

From: [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#)
Cc: [Robert L. Kehr](#); [Kurt Melchior](#); [Kevin Mohr G](#); [Dominique Snyder](#); [Stan Lamport](#); [Raul L. Martinez](#); [Mark Tuft](#); [Harry Sondheim](#)
Subject: RRC - 1.7 [3-310] - V.A. - Agenda Materials [1/22-23/10 Meeting]
Date: Tuesday, January 12, 2010 5:55:28 AM
Attachments: [RRC - 3-310 \[1-7\] - Rule - DFT 14.5 \(01-11-10\)RLK - Cf. to DFT 13.2-Part1.doc](#)
[RRC - 3-310 \[1-7\] - E-mails, etc. - REV \(01-19-10\) 227-235.pdf](#)
[RRC - 3-310 \[1-7\] - Rule - DFT 14.5 \(01-11-10\) - COMMENT - Cf. to DFT 13.2.doc](#)
[RRC - 3-310 \[1-7\] - Rule - DFT 14.5 \(01-11-10\)RLK - Cf. to DFT 13.2-Part2.doc](#)

Greetings:

I've attached the following in hopes of moving this forward.

1. E-mail compilation excerpt. In PDF. This includes Bob's cover e-mail of yesterday as the first item. I've also combined Stan's (in red) and Raul's (in red caps) interlineated responses to Bob's e-mail right after it.
2. Rule, Draft 14.5 (1/11/10)RLK- PART1, redline, compared to Draft 13.2 (10/20/09), the draft submitted to RAC/BOG at their November 2009 meeting and which was returned to us for further consideration. The document is denominated as part 1 as it includes only paragraphs (a), (b), and (c) from Draft 13.2. It is identical to the draft Bob circulated last night with only the draft no. changed. Word.
3. Rule, Draft 14.5 (1/11/10)RLK- PART2, redline, compared to Draft 13.2 (10/20/09). The document is denominated as part 2 as it includes only paragraph (d) from Draft 13.2 (now re-lettered as paragraphs (c) and (d)). It is identical to the draft Bob circulated last night with only the draft no. changed. Word.
4. Rule COMMENT, Draft 14.5 (1/11/10)RLK, redline, compared to Draft 13.2 (10/20/09). This draft incorporates further changes to the draft that was circulated for the December 2009 RRC meeting. However, it will require further revision, depending upon decisions the Commission makes concerning items 2 & 3, above. Word.

Some notes:

1. I haven't included all of the e-mails that the drafters and other interested RRC members (Stan, Raul and Mark) have circulated since the December meeting. I thought Bob has done a fine job of laying out the issues on these drafts in his cover e-mail, and Stan's and Raul's

interlineated comments have further fleshed out the differences of opinion. If you think we should include the rest of the e-mails, please let me know and I'll send them on for insertion AFTER Bob's cover e-mail and Stan's and Raul's interlineated responses to it.

2. I have some comments that I simply don't have time to make right now. I will send them on before the e-mail deadline next Monday.

3. As Bob noted, we can't advance the other documents (Dashboard, Rule & Comment Comparison Chart and Public Comment Chart) until the issues concerning the attached documents are resolved.

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

Kevin

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kevinm@wsulaw.edu

January 11, 2010 Kehr E-mail to Drafters, cc Chair, Lamport, Martinez & Chair:

My thanks to all the commenters on my various drafting suggestions, but my advance apologies to them for my oversights and misunderstandings. I was hit almost at once with comments and drafting suggestions from five sources, some of them commenting on each other as well as on my 12/16/09 drafts. I have done my best in my attempt to keep straight so many disparate thoughts and suggestions but I'm certain to have missed something along the way.

The attached attempts to pull all this together and is offered with the following responses to the emails of others (this message is intended to be the cover memo for the agenda materials):

1. Document labeled as Part 1:

a. Paragraph (a) [combining what formerly were paragraphs (a) and (c)]

- i. Stan's suggested change to the paragraph (a) title seems to me to be six of one, etc., but I'm glad to accept it so that we can move on to other matters.
- ii. Stan appears to have accepted my 12/16/09 draft of paragraph (a)(1), and the attached makes no changes in it. I disagree with Raul and Mark on this because use of the Model Rule version of paragraph (a) would destroy the distinction between direct adversity and joint representations. We can't go through this debate again.
 1. Raul's email also asks (in the first sentence of his comment on proposed (a)(1)) how a representation can be directly adverse to another client if the lawyer's representation is in another matter. The answer is that this describes the situation in which a lawyer sues his own client (a lawyer who represents multiple clients in a single matter is covered by paragraph (b)).
 2. Raul's email then goes on to suggest a drafting that would prohibit a representation where the interests of the clients conflict. Again, I don't agree. We so far in this Rule have retained the California appellate law concept that a lawyer has conflict when his duties, relationships, or interests interfere with the lawyer's ability to fulfill all responsibilities owed to a client. To use the example that we employed in the 1996-97 drafting efforts, there is nothing necessarily wrong in representing both Burger King and McDonalds. A lawyer who represents both in different matters has a conflict only if the lawyer represents one against the other (paragraph (a)(1)), and a lawyer who represents them in a single matter is subject to paragraph (b).
- iii. Stan's simplification of my draft of what now is paragraph (a)(2) does not seem to me to work because it materially expands what was paragraph (c). Former paragraph (c), and current rule 3-310(C)(3), apply only when the new client is the adversary in the very matter in which the lawyer represents the current client. Stan's revision would prohibit any lawyer who represents Burger King from ever representing McDonalds, even if

the lawyer does not represent McDonalds against Burger King in any matter, simply because McDonalds and Burger King are adversaries in some matter somewhere. That never has been the intent. The attachment as a result retains my 12/16/09 draft with a minor change to the first few words (this change is non-substantive and is intended only to make subparagraph (2) flow more smoothly from the introduction). If anyone thinks I have misread Stan's suggestion, we will have to thrash that out at the meeting as we are out of time for now.

b. Paragraph (b)

- i. RAC made no comments on paragraph (b), and it is unchanged.

