

Prohibited Representations

~~[27] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent. These include at least the following: Paragraph (1b) 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, subdivision (e) and Rule 3-100); (3) describes conflicts for which client consent cannot be obtained because of the interests of the legal system in vigorous development of each client's position 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 are aligned directly against each other in that matter; the same litigation or other proceeding before a tribunal. ¶ Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. See, e.g., Woods v. Superior Court (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] [“(the attorney/lawyer of a family-owned business, corporate or otherwise, organization should not represent one owner against the other in a [marital] dissolution action”)]; Klemm v. Superior Court (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] [attorney/a lawyer 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, 74-75 [67 Cal.Rptr.2d 857, 863] [attorney may Although paragraph (b)(3) does not represent both preclude a closely-held corporation and directors/shareholders who are accused lawyer's multiple representation of wrongdoing or whose interests are otherwise adverse parties to the corporation]; and a mediation (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38, and see because mediation is not a proceeding before a “tribunal” under Rule 1.14 regarding clients with diminished capacity; 1.0.1(m)), such representation may be precluded by paragraph (b)(1).~~

[28] ~~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(e).)~~

[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a representation that is prohibited under paragraph (a). If the lawyer cannot make the disclosure requisite to obtaining informed written consent, (see Rules 1.0.1(e) and 1.0.1(e-1)), without violating the lawyer's duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. See Rule 1.6 and Business and Professions Code section 6068(e). A lawyer might also 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 directors, or because of contractual or court-ordered restrictions. In addition, effective client consent cannot be obtained 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.

Disclosure and Informed Written Consent

[29] 18] Informed written consent requires that the lawyer to disclose/communicate in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences to of the conflict on the client's interests and the lawyer's representation and that the client thereafter gives his or former client her consent in writing. [See Rule 1.0 Rules 1.0.1(e) (informed consent) and 1.0.1(e-1) (informed written consent).]—The facts and explanation the lawyer must disclose will depend Comments [6] and [7] to that Rule. The information required depends 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 is undertaken, the information must include the implications of the joint representation, including possible effects on loyalty, ~~and the confidentiality and the~~ lawyer-client privilege ~~issues described in~~ and the advantages and risks involved. See Comment ~~[4330]~~ (effect of joint representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. See Comments [14]-[17A].

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client in writing. See Rule 1.0.1(n) (writing includes electronic transmission). The requirement of a written disclosure, (see Comment [18]), 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.

Duration of Consent

~~[3020A]~~ A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the ~~material~~ relevant 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, ~~if applicable,~~ obtaining a new written consent ~~under paragraph (a), (b), or (c).~~

~~[31] 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, subdivision (e), Rule 3-100.) 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 directors, or because of contractual or court-ordered restrictions.~~

Revoking Consent

~~[32] In some situations, Rule 1.13(g) limits who has authority to grant consent on behalf of an organization.~~

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

Consent to Future Conflict

~~[3322]~~ 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. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not 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~~ Comments [3018]-[20] (informed

written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation ~~Comment~~Comments [3018]-[20] ordinarily requires. ~~Whenever seeking an advance consent, the~~A lawyer's disclosure to ~~the~~a client ~~should~~must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) 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~~must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, ~~including whether the consent permits the lawyer to be adverse to the client in the current or in future~~ litigation, ~~and~~and 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 in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was ~~adequately~~timely and effectively instituted and fully 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 that was independently represented regarding the consent 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. In any case, advance consent will not be in compliance in the circumstances described in ~~Comment~~Comments [2914]-[17A] (prohibited representations). ~~{See Rule 4-01.0.1(e) ("informed consent") and 1.0.1 (e-1) (informed written consent).}~~ A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Representation of a ClassConflicts in Litigation

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

representation of persons having similar interests in civil litigation is permitted if the requirements of paragraph (b) are satisfied.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be informed of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed written consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters to the extent permitted by Rule 1.16.

[24A] If permission from a tribunal to terminate a representation is denied, the lawyer is obligated to continue the representation notwithstanding the provisions of this Rule. See Rule 1.16(c).

[~~34~~25] 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 ~~current or potential~~ member of a plaintiff ~~class~~ or a defendant class ~~in a class action lawsuit~~ 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 typically need to ~~obtain~~get the consent of ~~such a person~~ 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 an opponent in~~ a class action does not typically need the consent of ~~any~~ an unnamed member of the class 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.

Nonlitigation Conflicts

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

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present.

[28] [RESERVED]

Special Considerations in Joint Representation

[29] When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients can interfere with the performance of the lawyer's duties to the other clients. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the joint representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the joint representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake joint representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by joint representation is not likely. Other relevant factors include whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29A] Examples of conflicts that arise under paragraph (a)(2) from representing multiple clients in the same matter and that will likely preclude a lawyer from accepting or continuing a joint representation unless the lawyer complies with paragraph (b) include the following situations: (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 is obligated to advise each client about how to advance that client's position relative to the other's

position; (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); (6) the clients make inconsistent demands for the original file.

[30] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the lawyer-client privilege. With regard to the lawyer-client privilege, although each client's communications with the lawyer are protected as to third persons, as between jointly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation results between the joint clients, the privilege will not protect any such communications. See Evidence Code sections 952 and 962. In addition, because of the lawyer's obligations under Rule 1.4, the lawyer must inform each jointly represented client in writing of that fact and also that the client should normally expect that his or her communications with the lawyer will be shared with other jointly-represented clients. See also Comments [18]-[20].

[31] [RESERVED]

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

[33] Subject to the above limitations, each client in the joint representation has the right to the lawyer's undivided loyalty and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[3534] A lawyer who represents ~~an~~ a corporation or other organization does not, by virtue of that representation ~~alone~~, necessarily represent any constituent ~~of the or affiliated~~ organization, such as a parent or subsidiary. (See Rule 1.13(a).) ~~The~~ Thus, the lawyer for an organization ~~also does~~ is 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~~ in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client, ~~even in a matter unrelated that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially~~ the lawyer's representation of the other client, ~~under certain circumstances~~.