2. Document labeled as Part 2

- a. Paragraph (c) [formerly paragraph (d)] – the disparateness of the comments is dizzying. One thing that is clear is that everyone seems to have rejected my alternative attempts to simplify the drafting. As a result, we are left with the prior draft that has been reorganized into two paragraphs as Stan suggested (see below).
- i. Raul suggests that we move back a step from the informed written consent standard to one of written disclosure. Raul says he is agreeing with Randy on this and, although I don't read Randy's message as making that recommendation, we at least can treat it as being Raul's (and one that Stan supports per his message). I also want to point out that there is an alternative now available to us under our defined terms, which is "informed consent". The attached draft makes neither of these changes, but I think they should be considered at the outset as either of these changes might have other drafting consequences.
1. It apparently is because of concerns over the rigidity of the use of the standard of informed written consent in paragraph (c) that Randy suggested, and Raul and Stan (I think in differing ways) supports some kind of materiality standard. Stan gives *Pringle* as an example, but I don't think it is pertinent because: (i) it is a fee award case; (ii) it arose under rule 3-600 rather than 3-310(B); and (iii) because the court's decision was not based on the materiality of the conflict but rather whether the conflict in fact interfered with the lawyer's performance.
 2. I don't support the use of a materiality standard to modify all of paragraph (c). I have three independent reasons for this. First, I view what currently is rule 3-310(B) as being as much about a client's trust in the lawyer and the legal system as anything else. Even if a lawyer believes (and even if a lawyer reasonably believes) that a particular current or former relationship would not affect the quality of the representation, the lawyer should disclose those relationships that a client reasonably can be expected to think are significant. Doing so permits the client to decide whether

to hire the lawyer and how to supervise and monitor the lawyer, and strengthens client trust by allowing the client rather than the lawyer to be the decision maker. That element is eliminated if the relationship and interest conflicts are limited to those that the lawyer believes (or reasonably believes) would substantially affect the representation. Second, if the lawyer believes the representation would be substantially affected, the lawyer probably shouldn't even seek client consent (remember that a lawyer cannot obtain advance consent to an incompetent representation under Rule 1.8.8). Third, most of what is in paragraph (c) should be treated as a conflict situation that requires some level of notice to or consent from the client. For example, a lawyer who represents a witness in a matter should not be given the opportunity to find a comforting explanation for why the disclosure or consent is needed (I'm not the sort of person to allow myself to be affected by this). As we can see from *Hernandez v. Paicius*, lawyers will have no trouble in finding that explanation.

- ii. Stan suggests as one way to simplify that we separate out “the lawyer relationship rules” in a separate paragraph. As appears from his suggested revision to my draft, what he has in mind is the subject of current rule 3-320 plus lawyer-client relationship with another person's lawyer (what were (d)(5) and (6) in our prior version). I'm fine with Stan's suggested reorganization. It creates a new paragraph (d), as you will see from the attachment. This version is essentially the same as Stan's suggestion but with three or four minor drafting corrections.
- iii. Stan also suggests as a method for simplifying the draft that we eliminate what currently is paragraph (c)(2) [current rule 3-310(B)(2)]. I have not made that change to the attachment, but it can be done easily if that is the Commission's decision. I do not support this change as I think that a lawyer should be obligated to disclose significant former relationships. If we were to simplify (c)(2), I would suggest doing so by eliminating the materiality standard for the reasons given above.
- iv. The simplification that I suggested for (c)(2) also could be done with (c)(3).

3. Document labeled as Comment

- a. Comment [8A]: Stan disagrees with the first two sentences. I have copied his objection immediately below. I frankly don't understand his thought. If suing one's own client isn't a loyalty violation, what is it? I have retained the first two sentences but reworded them, and I hope this satisfies Stan's concern.

I do not like the first two sentences of Comment [8A]. First, the Rule does not address a second loyalty violation. It involves the same type of conflict, but in a different situation. Second, I do not like the reference to the second representation seeming to be disloyal to the current client. That makes it sound like it is not a real conflict, when it is. I recommend that we delete the first two sentences of the Comment.

- b. Comment [31]: I agree with Kevin’s email about “effective”. I don’t know how I got there, but I have reversed course on that. The attached draft otherwise is almost exactly the same as my 12/16/09 draft.
 - c. Because I don’t know what the Commission will do with what now are paragraphs (c) and (d), I have made no further changes to the related Comments. I can’t locate any suggestions about any of the other Comment changes shown on the attached drafts.
4. We need to wait until after the January meeting to finalize the Introduction, Dashboard, and rule comparison chart, and commenter chart.

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RRC - 3-310 [1-7] - Rule - DFT 14.5 (01-11-10)RLK - Cf. to DFT 13.2-Part1.doc
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RRC - 3-310 [1-7] - Rule - DFT 14.5 (01-11-10) - COMMENT - Cf. to DFT 13.2.doc

January 11, 2010 Lampport E-mail to Kehr, cc Drafters, Chair, Martinez & Staff:
January 11, 2010 Martinez E-mail to Kehr, cc Drafters, Chair, Lampport & Staff:

STAN: My comments are below in red.

RAUL: Bob, my response to parts of your e-mail are in RED CAPS below.

My thanks to all the commenters on my various drafting suggestions, but my advance apologies to them for my oversights and misunderstandings. I was hit almost at once with comments and drafting suggestions from five sources, some of them commenting on each other as well as on my 12/16/09 drafts. I have done my best in my attempt to keep straight so many disparate thoughts and suggestions but I’m certain to have missed something along the way.

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1. Raul's email also asks (in the first sentence of his comment on proposed (a)(1)) how a representation can be directly adverse to another client if the lawyer's representation is in another matter. The answer is that this describes the situation in which a lawyer sues his own client (a lawyer who represents multiple clients in a single matter is covered by paragraph (b)). [SO WHY NOT DELETE "IN ANOTHER MATTER" IN YOUR VERSION OF (a)(1)? THE "MATTER" CONTEXT IS NOT THE RELEVANT CONSIDERATION; RATHER, IT IS THE ADVERSITY THAT COUNTS REGARDLESS OF THE CONTEXT OR MATTER. AND IF YOU REMOVE "IN ANOTHER MATTER" FROM (a)(1), THIS TENDS TO MAKE PARAGRAPH (b) SOMEWHAT REDUNDANT. I DON'T SEE WHY WE NEED TO DRAW A DISTINCTION BETWEEN MATTERS, ESPECIALLY IF WE REQUIRE "DIRECT ADVERSITY.]
2. Raul's email then goes on to suggest a drafting that would prohibit a representation where the interests of the clients conflict. [SOUNDS LIKE A STRAW MAN. IF THIS THE CONCERN, IT'S A FUNCTION OF HOW (b)(1) IS DRAFTED.] Again, I don't agree. [NEITHER DO I.] We so far in this Rule have retained the California appellate law concept that a lawyer has conflict when his duties, relationships, or interests interfere with the lawyer's ability to fulfill all responsibilities owed to a client. To use the example that we employed in the 1996-97 drafting efforts, there is nothing necessarily wrong in representing both Burger King and McDonalds. A lawyer who represents both in different matters has a conflict only if the lawyer represents one against the other (paragraph (a)(1)), and a lawyer who represents them in a single matter is subject to paragraph (b). [I DON'T THINK WE NEED TO GO INTO A DISTINCTION BETWEEN THE "SAME" AND "ANOTHER" MATTER. PARAGRAPHS (a) AND (b) SAY MUCH OF THE SAME THING IF WE IGNORE THE "MATTER" CONTEXT. PARAGRAPH (a) REFERS TO THE "REPRESENTATION" BEING ADVERSE, WHEREAS PARAGRAPH (b) REFERS TO THE CLIENTS' "INTERESTS" BEING IN CONFLICT-- FLIP SIDES OF THE SAME COIN. ANALYTICALLY, WE'RE TALKING ABOUT THE SAME THING-- CLIENTS WITH ADVERSE INTERESTS, BUT IN DIFFERENT MATTERS. PARAGRAPHS (a) AND (b) ADDRESS AND PROTECT THE SAME CORE VALUES.]
- iii. Stan's simplification of my draft of what now is paragraph (a)(2) does not seem to me to work because it materially expands what was paragraph (c). Former paragraph (c), and current rule 3-310(C)(3), apply only when the new client is the adversary in the very matter in which the lawyer represents the current client. Stan's revision would prohibit any lawyer who represents Burger King from ever representing McDonalds, even if the lawyer does not represent McDonalds against Burger King in any matter, simply because McDonalds and Burger King are adversaries in some matter somewhere. That never has been the intent. The

attachment as a result retains my 12/16/09 draft with a minor change to the first few words (this change is non-substantive and is intended only to make subparagraph (2) flow more smoothly from the introduction). If anyone thinks I have misread Stan's suggestion, we will have to thrash that out at the meeting as we are out of time for now.

I did not intend the expansion Bob identified here, but agree that what I drafted would, unintentionally, produce that result because it does not link the adversity to the matter in which the lawyer represents the client. I don't have a quick fix to this at the moment, but will go back to the drawing board on this one.

- b. Paragraph (b)
 - i. RAC made no comments on paragraph (b), and it is unchanged.
3. Document labeled as Part 2
- a. Paragraph (c) [formerly paragraph (d)] – the disparateness of the comments is dizzying. One thing that is clear is that everyone seems to have rejected my alternative attempts to simplify the drafting. As a result, we are left with the prior draft that has been reorganized into two paragraphs as Stan suggested (see below).
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 - 1. It apparently is because of concerns over the rigidity of the use of the standard of informed written consent in paragraph (c) that Randy suggested, and Raul and Stan (I think in differing ways) supports some kind of materiality standard. Stan gives *Pringle* as an example, but I don't think it is pertinent because: (i) it is a fee award case; (ii) it arose under rule 3-600 rather than 3-310(B); and (iii) because the court's decision was not based on the materiality of the conflict but rather whether the conflict in fact interfered with the lawyer's performance.

Pringle involved both 3-310(B) and 3-600. The court was saying that a violation of the rule does not necessarily prohibit a lawyer from being paid unless the breach is an impropriety that is inconsistent with the character of the profession. The Court got to this conclusion because it realized that while there may (or may not) have

been a breach of the rule, there was no evidence that it had any effect on the representation. My point is that the rule currently covers situations that have no impact on the lawyer-client relationship and, as a result, at least one court was not prepared to apply it strictly. That tells me that the rule is overbroad as it is and should be more closely tailored to conduct involving impropriety that is inconsistent with the character of the profession, which is not the case now. I can't see the justification for disciplining lawyers for technical violations of a rule that is so broad that it encompasses situations that do not impact the representation of a client.

2. I don't support the use of a materiality standard to modify all of paragraph (c). I have three independent reasons for this. First, I view what currently is rule 3-310(B) as being as much about a client's trust in the lawyer and the legal system as anything else. Even if a lawyer believes (and even if a lawyer reasonably believes) that a particular current or former relationship would not affect the quality of the representation, the lawyer should disclose those relationships that a client reasonably can be expected to think are significant. Doing so permits the client to decide whether to hire the lawyer and how to supervise and monitor the lawyer, and strengthens client trust by allowing the client rather than the lawyer to be the decision maker. That element is eliminated if the relationship and interest conflicts are limited to those that the lawyer believes (or reasonably believes) would substantially affect the representation. Second, if the lawyer believes the representation would be substantially affected, the lawyer probably shouldn't even seek client consent (remember that a lawyer cannot obtain advance consent to an incompetent representation under Rule 1.8.8). Third, most of what is in paragraph (c) should be treated as a conflict situation that requires some level of notice to or consent from the client. For example, a lawyer who represents a witness in a matter should not be given the opportunity to find a comforting explanation for why the disclosure or consent is needed (I'm not the sort of person to allow myself to be affected by this). As we can see from *Hernandez v. Paicius*, lawyers will have no trouble in finding that explanation. [THE DEFAULT POSITION SHOULD BE INFORMED DISCLOSURE, AND IF THE RELATIONSHIP ADVERSELY AFFECTS THE REPRESENTATION, THEN INFORMED CONSENT SHOULD BE THE RULE.]

My problem with all of this is that it would lead to discipline for failing to obtain the client's consent to relationships that are not conflicts of interest. I should be disciplined because I failed to obtain a client's informed written consent to a disclosure that I play golf with a custodian of records who appears on an uncontested issue? Why?

My problem with your first point is that it is not a conflict issue. A conflict of interest is the situation that interferes with the lawyer's ability to fulfill certain basic duties to a client. The basic conflicts that arise in relationship settings are interference with independent professional judgment and the lawyer owing conflicting duties to the client and the person with whom the lawyer has the relationship. What you are describing is not about conflicts. This is more about a duty to inform; but even that duty is qualified as a duty to "reasonably inform" about "significant developments." What you are describing is open ended, with no reasonable limits based on a theoretical client interest that would mandate disclosures and written consent to meaningless relationships that do not advance any meaningful interest. Indeed, it would be broader than the duty to inform, since it is not subject to any of the qualifiers that apply to that duty.

My problem with your second point is that it pushes the substantial effect standard too far. When we say the relationship would substantially affect the representation, we are saying the the relationship *could* affect the lawyer's independent judgment or could create a conflict between the lawyer's duties to the client and the lawyer's duties to the person with whom the lawyer has the relationship. That doesn't mean that the lawyer cannot structure the engagement to avoid the conflict.

Can't say I understand your third point, but it sounds like an elaboration of your second point. It seems to me we could clarify what is meant by the materiality standard in a Comment so that it does not become the free-for-all I think you are suggesting.