[3635] A lawyer for a corporation who ~~also~~ is also 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. The~~ lawyer, ~~he or she might~~ may be called on to advise the corporation ~~on~~ in matters involving actions of the directors. ~~The lawyer~~ Consideration should ~~consider such things as~~ be given to the frequency with which ~~these~~ such situations ~~might~~ may arise, the potential ~~materiality~~ intensity of the

~~conflict to, the effect of~~ the lawyer's ~~performance of his or her duties as a lawyer, resignation from the board~~ and the possibility of the ~~corporation~~ corporation's obtaining legal advice from another lawyer in ~~these~~ such situations. If there is material risk that the dual role will compromise the lawyer's ~~ability to perform any~~ independence of his or her duties to the client professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board ~~whenever~~ that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the ~~attorney~~ lawyer-client privilege, and that conflict of interest considerations might require the ~~lawyer to withdraw~~ lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Insurance Defense

[3736] 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 (ea) 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*, ~~neither~~ paragraph (a) ~~nor (e) is intended to~~ does not apply ~~with respect~~ to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[3837] Paragraph (ba)(2) 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~~significant risk that the lawyer's representation of the insured, insurer, or both will be materially limited under paragraph (b)(2).

Public Service

[3938] {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 ~~nonprofit and court-annexed~~certain limited legal services programs, see Rule 6.5.}

Rule 1.7 Conflict of Interest: Current Clients

(Commission's Proposed Rule – Clean Version)

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed written consent.

Comment

General Principles

[1] Undivided Loyalty and independent professional judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. See Comments [6]-[7], [8], [9], [10]-[12]. This Rule and the other conflict rules (1.8, 1.9, 1.10, 1.11, 1.18) seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. In addition to the duty of undivided loyalty and the duty to exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to disclose to the client all material information and significant developments; and (3) the duty to represent the client competently and diligently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client. For specific rules regarding certain concurrent conflicts of interest, see Rules 1.8.1 through 1.8.11. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "informed written consent," see Rule 1.0(e) and (e-1), and Comments [6] and [7] to that Rule.

[2] Resolution of a conflict of interest under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine the scope of each relevant representation of a client or proposed representation of a client; (3) determine whether a conflict of interest exists; (4) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether lawyer has the ability to obtain the client's consent to the conflict; and

(5) if so, consult with the clients affected under paragraph (a) and obtain their informed written consent. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

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

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

[5] [RESERVED]

Paragraph (a)(1): Identifying Conflicts of Interest: Directly Adverse

[6] The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent. Thus, absent consent, a lawyer may not act as an advocate

in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom 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 adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer currently represents in another matter. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275. Similarly, a directly adverse conflict under paragraph (a)(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. 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, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (1) 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, for example, if a client is the landlord of, or a lender to, the non-client; (2) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute; (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. See Comments [14]-[17A].

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed written consent of each client. Paragraph (a)(1) applies even if the parties to the transaction have a common interest or contemplate working cooperatively toward a common goal.

[7A] If a lawyer proposes to represent two or more parties on the same side of a negotiation or lawsuit, the situation is analyzed under paragraph (a)(2), not paragraph (a)(1). See Comments [29]-[33].

Paragraph (a)(2): Identifying Conflicts of Interest: Material Limitation

[7B] Conflicts of interest that create a significant risk that a lawyer's representation of one or more clients will be materially limited as provided in paragraph (a)(2) can arise from: (1) duties owed a former client or a third person (see Comment [9]); (2) a lawyer's personal interests (see Comments [10]-[12]); or (3) a lawyer's joint representation of two or more clients in the same matter (see Comments [29]-[33]).

[8] Even where there is no direct adversity, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent two or more clients in the same matter, such as several individuals seeking to form a joint venture, is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The conflict in effect forecloses alternatives that would otherwise be

available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent. The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of actions that reasonably should be pursued on behalf of each client. See Comments [29]-[33]. Depending on the circumstances, various relationships a lawyer has may likewise create a significant risk that the lawyer's representation will be materially limited, for example, where (1) the lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (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; (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; (4) a lawyer or law firm representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; and (5) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] A lawyer's duties of undivided loyalty and independence of professional judgment may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director. See, e.g., *William H. Raley Co., Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give the client detached advice. A lawyer's legal, business, professional or financial interest in the subject matter of the representation might also give rise to a conflict under paragraph (a)(2), where, for example, (1) the lawyer is a party to a contract being litigated; (2) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; or (3) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rules 1.8.1 through 1.8.11 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 3.7 concerning a lawyer as witness and Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, or when there is an intimate personal relationship between the lawyers, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer who is related to another lawyer, e.g., as parent, child, sibling or spouse, or who is in an intimate

personal relationship with another lawyer, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed written consent. The prohibition on representation arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the lawyer-client relationship. See Rule 1.8.10.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client gives informed written consent and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8.6. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payor who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the lawyer has the ability to obtain the client's consent to the representation and, if so, whether the client has adequate information about the material risks of the representation. See Comments [14]-[17A].

Prohibited Representations

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

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

[16] Paragraph (b)(2) describes conflicts to which a client cannot consent because the representation is prohibited by applicable law. For example, certain representations by a former government lawyer are also prohibited, despite the informed consent of the former client. See, e.g., Business & Professions Code section 6131.

[17] Paragraph (b)(3) describes conflicts for which client consent cannot be obtained because of the interests of the legal system in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. See, e.g., *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action); *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict). Although paragraph (b)(3) does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a

representation that is prohibited under paragraph (a). If the lawyer cannot make the disclosure requisite to obtaining informed written consent, (see Rules 1.0.1(e) and 1.0.1(e-1)), without violating the lawyer's duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. See Business and Professions Code section 6068(e)(1) and Rule 1.6. A lawyer might also 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 directors, or because of contractual or court-ordered restrictions. In addition, effective client consent cannot be obtained 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.

Disclosure and Informed Written Consent

[18] Informed written consent requires that the lawyer communicate in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences of the conflict on the client's interests and the lawyer's representation and that the client thereafter gives his or her consent in writing. See Rules 1.0.1(e) (informed consent) and 1.0.1(e-1) (informed written consent) and Comments [6] and [7] to that Rule. The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the joint representation, including possible effects on loyalty, confidentiality and the lawyer-client privilege and the advantages and risks involved. See Comment [30] (effect of joint representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. See Comments [14]-[17A].

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client in writing. See Rule 1.0(n) (writing includes electronic transmission). The requirement of a written disclosure, (see Comment [18]), 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.

Duration of Consent

[20A] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the relevant 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.

Revoking Consent

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

Consent to Future Conflict

[22] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not 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 Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) 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 must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and 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 in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully 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 that was independently represented regarding the consent 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. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple

defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, joint representation of persons having similar interests in civil litigation is permitted if the requirements of paragraph (b) are satisfied.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be informed of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed written consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters to the extent permitted by Rule 1.16.

[24A] If permission from a tribunal to terminate a representation is denied, the lawyer is obligated to continue the representation notwithstanding the provisions of this Rule. See Rule 1.16(c).

[25] 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 typically need to get

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 an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter. 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.

Nonlitigation Conflicts

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

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present.