- ii. Stan suggests as one way to simplify that we separate out "the lawyer relationship rules" in a separate paragraph. As appears from his suggested revision to my draft, what he has in mind is the subject of current rule 3-320 plus lawyer-client relationship with another person's lawyer (what were (d)(5) and (6) in our prior version). I'm fine with Stan's suggested reorganization. It creates a new paragraph (d), as you will see from the attachment. This version is essentially the same as Stan's suggestion but with three or four minor drafting corrections.
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- 5. We need to wait until after the January meeting to finalize the Introduction, Dashboard, and rule comparison chart, and commenter chart.

Rule 1.7: Conflict Of Interest: Current Clients

- (a) **Representation of directly adverse to current clients.** A lawyer shall not, without the informed written consent of each client:¹
- (1) accept or continue representation of a client if the in a matter in which the lawyer's representation of that client will be directly adverse to another client the lawyer currently represents in another matter, ~~without informed written consent from each client;~~ or
 - (2) While representing a client in a first matter, a lawyer shall not, in a second matter, accept in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client ~~in the first matter, without the informed written consent of each client.~~²
- (b) **Representation of multiple clients in one matter.** A lawyer shall not, without the informed written consent of each client:
- (1) Accept or continue representation of more than one client in a matter in which the interests of the clients potentially conflict; or
 - (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.
- ~~(c) **Representation of an adverse party.** While representing a client in a first matter, a lawyer shall not, in a second matter, accept the representation of a person or organization who is directly adverse to the lawyer's client in the first matter, without the informed written consent of each client.~~

¹ The informed written consent standard has been moved from what now is paragraph (a)(1) into the introduction so that it applies to subparagraphs (1) and (2) without the need for repetition. This makes no substantive change because the informed written consent standard was part of what previously was paragraph (c).

² The comparison is to former paragraph (c).

1
2
3 **(c)** **Personal relationships and interests.** A lawyer shall not accept or continue
4 representation of a client without the client's informed written consent where:

- 5
6 (1) ~~The~~ lawyer has a legal, business, financial, professional, or personal
7 relationship with a party or witness in the same matter; or
8
9 (2) ~~The~~ lawyer knows or reasonably should know that:
10
11 (a) the lawyer previously had a legal, business, financial, professional,
12 or personal relationship with a party or witness in the same matter;
13 and
14
15 (b) the previous relationship would substantially affect the lawyer's
16 representation; or
17
18 (3) ~~The~~ lawyer has or had a legal, business, financial, professional, or
19 personal relationship with another person or entity and the lawyer knows
20 or reasonably should know that either the relationship or the person or
21 entity would be affected substantially by resolution of the matter; or
22
23 (4) ~~The~~ lawyer has or had a legal, business, financial, or professional interest
24 in the subject matter of the representation; ~~or~~
25
26 ~~(5) — The lawyer knows that the lawyer, the lawyer's law firm, or a lawyer who is~~
27 ~~associated in that law firm is a client of another lawyer involved in the~~
28 ~~matter; or~~
29
30 ~~(6) — The lawyer knows that another lawyer involved in the matter, the other~~
31 ~~lawyer's law firm, or a lawyer associated in that law firm is the lawyer's~~
32 ~~client; or~~
33
34 ~~(7) — The lawyer knows that the lawyer representing another person involved in~~
35 ~~the matter has one of the following relationships with lawyer or with~~
36 ~~another lawyer associated in the lawyer's law firm: (i) a spousal, parental,~~
37 ~~or sibling relationship; (ii) a cohabitational relationship; or (iii) an intimate~~
38 ~~personal relationship.~~

39
40
41 **(d) Relationships with another Lawyer.** A lawyer shall not accept or continue
42 representation of a client without the client's informed written consent where the lawyer
43 knows that:
44

Rule – Draft 14.5 (1/11/10)RLK – COMPARED TO Draft 13.2 (10/20/09) – PART 2
January 22-23, 2009 Meeting; Agenda Item V.A.

- 45 (1) a lawyer or law firm representing a party or witness in the matter has a
46 lawyer-client relationship with the lawyer, the lawyer’s law firm, or another
47 lawyer in the lawyer’s law firm; or
48
49 ~~(1)~~(2) a lawyer representing a party or witness in the matter is a spouse, parent
50 or sibling of the lawyer, or has a cohabitational or intimate personal
51 relationship with the lawyer or with another lawyer in the lawyer’s law firm.
52

1 **Comment**

2
3 **General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)**

4
5 [1] This rule and the other conflict rules seek to protect a lawyer’s ability to carry out
6 the lawyer’s basic fiduciary duties to each client. For the purpose of considering
7 whether the lawyer’s duties to a client or other person could impair the lawyer’s ability to
8 fulfill the lawyer’s duties to another client, a lawyer should consider all of the following:
9 (1) the duty of undivided loyalty (including the duty to handle client funds and property
10 as directed by the client); (2) the duty to exercise independent professional judgment for
11 the client’s benefit, not influenced by the lawyer’s duties to or relationships with others,
12 and not influenced by the lawyer’s own interests; (3) the duty to maintain the
13 confidentiality of client information; (4) the duty to represent the client competently
14 within the bounds of the law; and (5) the duty to make full and candid disclosure to the
15 client of all information and developments material to the client’s understanding of the
16 representation and its control and direction of the lawyer. See Rule 1.2(a) regarding the
17 allocation of authority between lawyer and client.

18
19 [2] The first step in a lawyer’s conflict analysis is to identify his or her client(s) in a
20 current matter or potential client(s) in a new matter. In considering his or her ability to
21 fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant
22 representation of a client or proposed representation of a potential client. Only then can
23 the lawyer determine whether a conflict rule prohibits the representation, or permits the
24 representation subject to a disclosure to the client or the informed written consent of the
25 client or a former client. Determining whether a conflict exists may also require the
26 lawyer to consult sources of law other than these Rules.

27
28 [3] This rule describes a lawyer’s duties to current clients. Additional specific rules
29 regarding current clients are set out in Rules 1.8.1 to [1.8.12]. For conflicts duties to
30 former clients, see Rule 1.9. For conflicts of interest involving prospective clients, see
31 Rule 1.18. For definitions of “informed consent” and “written,” see Rule 1.0.1(e) and (b).
32 See also Comments [26] – [30] to this Rule.

33
34
35 **Lawyer Acting in Dual Roles**

36
37 [4] A lawyer might owe fiduciary duties in capacities other than as a lawyer that
38 could conflict with the duties the lawyer owes to clients or former clients, such as
39 fiduciary duties arising from a lawyer’s service as a trustee, executor, or corporate
40 director. (See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d
41 1042 [197 Cal.Rptr. 232].)

42
43
44 **Paragraph (a): Representation Directly Adverse to Current Client**

46 [5] A lawyer owes a duty of undivided loyalty to each current client. As a result, a
47 lawyer who represents Client A cannot accept the representation of Client B if the
48 lawyer's work for Client B will be directly adverse to Client A, without first obtaining the
49 informed written consent of both A and B. ~~For purposes of p~~ Paragraph (a)(1)
50 encompasses those situations in which a lawyer is asked to ~~may not~~ act as an advocate
51 or counselor in a matter against a person or organization the lawyer represents in
52 another matter, even when the matters are wholly unrelated. The duty of loyalty
53 reflected in paragraph (a)(1) applies equally in transactional and litigation matters. For
54 example, a lawyer may not represent the seller of a business in negotiations when the
55 lawyer represents the buyer in another matter, even if unrelated, without the informed
56 written consent of each client. Paragraph (a)(1) would apply even if the parties to the
57 transaction expect to, or are, working cooperatively toward a goal of common interest to
58 them. (If a lawyer proposes to represent two or more parties concerning the same
59 negotiation or lawsuit, the situation should be analyzed under paragraph (b), not
60 paragraph (a). As an example, if a lawyer proposes to represent two parties concerning
61 a transaction between them, the lawyer should consult paragraph (b).)
62

63 [6] Paragraph (a)(1) applies only to engagements in which the lawyer's work in a
64 matter is *directly* adverse to a current client in any matter. The term "direct adversity"
65 reflects a balancing of competing interests. The primary interest is to prohibit a lawyer
66 from taking actions "adverse" to his or her client and thus inconsistent with the client's
67 reasonable expectation that the lawyer will be loyal to the client. The word "direct" limits
68 the scope of the rule to take into account the public policy favoring the right to select
69 counsel of one's choice and the reality that the conflicts rules, if construed overly
70 broadly, could become unworkable. As a consequence of this balancing and the variety
71 of situations in which the issue can arise, there is no single definition of when a lawyer's
72 actions are directly adverse to a current client for purposes of this Rule.
73

74 [7] Generally speaking, a lawyer's work on a matter will not be directly adverse to a
75 person if that person is not a party to the matter, even if the non-party's interests could
76 be affected adversely by the outcome of the matter. However, in some situations, a
77 lawyer's work could be directly adverse to a non-party if that non-party is an identifiable
78 target of a litigation or non-litigation representation, or a competitor for a particular
79 transaction (as would occur, for example, if one client were in competition with another
80 of the lawyer's clients on other matters to purchase or lease an asset or to acquire an
81 exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a
82 non-party witness who is the lawyer's client in another matter, if the examination is likely
83 to harm or embarrass the witness. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th
84 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)
85

86 [8] Not all representations that might be harmful to the interests of a client create
87 direct adversity governed by paragraph (a)(1). The following are among the instances
88 that ordinarily would not constitute direct adversity: (1) the representation of business
89 competitors in different matters, even if a positive outcome for one might strengthen its
90 competitive position against the other; (2) a representation adverse to a non-client
91 where another client of the lawyer is interested in the financial welfare or the profitability

92 of the non-client, as might occur, e.g., if a client is the landlord of, or a lender to, the
93 non-client; (3) working for an outcome in litigation that would establish precedent
94 economically harmful to another current client who is not a party to the litigation; (4)
95 representing clients having antagonistic positions on the same legal question that has
96 arisen in different cases, unless doing so would interfere with the lawyer's ability to
97 represent either client competently, as might occur, e.g., if the lawyer were advocating
98 inconsistent positions in front of the same tribunal; and (5) representing two clients who
99 have a dispute with one another if the lawyer's work for each client concerns matters
100 other than the dispute.

101
102 [8A] Paragraph (a)(2) addresses a second loyalty violation. A lawyer who represents a
103 client against an adversary would seem to be disloyal to the client by accepting the
104 representation of the adversary, even in an unrelated matter. As a result, Pparagraph
105 (a)(2) (c) identifies as a conflict the situation in which a lawyer, who represents client A
106 in a matter adverse to B, is asked by B and proposes to retain the lawyer for
107 representation on another matter in which the lawyer's work will not be adverse to A.
108 The purposes of paragraph (a)(2) (e) include (1) ensuring that client A's relationship
109 with, and trust in, the lawyer are not disturbed by the lawyer accepting the
110 representation of client A's adversary, B, without A's informed written consent; and (2)
111 ensuring that B understands that the lawyer will continue to owe all of his or her duties
112 in the first matter solely to A, notwithstanding the lawyer's representation of B on
113 another matter. If B were to seek to retain the lawyer in a matter directly adverse to A,
114 then paragraph (a)(1) would apply, not paragraph (a)(2) (c). As with paragraph (a)(1),
115 the duty of loyalty reflected in paragraph (a)(2) applies equally in transactional an
116 litigation matters.¹

117
118
119 [9] If a conflict under paragraph (a) arises during a representation, the lawyer must
120 in all events continue to protect the confidentiality of information of each affected client
121 and former client. Regarding former clients, see Rule 1.9(c).

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

123
124
125 [10] When a lawyer represents multiple clients in a single matter, the lawyer's duties
126 to one of the clients often can interfere with the full performance of the duties the lawyer
127 owes to the other clients. As a result, PParagraph (b) applies when a lawyer represents
128 multiple clients in a single matter, as when multiple clients intend to work cooperatively
129 as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a
130 transaction or other common enterprise. Examples of a transaction or common
131 enterprise include the formation of a business organization for multiple investors, the
132 preparation of an ante-nuptial agreement for both parties, and the preparation of a post-
133 nuptial agreement, a trust or wills, and the resolution of an "uncontested" marital
134 dissolution, for both spouses. In some situations, the employment of a single counsel

¹ The comparison is to former Comment [16]. The Comment paragraphs will need to be renumbered, including the internal cross-references, once the Commission completes its drafting.

135 might have benefits of convenience, economy or strategy, but paragraph (b) requires
136 the lawyer to make disclosure to, and to obtain informed written consent from, each
137 client whenever the lawyer knows or reasonably should know it is reasonably possible
138 that the lawyer's performance of the lawyer's duties to one of the joint clients will or
139 does interfere with the lawyer's performance of the duties owed to another of the joint
140 clients. See Comment [36] with respect to the application of paragraph (b) to an
141 insurer's appointment of counsel to defend an insured.