[28] [RESERVED]

Special Considerations in Joint Representation

[29] When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients can interfere with the performance of the lawyer's duties to the other clients. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the joint

representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the joint representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake joint representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by joint representation is not likely. Other relevant factors include whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29A] Examples of conflicts that arise under paragraph (a)(2) from representing multiple clients in the same matter and that will likely preclude a lawyer from accepting or continuing a joint representation unless the lawyer complies with paragraph (b) include the following situations: (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 is obligated to advise each client about how to advance that client's position relative to the other's position; (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); (6) the clients make inconsistent demands for the original file.

[30] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the

lawyer-client privilege. With regard to the lawyer-client privilege, although each client's communications with the lawyer are protected as to third persons, as between jointly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation results between the joint clients, the privilege will not protect any such communications. See Evidence Code sections 952 and 962. In addition, because of the lawyer's obligations under Rule 1.4, the lawyer must inform each jointly represented client in writing of that fact and also that the client should normally expect that his or her communications with the lawyer will be shared with other jointly-represented clients. See also Comments [18]-[20].

[31] [RESERVED]

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

[33] Subject to the above limitations, each client in the joint representation has the right to the lawyer's undivided loyalty and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the

circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

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

Insurance Defense

[36] 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 (a) 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*, paragraph (a) does 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.

[37] Paragraph (a)(2) 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 significant risk that the representation of the insured, insurer, or both will be materially limited under paragraph (a)(2).

Public Service

[38] 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.

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

TOTAL = 12 **Agree = 1**
Disagree = 5
Modify = 5
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response ²
1	COPRAC	M		Cmts. [9] & [16]	Comment [9] says that a lawyer “must in all events protect confidentiality” yet Comment [18] contradicts this by indicating that when a lawyer is representing a client’s adversary the lawyer has an obligation to disclose to the lawyer’s client “all information that is material to the representation of the client, including otherwise confidential information of the lawyer’s other client.” COPRAC concerned that disclosure without informed written consent constitutes a breach of duty of confidentiality.	The Commission agreed and made clarifying changes to Comment [9] and deleted Comment [18]. See footnote 2.
				Cmt. [4]	Comment [17] relates to a conflict arising from a lawyer’s fiduciary duties to a non-client and should not be placed within the comments relating to paragraph (b) unless the Comment is reworded to state that the term	See footnote 2.

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

² **Commission Note:** Following public comment and consideration of the post-public comment draft by the Board of Governors, the Commission reconsidered its overall approach in Rule 1.7 and voted to recommend adoption of the black letter of Model Rule 1.7 nearly verbatim, with the only change being the substitution of the heightened California “informed written consent” standard for the Model Rule’s less client protective “informed consent, confirmed in writing.” The Commission also recommends the adoption of the structure and organization of the Model Rule, with a number of changes made for clarification and to provide better guidance for lawyers to apply the Rule and be in compliance with their professional obligations. Therefore, most of the public comment submissions have been mooted by the recommend to substantially adopt the Model Rule.

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

TOTAL = 12 **Agree = 1**
Disagree = 5
Modify = 5
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response ²
					<p>“representation of a client” is not limited to a lawyer’s legal representation of a client in an attorney client relationship, but may also include a lawyer’s fiduciary relationship with a non-client. Alternatively, Comment [17] could be placed with the comments regarding paragraph (d), in which the fiduciary relationship might be described as a legal, financial, or business relationship.</p>	
				Cmt. [24]	<p>Comment [27]’s provision that a lawyer cannot obtain effective client consent where the lawyer cannot provided competent representation to each affected client seems like a significant limitation that could be explained or illustrated better. No specific recommendation.</p>	<p>See footnote 2. Former Comment [24] has been expanded to several comments in the new proposed Rule. See Comments [14]-[17A] thereto.</p>
				Cmt. [24]	<p>Reference to rule 1.8.8(a) in Comment [27] is inappropriate.</p>	<p>See footnote 2.</p>

2	Langford, Carol M.	D		Cmt. [31]	<p>Rule is overly broad as written and more specific guidelines should be included to determine whether there was informed consent. Comment [4] should include guidelines as to how thorough the informed consent would have to be.</p> <p>Blanket waivers should be treated with caution and only permitted where there is some type of limitation in scope. (One suggested limitation that courts have approved is the identification of potentially adverse parties in the waiver or establishing durational boundaries. See <i>Zador Corp v. Kwan</i>, 31 Cal.App.4th 1285; <i>Visa U.S.A., Inc. v. First Data Corp.</i>, 241 F.Supp.2d 1100). Comment [33] (now Cmt. [22]) therefore should be taken out unless the rule provides specific guidelines to act as safeguards against uninformed and unintended waivers.</p>	<p>The meaning of “informed consent” is contained in Model Rule 1.0 (proposed Rule 1.0.1) and not in Rule 1.7. It does not appear to be possible to define that term except along the lines of the Model Rule definition, which recognizes that whether a client’s consent is informed is inherently fact specific. The Commission therefore did not make this requested change.</p> <p>The Commission agrees that advance consents to future conflicts of interest should be treated with caution but believes it has done so in proposed Comment [22] (formerly numbered [33] in the public comment draft). Omitting Comment [22] would not add to lawyers’ understanding of the subject. There was perhaps no portion of the Commission’s work on Rule 1.7 that led to greater public involvement and comment. However, after careful consideration of the public comment, both pro and con, the Commission has revised Comment [22] with the intent to more explicitly state the requirements for obtaining client consent, thereby enhancing client protection.</p>
				1.7(a)	Amend 1.7(a) by deleting references to “in that matter.”	See footnote 2.
3	Lewis, Steve	M		1.7(d)(4)	With regard to 1.7(d)(4), more than disclosure is necessary to protect a client, particularly in the situation where the lawyer makes a mistake. The Rule should require advising the client in writing of opportunity to seek independent counsel. This could be done by adding a (d)(5) that applies specifically to the	See footnote 2.