142
143 [11] The following are examples of actual conflicts in representing multiple clients in a
144 single matter: (1) the lawyer receives conflicting instructions from the clients and the
145 lawyer cannot follow one client's instructions without violating another client's
146 instruction; (2) the clients have inconsistent interests or objectives so that it becomes
147 impossible for the lawyer to advance one client's interests or objectives without
148 detrimentally affecting another client's interests or objectives; (3) the clients have
149 antagonistic positions and the lawyer's duty requires the lawyer to advise each client
150 about how to advance that client's position relative to the other's position, because the
151 lawyer cannot be expected to exercise independent judgment in that circumstance; (4)
152 the clients have inconsistent expectations of confidentiality because one client expects
153 the lawyer to keep secret information that is material to the matter; (5) the lawyer has a
154 preexisting relationship with one client that affects the lawyer's independent
155 professional judgment on behalf of the other client(s); and (6) the clients make
156 inconsistent demands for the original file.

157
158 [12] A lawyer's representation of two or more clients in a single matter can create
159 potential confidentiality issues on which the lawyer must obtain each client's informed
160 written consent under paragraph (b). First, although each client's communications with
161 the lawyer are protected as to third persons by the lawyer's duty of confidentiality and
162 the lawyer-client privilege, the communications might not be privileged in a civil dispute
163 between the joint clients. (See Business and Professions Code section 6068(e)(1), Rule
164 1.6, and Evidence Code sections 952 and 962.) Second, because the lawyer is
165 obligated to make disclosures to each jointly represented client to the full extent
166 required by Rule 1.4, and because the lawyer may not favor one joint client over any
167 other, each joint client normally should expect that its communications with the lawyer
168 will be shared with other jointly represented clients.

169
170 [13] If a lawyer obtains the consent of multiple clients to the lawyer's representation of
171 them in a matter notwithstanding the existence of a potential conflict under paragraph
172 (b)(1), the lawyer must obtain a new, informed written consent from each client pursuant
173 to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a
174 previously unanticipated or unidentified potential or actual conflict arises, the lawyer
175 then must obtain consent of each client in the matter under paragraph (b)(1). Clients
176 may provide such consents in advance of the conflict arising, subject to the criteria set
177 forth below in Comment [31].

178
179 [14] Even if the clients have a dispute about one aspect of the matter, there often
180 remain issues about which they have aligned interests. In litigation, for instance, joint

181 clients might have an interest in presenting a unified front to the opposing party and in
182 reducing their litigation expenses, but have an actual conflict about allocation of the
183 proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be
184 able to benefit the clients by representing them on issues on which they have aligned
185 interests while excluding from the scope of the representation the areas in which they
186 have a dispute or different interests, subject to the informed written consent
187 requirements of paragraph (b). See Rule 1.2 (c) (limiting the scope of representation).

188
189 [15] A client, who has consented to a joint representation under paragraph (b), may
190 terminate the lawyer's representation at any time with or without a reason. If a jointly
191 represented client terminates the lawyer-client relationship, the lawyer may not continue
192 to represent the other jointly represented client or clients if the continued representation
193 would be directly adverse to the client who terminated the representation unless the
194 client terminating the representation consents or previously did so.

195
196 **Paragraph (c): Representation of an Adverse Party.**

197
198 ~~[16]—Paragraph (c) when a lawyer represents client A in a matter adverse to B, and B~~
199 ~~proposes to retain the lawyer on another matter in which the lawyer's work will not be~~
200 ~~adverse to A. The purposes of paragraph (c) include (1) ensuring that client A's~~
201 ~~relationship with, and trust in, the lawyer are not disturbed by the lawyer accepting the~~
202 ~~representation of client A's adversary, B, without A's informed written consent; and (2)~~
203 ~~ensuring that B understands that the lawyer will continue to owe all of his or her duties~~
204 ~~in the first matter solely to A, notwithstanding the lawyer's representation of B on~~
205 ~~another matter. If B were to seek to retain the lawyer in a matter directly adverse to A,~~
206 ~~then paragraph (a) would apply, not paragraph (c). [\[reserved\]](#)~~

207
208 **Paragraph (c) (d): Personal Relationships and Interests**

209
210 [17] [A lawyer's personal relationships and interests might interfere with the lawyer's](#)
211 [full performance of the duties owed to a client. As result, paragraph \(c\) Paragraph \(d\)](#)
212 requires a lawyer to obtain a client's informed written consent when the lawyer has any
213 of certain present or past relationships with others. The purpose of this requirement is
214 to permit the client or potential client to make a more informed decision about whether
215 and on what conditions to retain, or continue to retain, the lawyer. Paragraph [\(c\) \(d\)](#)
216 applies in litigation and in non-litigation representations.

217
218 [18] A lawyer also should not allow his or her own interests to have an adverse effect
219 on the representation of a client. Paragraph [\(c\) \(\) \(d\)\(4\)](#)² requires a lawyer to obtain the
220 client's informed written consent when the lawyer has an interest in the subject matter of
221 the representation. Examples of this include the following: (1) [a lawyer would have a](#)
222 [legal interest if the lawyer is a party to a contract being litigated; \(2\) a lawyer would have](#)

² This draft does not identify the paragraph (c) subparagraph, which will have to be done once the Commission finalizes paragraph (c). This also might require some reordering of the paragraph (c) Comments.

223 a business and financial interest if the lawyer represents a client in litigation with a
224 corporation in which the lawyer is a shareholder; and (3) a lawyer would have a
225 professional interest if the lawyer represents a landlord in lease negotiations with a
226 professional organization of which the lawyer is a member. Some situations might
227 come within more than one of the paragraph (c) categories, such as when the subject of
228 a representation might raise questions about the lawyer's own conduct, ~~such as~~
229 including questions about the correctness of the lawyer's earlier advice to the client; this
230 situation would be governed by paragraph (c)() ~~(d)(4)~~ unless the lawyer and client
231 have agreed to take a common position, as might occur, for example, in response to a
232 motion for discovery sanctions. See Rules 1.8.1 through 1.8.12 for additional rules
233 pertaining to other personal interest conflicts, including business transactions with
234 clients, and Rule 3.7 concerning lawyer as witness.

235
236 [19] When a lawyer owns an interest in a publicly-traded investment vehicle, such as
237 a mutual fund, paragraph (c)() ~~(d)(4)~~ does not require the lawyer to investigate whether
238 the investment vehicle owns an interest in parties to a matter. However, if the lawyer
239 knows that a publicly-traded investment vehicle in which the lawyer owns an interest
240 owns an interest in a party to the matter, the lawyer must disclose the interest to the
241 client and obtain the client's informed written consent to the lawyer's continued
242 representation of the client.

243
244 [20] Paragraph (c)() ~~(d)(4)~~ requires a lawyer to obtain the informed written consent
245 of the lawyer's client if the lawyer has been having, or when the lawyer decides to have,
246 substantive discussions concerning possible employment with an opponent of the
247 lawyer's client or with a lawyer or law firm representing the opponent.