				<p>Cmt. [10] situation where an attorney has made a mistake.</p> <p>Comment [10]: second sentence includes phrase "might or does interfere with lawyer's full performance..." The word "might" makes this Comment too broad in scope; change "might" to "might reasonably be expected to."</p> <p>Cmt. [21] Comment [21] mutual fund disclosure requirement is excessive and should be deleted entirely.</p>	<p>See footnote 2.</p> <p>See footnote 2.</p>
4	Lodise, Margaret	D	Trust and Estates Section]	<p>Requiring disqualification without tying it to the possession of confidential information relevant to the new matter will severely impact estate planners who may do planning for a client and place their firms into a conflict position merely by representation of the individual without access to any information which is in any way confidential or material to the new representation.</p> <p>Cmt. [10] Prior version of rule contained a comment relating to the situation of reciprocal will for a husband and wife or of representation in an antenuptial agreement as situations where a potential conflict might exist. This should be returned to the comments.</p>	<p>Rule 1.7 does not address the topic of disqualification, which is a matter within the control of the courts. Rule 1.7 in both the Model Rule and proposed versions recognizes the primacy of the duty of loyalty owed to current clients. The key to the expressed concerns is determined by whether a representation is directly adverse to another current client.</p> <p>See footnote 2.</p>

5	Los Angeles County Bar Association (Toby J. Rothschild)	M		1.7(a) Cmts. [5], [6] & [7] Cmt. [23] Cmts. [27] & [28] Cmt. [31]	Delete references in 1.7(a) to the “matter.” This makes (b) unnecessary. Amend (c) to read: “A lawyer shall not accept the representation of a client if that client has a dispute with another of the lawyer’s clients, unless the lawyer’s representation of each client concerns matters other than those which are the subject of the dispute.” Delete Comments [5], [6], and [7]. Utilize the Model Rule standard of “confirmed in writing” rather than the proposed “informed written consent”. Expressed concern that Comment [23] buries a potential conflict that could exist among related attorneys but made no specific recommendation Move section on prohibited representations (Comments [27] and [28]) closer to the beginning of the comments. Third sentence of Comment [33] (now Cmt. [22]) is contradictory and ambiguous and should be deleted.	See footnote 2. See footnote 2. See footnote 2. The Commission believes this change would dilute important client protection and did not make this consent. See footnote 2. See footnote 2. The section on prohibited representations now appears at Comments [14]-[17A], immediately following the general overview of the Rule. See ¶.2 of response to Langford. Comment [33] is now Comment [22].
6	McGowan, David	M		1.7(a)	Delete references in 1.7(a) to the “matter,” which makes 1.7(c) [now paragraph (a)(2)] unnecessary because then (a) becomes a flat prohibition on all concurrent representation of directly adverse interests, including the types specified in (c) [now paragraph (a)(2)].	See footnote 2.

				<p>“1.7(e)” & Cmt. [29]</p> <p>Add a section 1.7(e), which would provide a detailed safe harbor provision for advanced conflict waivers, including what steps a lawyer must take to ensure informed consent. Then change Comment [29] to reflect the evidentiary presumptions relating to section (e).</p>	<p>The Commission engaged with lawyers several times at its public sessions on the topic of a client’s advance consent to a representation despite a potential for a future conflict of interest, received several written suggestions during the initial drafting stage, and received several written comments during the formal public comment process. The thoughts shared with the Commission covered a wide range of views extending from a desire to expand existing case law so as to make the process easier to two commenters who objected to advance consents on principle despite their facilitating a client’s choice of counsel and being permitted by existing case law.</p>
				<p>Cmt. [33]</p> <p>Delete current Comment [33] [now Comment [31)].</p>	<p>The Commission recognized that removing Comment [33] (now Comment [22]) would cause confusion because Model Rule 1.7, cmt. [22] does cover the topic of advance consent, and it determined that the correct resolution is to acknowledge that advance consents can be obtained but to underline the limitations involved in the process. The Commission decided not to make Prof. McGowan’s interesting suggestion to include in the Rule rather than the Comment presumptions about the effectiveness of advance consents, in part because it is not convinced that presumptions should be in a Rule. See also footnote 2.</p>
7	Morrison & Foerster (Douglas Hendricks)	A		<p>Support Comment [33] regarding advance waivers of conflicts of interest. Advanced waivers are used regularly in modern law practice and permit access to counsel of choice for clients.</p>	<p>No response necessary. Comment [33] has been renumbered Comment [22]. See also response to Langford, ¶. 2.</p>

8	Office of Chief Trial Counsel (“OCTC”), State Bar of California	NI			<p>Suggests the inclusion of a definition of potential and actual conflicts of interest.</p> <p>1.7(a) The meaning of “directly adverse” will create multiple problems. The only suggestive alternative is to strike the word “directly”.</p> <p>Cmt. [7] Disagrees with the description of a lawyer’s cross-examination of his or her own client as “directly” adverse except in particular circumstances and would remove the second sentence of Comment [6] [now cmt. [7]].</p> <p>1.7(d) Would make paragraph (d) subject to a standard of “informed written consent” rather than only “disclosure”.</p> <p>Cmt. [1] OCTC suggests that Comment [1], which lists factors to consider in determining whether there is a conflict is confusing and vague, and suggests that the presence of particular factor or not will determine whether a conflict exists. OCTC notes a conflict must be determined by reference to the surrounding circumstances.</p> <p>Cmt. [10] In Comment [10], strike “full” from the term “full performance.”</p> <p>Cmt. [11] Comment [11] should be included in the text of the rule itself, perhaps as a definition.</p>	<p>See footnote 2.</p> <p>This term is central to the Model Rule and the proposed Rule, and there is no available alternative. Striking the word “directly” would create discipline where none would be warranted, such as those discussed in Comment [8].</p> <p>The Commission disagrees because any cross-examination of one’s own client is a violation of the lawyer’s duty of undivided loyalty. The statement remains in new Comment [6].</p> <p>See footnote 2. The Commission agrees and has increased the standard under paragraph (b) of MR 1.7 from obtaining “informed consent, confirmed in writing,” to obtaining “informed written consent”.</p> <p>See footnote 2.</p> <p>See footnote 2.</p> <p>See footnote 2.</p>
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				<p>Cmt. [13] OCTC expresses concern that rather than mandate conflict waivers in all joint representations as does Discussion ¶. 7 to current rule 3-310, proposed Comment [13] appears to make it just one factor that may sometimes be required.</p> <p>Cmt. [23] OCTC believes that Comment [23] undermines an attorney's duty to have adequate conflict checking procedures and programs in place; the rule should encourage firms to have adequate conflict checking programs.</p> <p>Cmt. [31] Concerning Comment [33] [now Cmt. [22]], which provides advance conflict waivers are not prohibited, OCTC is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. OCTC recommends that advance conflict waivers be expressly prohibited.</p>	<p>See footnote 2.</p> <p>See footnote 2. See also new Comment [3].</p> <p>The Commission disagrees that the Rule should expressly prohibit advance conflict waivers. After lengthy deliberations involving interested parties from outside the Commission, the Commission concluded that the correct resolution of the advance waiver issue is to acknowledge that advance consents can be obtained but to underline the limitations involved in the process. That is what Comment [22] (Comment [33] in the public comment draft) does. See also RRC Responses to Langford, McGowan, Sall, Zitrin.</p>
9	Orange County Bar Association (Trudy Levindofske)	D	1.7(c)	<p>The heading for paragraph (c) is confusing.</p> <p>The terms "direct adversity," "client's adversary," and "indirect adversity" are not adequately defined.</p> <p>Draft rule deviates from the Model Rule, making it difficult for attorneys to find guidance on interpretation.</p>	<p>See footnote 2.</p> <p>See footnote 2.</p> <p>See footnote 2.</p>

				<p>Rule should explain or define the distinctions between the same matter and different matter contexts that are fundamental to subparagraphs (a), (b), and (c).</p>	<p>See footnote 2. Neither the Model Rule nor the proposed Rule make an attempt to define “matter”, and that term is not included among the Model Rule 1.0 definitions. However, Alaska, D.C., New York, North Dakota, and Oregon have defined the term in their version of Rule 1.0. The Commission reconsidered this issue and determined that no meaningful definition is possible.</p>
				<p>Cmt. [10] Criticized the word “full” in the fourth sentence of Comment [10].</p>	<p>See footnote 2.</p>
				<p>Cmts. [13] & [33] With regard to advance waivers addressed in Comments [14] and [33], concern about adequacy of disclosure where the relevant factual circumstances have not yet developed.</p>	<p>The Commission agrees that the adequacy of disclosure is a key element and believes that is correctly stated in the Comment. Comment [14] has been deleted and [33] renumbered [22].</p>
				<p>Cmt. [33] Suggestion in Comment [33] (now Cmt. [22]) that screening might be appropriate has yet to be endorsed by CA courts.</p>	<p>Comment [22] refers only to ethics screens instituted with client consent, which are permitted.</p>
				<p>Cmt. [33] Suggestion in Comment [33] that the relative sophistication of the client may be factor is troubling because it requires a lawyer to assess the client’s intellect and experience before knowing whether or not a particular disclosure will violate an ethical rule.</p>	<p>Client sophistication is a proper and accepted consideration in determining the effectiveness of an advance consent. See, e.g., <i>Visa U.S.A., Inc. v. First Data Corp.</i>, 241 F.Supp.2d 1100.</p>
				<p>Cmt. [34] Requests deletion of Comment [34] (now Cmt. [25]) because, although it believes the Comment is accurate, the topic of class actions is too complex to cover in a Comment paragraph</p>	<p>See footnote 2. Comment [34] of the public comment draft (now numbered Comment [25]) does not attempt to cover all class action issues and could not, but the Commission believes that Comment [25] provides important guidance of some fundamental conflicts issues that arise in class action representations.</p>

10	Sall, Robert K.	D		Cmt. [33]	<p>Troubled by Comment [33] (now Cmt. [22]) endorsement of advance waivers as they are rarely sufficient to disclose either the circumstance or the foreseeable adverse consequences. At a minimum, sentence in Comment [33] that suggests an open ended general waiver may be sufficient should be deleted. Focus on sophisticated clients versus unsophisticated clients is not appropriate.</p>	<p>There was perhaps no portion of the Commission's work on Rule 1.7 that led to greater public involvement and comment than the topic of advance consent to future conflicts of interest. After careful consideration of the public comment, both pro and con, the Commission has edited Comment [33] (now numbered Comment [22]) for greater clarity and also to more explicitly state the requirements for obtaining client consent, thereby enhancing client protection.</p>
				Cmt. [5]	<p>Concepts of "direct" and "indirect" adversity are ill-defined (no corrective drafting suggested). Also, Comment [5] statement that there is no single definition for what constitutes a direct conflict is not helpful and should be deleted.</p>	<p>See footnote 2. The concept of "direct adversity" is fundamental to application of Rule 1.7 both in the Model Rule and the proposed versions. The Commission carefully reviewed the Model Rule explanation and compared it to the proposed discussion, and as a result it did not make the requested revision.</p>
11	San Diego County Bar Association (Heather L. Rosing)	M		Cmt. [32]	<p>Delete Comment [34] (now Cmt. [25]) regarding class representation because it should be addressed in a separate rule on class representation.</p>	<p>The Commission did not undertake to create a new class action rule (there being no such Model Rule) and instead retained Comment [34] (now numbered Comment [25]) as a helpful explanation of some of the key conflicts issues that can arise in a class action representation. Further, as stated above in response to the comment from the O.C. Bar Assoc., the Commission does not believe it would be possible to cover all class action issues in these Rules, but it does believe that this Comment provides important guidance on key conflicts issues.</p>
				Cmt. [33]	<p>Delete fourth sentence from end of Comment [33] (now Cmt. [22]) regarding advance consent because it does not accurately state the status of current law.</p>	<p>See footnote 2. The fourth sentence of currently-numbered Comment [22] describes potentially important client protection, and the Commission did not make the requested revision.</p>

12	Zitrin, Richard, and California Legal Ethics Educators	D		1.7(a)	1.7(a) as drafted would allow lawyers to be adverse to their own clients (if a lawyer represents A in A v. B, the lawyer may undertake representation of B in B v. X without consent, even though B is directly adverse to the lawyer's client A). No jurisdiction in the US allows a lawyer to be directly adverse to that individual's own client and CA should not move in that direction.	See footnote 2.
				1.7(a)	1.7(a) should be amended to remove the three phrases concerning "matters" and what remains is a simple statement of the duty of loyalty.	See footnote 2.
				1.7(c)	1.7(c) is an amended restatement of 3-310(C)(3) that is considerably narrower than the current rule because it removes the language that now read "whose interest in the ... matter is adverse," adds the word "direct" to the word adverse, and puts the "matters" in chronological order, thus narrowing the rule's application.	See footnote 2.
				1.7(b)(1) and (2)	The language in 1.7(b)(1) and (2) could be combined by saying "potentially or actually conflict".	See footnote 2.
				Cmt. [33]	Commission's position on advance waivers is untenable and must be removed. Comment [33] (now Cmt. [22]) inappropriately allows clients to consent to blanket advance waivers of conflict even where adequate disclosure cannot possibly be met. Comment [33] states that "use of an adequate ethics screen" is a factor in determining the adequacy of a waiver	There was perhaps no portion of the Commission's work on Rule 1.7 that led to greater public involvement and comment than the topic of advance consent to future conflicts of interest. After careful consideration of the public comment, both pro and con, the Commission edited Comment [22] to the public comment draft (now numbered Comment [22]) for clarity and to more explicitly state the