248
249 [21] Paragraph (c) ~~(d)~~ applies only to a lawyer's own relationships and interests,
250 except: (1) when the lawyer knows that another lawyer in the same firm as the lawyer
251 has or had a relationship with another party or witness, or has or had an interest in the
252 subject matter of the representation; or (2) as stated in paragraph (c)() ~~(d)(5), (6), or~~
253 ~~(7)~~. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not
254 imputed to other lawyers in a law firm).

255
256 [22] Paragraph (c) ~~(d)~~ requires informed written consent only from current clients.
257 Rule 1.9 specifies when a lawyer must obtain informed written consent from a former
258 client.

259
260 [23] Paragraph (a)(1) applies, rather than paragraph (c)() ~~(d)(1) or (d)(3)~~, whenever
261 a representation is directly adverse to another current client of the lawyer. (See
262 Comment [5] to this Rule.)

263
264 **Prohibited and Required Representations³**
265

³ The prior heading correctly described Comment [24] but not [25].

266 [24] There are some situations governed by this Rule for which a lawyer cannot
267 obtain effective client consent. These include at least the following: (1) when the lawyer
268 cannot provide competent representation to each affected client (See Rule 1.8.8(a)); (2)
269 when the lawyer cannot make an adequate disclosure, for example, because of
270 confidentiality obligations to another client or former client (See Business and
271 Professions Code section 6068(e)(1) and Rule 1.6); (3) when the representation would
272 involve the assertion of a claim by one client against another client, where the lawyer is
273 asked to represent both clients in that matter. (See *Woods v. Superior Court* (1983) 149
274 Cal.App.3d 931 [107 Cal.Rptr. 185] [“the attorney of a family-owned business, corporate
275 or otherwise, should not represent one owner against the other in a [marital] dissolution
276 action”]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509]
277 [attorney may not represent parties at hearing or trial when those parties’ interests in the
278 matter are in actual conflict]; and *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67
279 Cal.Rptr.2d 857] [attorney may not represent both a closely-held corporation and
280 directors/shareholders who are accused of wrongdoing or whose interests are otherwise
281 adverse to the corporation]); and (4) when the person who grants consent lacks
282 capacity or authority. (See Civil Code section 38; and see Rule 1.14 regarding clients
283 with diminished capacity.)
284

285 [25] If a lawyer seeks permission from a tribunal to terminate a representation and
286 that permission is denied, the lawyer is obligated to continue the representation even if
287 the representation creates a conflict to which not all affected clients have given consent,
288 and even if the lawyer has a conflict to which client consent is not available. (See Rule
289 1.16(c).)
290

291 **Disclosure and Informed Written Consent**

292

293 [26] Informed written consent requires the lawyer to disclose in writing to each
294 affected client the relevant circumstances and the actual and reasonably foreseeable
295 adverse consequences to the client or former client. See Rule 1.0.1(e) (informed
296 written consent). The facts and explanation the lawyer must disclose will depend on
297 the nature of the potential or actual conflict and the nature of the risks involved for the
298 client or potential client. When undertaking the representation of multiple clients in a
299 single matter, the information must include the implications of the joint representation,
300 including possible effects on loyalty, and the confidentiality and lawyer-client privilege
301 issues described in Comment [12] to this Rule.
302

303 [27] The requirement of a writing does not supplant the need in most cases for the
304 lawyer to talk with the client, to explain the risks and advantages, if any, of
305 representation burdened with a conflict of interest, as well as reasonably available
306 alternatives, and to afford the client a reasonable opportunity to consider the risks and
307 alternatives and to raise questions and concerns. Rather, the writing is required in order
308 to impress upon clients the seriousness of the decision the client is being asked to
309 make and to avoid disputes or ambiguities that might later occur in the absence of a
310 writing.
311

312 [28] A disclosure and an informed written consent are sufficient for purposes of this
313 Rule only for so long as the material facts and circumstances remain unchanged. With
314 any material change, the lawyer may not continue the representation without making a
315 new written disclosure to each affected client and obtaining a new written consent.
316

317 [29] If the lawyer is required by this Rule or another Rule to make a disclosure, but
318 the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may
319 not accept or continue the representation for which the disclosure would be required.
320 (See, e.g., Business and Professions Code section 6068(e)(1), Rule 1.6.) A lawyer
321 might be prevented from making a required disclosure because of a duty of
322 confidentiality to former, current or potential clients, because of other fiduciary
323 relationships such as service on a board directors, or because of contractual or court-
324 ordered restrictions.
325

326 [30] In some situations, Rule 1.13(g) limits who has authority to grant consent on
327 behalf of an organization.
328

329 **Consent to Future Conflict**

330

331 [31] Lawyers may ask clients to give advance consent to conflicts that might arise in
332 the future, but ~~this is subject to the usual requirement that~~ a client's consent must be
333 "informed" to comply with this Rule. A lawyer would have a conflict of interest in
334 accepting or continuing a representation under a consent that does not comply with this
335 Rule. Determining whether a client's advance consent is "informed," and thus complies
336 with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in
337 Comment [26] (informed written consent). However, an advance consent can comply
338 with this Rule even where the lawyer cannot provide all the information and explanation
339 Comment [26] ordinarily requires. A lawyer's disclosure to a the-client should must
340 include: (i) a disclosure to the extent known of facts and reasonably foreseeable
341 consequences; and (ii) an explanation that the lawyer is requesting the client to consent
342 to a possible future conflict that would involve future facts and circumstances that to a
343 degree cannot be known when the consent is requested. The lawyer also should must
344 disclose to the client whether the consent permits the lawyer to be adverse to the client
345 on any matter in the future, including whether the consent permits the lawyer to be
346 adverse to the client in the current or in future litigation, or and whether there will be any
347 limits on the scope of the consent. Whether an advance consent complies with this
348 Rule ordinarily also can depend on such things as the following: (1) the
349 comprehensiveness of the lawyer's explanation of the types of future conflicts that might
350 arise and of the actual and reasonably foreseeable adverse consequences to the client;
351 (2) the client's degree of experience as a user of the legal services, including
352 experience with the type of legal services involved in the current representation; (3)
353 whether the client has consented to the use of an adequate ethics screen and whether
354 the screen was adequately timely and effectively instituted and fully maintained; (4)
355 whether before giving consent the client either was represented by an independent
356 lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice
357 of an independent lawyer of the client's choice and was given a reasonable opportunity