				<p>but screening is very limited under CA case law and the Commission appears to be legislating. Consulting independent counsel does not overcome the problem of inadequate disclosure.</p>	<p>requirements for obtaining client consent, thereby enhancing client protection. These modifications make no substantive change.</p>
			1.7(d)	<p>1.7(d) does not protect clients by requiring only written disclosure without written consent. Perhaps include a “materiality” standard that is used to set forth what 1.7(d) situations require consent.</p>	<p>See footnote 2. The Commission agreed and increased the standard under paragraph (b) Model Rule 1.7 obtaining “informed consent, confirmed in writing,” to obtaining “informed written consent”.</p>
			1.7(d)(4)	<p>Inadequate parallel language in (d)(3) and (d)(4) because word “personal” is left out of (d)(4).</p>	<p>See footnote 2.</p>
			1.7(d)(3)	<p>(d)(3) refers to a conflict that arises when the lawyer’s friends or associates are “affected substantially” but language should include the client being affected substantially.</p>	<p>See footnote 2.</p>

Rule 1.7: Conflicts and Interests: Current Clients

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California: Rule 3-310 (Avoiding the Representation of Adverse Interests) requires written informed consent to the conflicts it describes. This rule incorporates in one place principles spread across several rules in the ABA Model Rules, including current and former client conflicts and conflicts arising from the payment of a fee by a nonclient.

Section 2860 of the California Civil Code, adopted after the important decision in *San Diego Credit Union v. Cumis*, 208 Cal. Rptr. 494 (1984), seeks to reconcile the multiple interests at stake when an insurance company has a duty to defend an insured whose interests might not be congruent with those of the insurer. The first paragraph of §2860 provides as follows:

(a) If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision which sets forth the method of selecting that counsel consistent with this section.

District of Columbia: Rule 1.7 differs significantly from the ABA Model Rule in its language but addresses the same current client conflicts. A unique provision is Rule 1.7(d), which in certain (but not all) instances allows a lawyer to continue with a conflicted representation when the conflict arises after the lawyer has begun work on a matter, but only if the conflict was “not reasonably foreseeable at the outset of a representation.”

Florida adds Rule 1.7(d) (identical to the 1983 version of ABA Model Rule 1.8(i), now Comment 11 to ABA Model Rule 1.7), which provides:

A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

Florida also adds Rule 1.7(e), which requires a lawyer representing “an insured client at the expense of the insurer ... to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation.”

Georgia has a unique version of Rule 1.7 that draws heavily on the Restatement of the Law Governing Lawyers. Georgia Rule 1.7 provides, in full, as follows:

(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

(b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after:

(1) consultation with the lawyer,

(2) having received in writing reasonable and adequate information about the material risks of the representation, and

(3) having been given the opportunity to consult with independent counsel.

(c) Client consent is not permissible if the representation:

(1) is prohibited by law or these rules;

(2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or

(3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

Maine: Rule 3.4(a)(1) provides as follows:

Disclosure of Interest. Before commencing any professional representation, a lawyer shall disclose to the prospective client any relationship or interest of the lawyer or of any partner, associate or affiliated lawyer that might reasonably give rise to a conflict of interest under these rules. A lawyer has a continuing duty to disclose to the client any information that, in light of circumstances arising after the commencement of representation, might reasonably give rise to such a conflict of interest.

Massachusetts retains the original 1983 version of ABA Model Rule 1.7, and the Comment to Massachusetts Rule 1.7 differs substantially from the Comment to ABA Model Rule 1.7. Among other things, the Massachusetts Comment addresses the situation of the lawyer who represents one member of a corporate family while opposing another member of the family, the issue of confidentiality and privilege in multiple representation, and the responsibilities of lawyers who represent classes. Comment 6 states that "a lawyer should not accept referrals from a referral source... if the lawyer's desire to continue to receive referrals from that source or the lawyer's relationship to that source would or would reasonably be viewed as discouraging the lawyer from representing the client zealously."

New Jersey: Rule 1.7(b)(1), the counterpart to ABA Model Rule 1.7(b)(4), contains a proviso to the effect "that a public entity cannot consent to any such representation." In addition, New Jersey adds a sentence from the original 1983 version of ABA Model Rule 1.7 requiring the lawyer, when representing multiple clients in a single matter, to explain "the advantages and risks involved" in common representation.

With respect to mortgage transactions, New Jersey has an unusual conflict of interest statute, N.J.S.A. §46:10A-6(b), which provides as follows:

If a lender makes a written offer to a borrower to make a loan secured by real property located in this State, the lender shall disclose, in writing, prominently and in bold type, to the borrower before the acceptance of the offer by the borrower, that the interests of the borrower and lender are or may be different and may conflict, and that the lender's attorney represents only the lender and not the borrower and the borrower is, therefore, advised to employ an attorney of the borrower's choice licensed to practice law in this State to represent the interests of the borrower.

New York retains DR 5-101 and DR 5-105 of the ABA Model Code of Professional Responsibility. In addition, DR 5-105(E) imposes a duty on a "law firm" to keep adequate records to enable lawyers to check for conflicts. It provides:

E. A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105(D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105(D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105(D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105(D).

Pennsylvania: Rule 1.7 tracks ABA Model Rule 1.7, except that Pennsylvania Rule 1.7(b)(4) does not require that client consent be "confirmed in writing."

Texas: Rule 1.06 provides as follows:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or becomes adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such

parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

The Texas rule thus allows a lawyer to oppose a current client in a matter not "substantially related" to matters being handled for that client. However, in *In re Dresser Industries, Inc.*, 972 F.2d 540 (5th Cir. 1992), the Fifth Circuit refused to apply Texas Rule 1.06, stating, that conflicts of interest in federal litigation are governed by "national standards," including ABA Model Rule 1.7 and the Restatement of the Law Governing Lawyers.

Washington: For consent to a conflict to be valid. Rule 1.7(b)(4) requires that each affected client gives Informed consent, confirmed in writing "(following authorization from the other client to make any required disclosures)."

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May 5, 2010 McCurdy E-mail to Drafters (KEM/Kehr, Melchior & Snyder), cc RRC:

Rule 1.7 Codrafters (MOHR/KEHR, Melchior, Snyder):

The public comments received to date on this rule are attached in a combined PDF. I've also provided a Word copy of the draft public commenter chart with the comment synopses filled in. To keep pace with the comments being received, please consider beginning to add the RRC responses, and if desired, modifications to the synopses.

Of course, more comments continue to be received each day, and we will convey updated information periodically in order to keep abreast of the public comment review in anticipation of the work being carried out at your June 4 & 5, and June 25 & 26 meetings.

Attached:

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT1 (4-22-10).doc
RRC - 3-310 [1-7] - Public Comment Complete - REV (05-05-10).pdf

May 19, 2010 McCurdy E-mail to Drafters (KEM, Kehr, Melchior & Snyder), cc RRC:

Rule 1.7 Codrafters (MOHR/KEHR, Melchior, Snyder):

We have now received 3 comments on Rule 1.7. According to the Chair's guidelines this rule will be called for discussion at the June 4 & 5 meeting. Here are the instructions from the assignment agenda for all post public comment rules:

INSTRUCTIONS: For each rule listed below that has received three or more comments/testimony, the codrafters are assigned to review the comments/testimony received and to prepare a revised draft rule, if any revisions are recommended, and a Public Commenter Chart with RRC responses, for submission to staff by 12 noon on Tuesday, May 25, 2010 to distribute with the June 4 & 5 meeting agenda materials. An updated Dashboard, Introduction, and Model Rule comparison chart are also needed to complete the rule; however, the codrafters have the discretion of waiting until the end of the public comment period (on June 15th) to begin work on these documents. Additional comments will be sent to each drafting team by e-mail as they are received. Where three or more comments have been received, materials are enclosed for codrafters. Rules that have received less than three comments/testimony will not be considered until the June 25 & 26 meeting.

I've attached a current comment compilation, and an updated public commenter chart.

Attached:

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT1 (05-19-10).doc
RRC - 3-310 [1-7] - Public Comment Complete - REV (05-19-10).pdf

May 19, 2010 Kehr E-mail to Drafters:

I will try to dig into this before the end of this week.

May 19, 2010 Snyder E-mail to Drafters:

Thank you.

May 20, 2010 Kehr E-mail to Drafters, cc Chair, Lamport, Vice-Chairs & Staff:

I've attached a completed draft of the public comment chart for your review and suggestions.

Kevin, can you confirm the accuracy of two Comment references that were in the partial draft sent out by Lauren? In the last column, is the reference to Rule 1.7, Comment [32] correct? The posted version of the complete Rules has it as Comment [25]. In the very next paragraph, is the reference to Comment [31] correct? The posted version of the Rules has advance consent as Comment [22].

The second S.D. comment provides no explanation, but I was troubled by the sentence they criticized and have come to think they have a point. My concern is that the questioned sentence refers only to independent counsel, which I think overlooks other factors that (properly) are part of the mix under case law. I propose changing the sentence to say (and, by the way, I'm not certain how we arrived at the posted version, which differs from the last draft that I have, but this nevertheless is based on the posted version):

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; this can depend on factors such as whether that person was independently represented regarding the consent 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 reasonably opportunity to seek that advice, the quality of the lawyer's conflicts discussion with the person, and the nature of the actual conflict.

I look forward to your comments.

Attached:

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2 (05-20-10).doc

May 20, 2010 KEM E-mail to Kehr, cc Drafters, Chair, Vice-Chairs, Lamport & Staff:

I think some of the comments were resubmissions of earlier public comments (e.g., sdcba). That's why the references are off. I'll bracket the correct references in the chart you sent.

May 21, 2010 KEM E-mail to Kehr, cc Drafters, Chair, Vice-Chairs, Lamport & Staff:

1. I've done a little detective work and as near as I can tell, SDCBA was not referring to the sentence that begins, "However, even a general and open-ended ..." Please see footnote 5 in the attached Public Comment Chart, XDFT2.1 (5/21/10).

**RRC – Rule 1.7 [3-310]
E-mails, etc. – Revised (6/1/2010)**

2. I've also attached the most recent version of ALT1, Draft 2.2A (2/28/10) [this is the draft that was sent out for the 90-day public comment period in March]. The subject sentence in that draft provides:

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 that was independently represented regarding the consent 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.

a. January 2010 Meeting. I would not change that sentence. As you recall, at our January meeting, Dave Bell and Ron Ryland asked that we take another look at the sentence in the draft at issue at that meeting, Draft 14.5 (1/11/10). The sentence then provided:

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 that was independently represented regarding the consent.

The sentence was more absolute in requiring that the client BE REPRESENTED by independent counsel, not just that the client be given an opportunity. It had been intentionally drafted that way to distinguish the open-ended consent situation addressed toward the end of the Comment (i.e., being represented is a requirement) from the more specific kind of consent that arguably is addressed earlier in the Comment and refers to representation by independent counsel as ONE of a number of factors to be considered. It was revised at Dave Bell's and Ron Ryland's request to require that the 1.8.1 protocol (representation or advice & opportunity) be stated instead. The Commission approved the revised comment. See below. Because this was intended as an absolute requirement, there is no reason to reintroduce a balancing of factors; that appears earlier in the comment as applied to advance consents in general.

b. February 2010 Meeting. At the 2/2010 meeting, the Commission approved revised Comment [22], including the sentence as it appears in Draft 2.2A (2/28/10) by a 7-3-1 vote. I would leave it as is.

c. Rule 1.7 KEM Meeting Notes, Cumulative. Finally, for your reference, I've attached my cumulative notes for 1.7, in PDF. It includes the January and February 2010 meeting notes.

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

Kevin

Attached:

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.1 (05-21-10)RLK-KEM - Cf. to DFT2.doc

RRC - 3-310 [1-7] - Rule - ALT1 - DFT2.2A (02-28-10) - CLEAN-LAND.doc

RRC - 3-310 [1-7] - KEM Meeting Notes - CUMUL (04-12-10).pdf

May 21, 2010 Snyder E-mail to Drafters, cc Chair, Lamport & Staff:

I recall this exchange between David Bell, Ron Ryland & the RRC. I agree with Kevin - I would not change this language for the reasons Kevin mentioned. It was specifically considered and voted on by the RRC. To my mind, this proposed revision introduces an entirely different standard.

May 21, 2010 Kehr E-mail to KEM, cc Drafters, Chair, Vice-Chairs, Lamport & Staff:

On the question of which sentence S.D. had in mind, why don't we cover each possibility? If the S.D. comment refers to ..., then, etc.

As to the sentence that really is four from the end, I agree with you that, logically, the open-ended consent discussion does not exclude the application of the other factors identified earlier in Comment [22], and it certainly was not my intent when I wrote this language to limit the "experienced user" discussion to the question of independent representation (now expanded to include the situation in which there is written notice and time to obtain independent representation). But the risk is that the "however" sentence will be read out of context. One of my great concerns throughout is that what we write will be misunderstood, and looking at this language cold, I fear this is one of those situations.

The "however" sentence is paired with the one that precedes it. They say ---

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 that was independently represented regarding the consent 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.

What I was trying to get at, perhaps badly, was that the other factors still apply. What if we were to begin the second quoted sentence: "However, subject to the other factors referred to in this Comment, even a general"

Any thoughts?

May 21, 2010 KEM E-mail to Kehr, cc Drafters, Chair, Vice-Chairs, Lamport & Staff:

I'm not sure we need to refer back to the enumerated factors, but if we do, we should probably clarify specifically what we are referring to. How about the following:

[22] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not 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 Comments [18]-[20] (informed written consent).

**RRC – Rule 1.7 [3-310]
E-mails, etc. – Revised (6/1/2010)**

However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) 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 must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and 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 factors ~~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 in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully 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, depending upon the extent to which the other enumerated factors set forth above are present, even a general and open-ended advance consent can be in compliance when (1) the consent was given by an experienced user of the type of legal services involved; and (2) that the client was independently represented regarding the consent 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. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

First, rather than refer to "things," we refer to "factors" to be considered. Second, we then later say, in essence, that at a minimum, the client has to: (1) be an experienced user, etc. (factor #2) and (2) have been independently represented, etc. (factor #4), in addition to the extent to which the other factors are present (by stating "subject to," it seems to me that we are suggesting that all the other factors have to be present when we're not really saying that). I'm on the east coast and it's late. That's the best I can offer at present. I'm afraid that in our attempt to be complete, we might only be muddying the waters. Thanks,

May 22, 2010 Kehr E-mail to KEM, cc Drafters, Chair, Vice-Chairs, Lamport & Staff:

I'm fine with your suggestion. It is another way of getting at my concern.

Two nits --- I would place a colon after "when" and before the current "(1)" b/c of the use of the semi-colon later in the sentence. Also, I would prefer to remove the "(1)" and "(2)" b/c the same numbering system is used earlier in the Comment.

May 22, 2010 KEM E-mail to Kehr, cc Drafters, Chair, Vice-Chairs, Lamport & Staff:

I've attached the revised Comment [22], in Word, redline and clean versions.

Attached:

RRC - 3-310 [1-7] - Rule - Comment [22] - REV1.1 (05-22-10) - Cf. to PCD.doc

RRC - 3-310 [1-7] - Rule - Comment [22] - REV1.1 (05-22-10) - CLEAN

May 22, 2010 Lamport E-mail to KEM:

I finally have some time to work on this. Attached is a rework of the alternative approach to the Rule that we discussed at dinner. I'd be interested in your thoughts.

You will notice that I bracketed the reasonably possible language in the 1.7(a)(2). I know you would prefer the "substantial risk" language over a "reasonably possible" standard. If we can get a clear discussion of a reasonably possible standard in the the Comment, I can probably live with that, although I would prefer it in the Rule if it is all the same to you.

You will also notice that I have left out the "concurrent conflict" language in (a). I think that terminology is incorrect when it comes to (a)(2), which I think is really referring to a potential conflict of interest - if there is a significant risk, that means the conflict hasn't happened yet. It is just likely. When you have conflicting duties or a relationship affects your independent judgment, you have a conflict. That is an important point in the malpractice context. If the risk is significant, but it hasn't happened yet, it is just a potential conflict. I know the ABA does not like the actual/potential terminology; but referring to something as a conflict that is not yet an actual conflict can lead to confusing results. The "concurrent conflict" language is not necessary to state the Rule. I am suggesting that we not use the terminology and address the reasons in the Comment.

I would appreciate your thoughts on this. I would like to see if you, Mark, Bob and I can build a consensus around this. I will be sending them a copy of the draft concept as well. If we can agree on the concept, we would have to work on the Comments; but that comes after we have a consensus on the Rule. Let me know.

Attached:

RRC - 3-310 [1-7] - Rule - ALT3 - DFT1 (05-22-10)SWL.DOC

May 22, 2010 Lampport E-mail to KEM:

In going over the draft I sent you earlier, I realized I left out multiple client representations, which I have added as a new 1.7(a)(2)(A). Please use this version when you review it.

Attached:

RRC - 3-310 [1-7] - Rule - ALT3 - DFT1.1 (05-22-10)SWL.doc

May 23, 2010 Kehr E-mail to KEM, cc Drafters, Chair, Vice-Chairs, Lampport & Staff:

This works for me. Are you going to do the revisions now needed to the public comment chart I did?

May 23, 2010 KEM E-mail to Kehr, cc Drafters, Chair, Vice-Chairs, Lampport & Staff:

I'll make those revisions.

May 24, 2010 KEM E-mail to Lampport:

I can't get to this for another day or two. I'm back east. My sister had a fall and broke both her elbows (who knew you could do that?) She's in excellent spirits (which is a lot better than I would be) and is on the mend but there's a lot to do back here around her house. I'll definitely get to this before the end of the week.

May 25, 2010 KEM E-mail to McCurdy, cc Drafters, Chair & Staff:

I've attached the following:

1. Public Comment Chart, XDraft 2.2 (5/24/10)RLK-KEM;
2. Comment [22], REV1.1 (5/24/10), redline, compared to Pub Com Draft [#2.2A] (2/28/10).

Please use the attached as the materials for this agenda item for the 6/4/10 meeting.

I have not made any changes to the Rule itself, Dashboard, Introduction or Rule & Comment Chart pending the Commission's decisions on the proposed revisions to Comment [22].

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

Kevin

Attached:

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM.doc

RRC - 3-310 [1-7] - Rule - Comment [22] - REV1.1 (05-24-10) - Cf. to PCD.doc

June 2, 2010 Sapiro E-mail to RRC List:

Regarding rule 1.7:

1. The bolding of the sentence at footnote 5 caused me to consider whether I agree with it.
2. On reflection, I think that sentence is incorrect or incomplete. I think that saying that an advance consent “normally” will comply with the rule if the client is already familiar with a particular type of conflict understates the variables that may apply and overstates the validity of an advance consent. For example, if a lawyer is representing two parties in a litigation matter, they may understand in advance the nature of a conflict that will arise if they become embroiled as adversaries in a different matter. However, they may not, in advance, understand the consequences of that conflict, because the consequences may be specific to the type of conflict that arises in the future. In that event, the advance consent will not have been “informed.”
3. My point is that it is not just the “type of conflict” that determines whether the advance consent satisfies the rule. Comment [22] emphasizes six variables, of which experience is only one. Whether the client understood both the type of conflict and its reasonably foreseeable adverse consequences at the signing of the advance waiver is but one aspect of the validity of the advance waiver, and the bolded sentence does not even include the adverse consequences.
4. For this reason, I recommend either that we delete the bolded sentence or that we add at the end of the sentence at least: “. . . with which the client already is familiar and the reasonably foreseeable adverse consequences of which the client already knows.”
5. I agree with and am grateful for the changes in Comment [22] at page 465 of the agenda materials.