358 to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the
359 subject of the representation; and (6) the client’s ability to understand the nature and
360 extent of the advance consent. A client’s ability to understand the nature and extent of
361 the advance consent might depend on factors such as the client’s education and
362 language skills. An advance consent normally will comply with this Rule if it is limited to
363 a particular type of conflict with which the client already is familiar. An advance consent
364 normally will not comply with this Rule if it is so general and open-ended that it would be
365 unlikely that the client understood the potential adverse consequences of granting
366 consent. However, even a general and open-ended advance consent can be in
367 compliance when given by an experienced user of the type of legal services involved
368 [that was independently represented regarding the consent](#). In any case, advance
369 consent will not be in compliance in the circumstances described in Comment [24]
370 (prohibited representations). See Rule 1.0.1(g) (“informed consent”). [A lawyer who
371 obtains an effective advance consent from a client will have all the duties of a lawyer to
372 that client except as expressly limited by the consent. A lawyer cannot obtain an
373 advance consent to incompetent representation. See Rule 1.8.8.](#)
374

Representation of a Class

375
376
377 [32] This Rule applies to a lawyer’s representation of named class representatives in
378 a class action, whether or not the class has been certified. For purposes of this Rule,
379 an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a
380 client of a lawyer who represents or seeks to represent the class. Thus, the lawyer
381 does not need to obtain the consent of an unnamed class member before representing
382 a client who is adverse to that person in an unrelated matter. Similarly, a lawyer
383 seeking to represent a party opposing a class action does not need the consent of any
384 unnamed class member whom the lawyer represents in an unrelated matter in order to
385 do so. A lawyer representing a class or proposed class may owe civil duties to
386 unnamed class members, and this Comment is not intended to alter those civil duties in
387 any respect.
388

Organizational Clients

389
390
391 [33] A lawyer who represents an organization does not, by virtue of that
392 representation alone, represent any constituent of the organization. (See Rule 1.13(a).)
393 The lawyer for an organization also does not, by virtue of that representation alone,
394 represent any affiliated organization, such as a subsidiary or organization under
395 common ownership. The lawyer nevertheless could be barred under case law from
396 accepting a representation adverse to an affiliate of an organizational client, even in a
397 matter unrelated to the lawyer’s representation of the client, under certain
398 circumstances.
399

400 [34] A lawyer for a corporation who also is a member of its board of directors (or a
401 lawyer for another type of organization who has corresponding fiduciary duties to it)
402 should determine whether it is reasonably foreseeable that the responsibilities of the
403 two roles might conflict, for example, because, as its lawyer, he or she might be called

404 on to advise the corporation on matters involving actions of the directors. The lawyer
405 should consider such things as the frequency with which these situations might arise,
406 the potential materiality of the conflict to the lawyer’s performance of his or her duties as
407 a lawyer, and the possibility of the corporation obtaining legal advice from another
408 lawyer in these situations. If there is material risk that the dual role will compromise the
409 lawyer’s ability to perform any of his or her duties to the client, the lawyer should not
410 serve as a director or should cease to act as the corporation’s lawyer. The lawyer
411 should advise the other members of the board whenever matters discussed at board
412 meetings while the lawyer is present in the capacity of director might not be protected
413 by the attorney-client privilege, and that conflict of interest considerations might require
414 the lawyer to withdraw as a director or might require the lawyer and the lawyer’s firm to
415 decline representation of the corporation in a matter.

416

417 **Insurance Defense**

418

419 [35] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance*
420 *Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the
421 predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to
422 defend one suit against an insured, filed a direct action against the same insurer in an
423 unrelated action without securing the insurer’s consent. Notwithstanding *State Farm*,
424 paragraphs (a) and (c) do not apply to the relationship between an insurer and a lawyer
425 when, in each matter, the insurer’s interest is only as an indemnity provider and not as a
426 direct party to the action.

427

428 [36] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer,
429 an insurer, and an insured that is created when the insurer appoints the lawyer to
430 represent the insured under the contract between the insurer and the insured. Although
431 the lawyer’s appointment by the insurer makes the insurer and the insured the lawyer’s
432 joint clients in the matter, the appointment does not by itself create a potential conflict of
433 interest for the lawyer under paragraph (b).

434

435 **Public Service**

436

437 [37] For special rules governing membership in a legal service organization, see Rule
438 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and
439 for work in conjunction with certain limited legal services programs, see Rule 6.5.

McCurdy, Lauren

Subject: FW: RRC - 1.7 [3-310] - V.A. - Agenda Materials [1/22-23/10 Meeting]
Attachments: RRC - 3-310 [1-7] - E-mails, etc. - REV (01-19-10)_209-226.pdf

From: Kevin Mohr [mailto:kemohr@charter.net]

Sent: Tuesday, January 12, 2010 11:36 AM

To: Mark Tuft

Cc: McCurdy, Lauren; Difuntorum, Randall; Robert L. Kehr; Kurt Melchior; Kevin Mohr G; Dominique Snyder; Stan Lamport; Raul L. Martinez; Harry Sondheim

Subject: Re: RRC - 1.7 [3-310] - V.A. - Agenda Materials [1/22-23/10 Meeting]

Greetings:

I've attached the remainder of the e-mail exchange in a separate PDF document (page 209-226 of the still growing compilation; I sent out pages 227-235 earlier this morning. Where the e-mails did not address substantive issues, I've stricken them. I think Bob's cover e-mail and Stan's and Raul's responses thereto should still appear first in the agenda package).

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

Kevin

Mark Tuft wrote:

[In order to have a complete record of our work, I request that all of our emails be included in the materials.](#)

~~December 4, 2009 Sondheim E-mail to Leadership, Drafters, cc Hawley & Staff:~~

~~I agree with Kurt and Mark about the special setting at 3 p.m. on Friday and sending Zitrin a copy of the letters.~~

~~December 5, 2009 Kehr E-mail to KEM:~~

~~There has been mention of a letter from Richard to the Board regarding advance consents. Can you forward a copy of it to me?~~

~~December 5, 2009 KEM E-mail to Kehr:~~

~~I've attached the following three files:~~

~~1. 11/10/09 Zitrin Letter to BOG re Batches 1, 2 & 3, in PDF and Word (in case you want to copy and paste from his letter; I haven't proofed the Word document, just ran it through my OCR program but typically it's pretty accurate in transforming a PDF image file to a word processing file you can copy, paste & edit);~~

~~a. The 1.7 comments are at pages 3-5; the advance consent comment begins on page 4.~~

~~2. 6/6/08 Letter from Zitrin & Law Profs re 1.7 and 1.8.1. In Word.~~

~~I've copied staff so they also have a copy of the 11/11/09 Word file described in 1.~~

~~Please let me know if you have any questions.~~

December 6, 2009 Martinez E-mail to RRC:

Paragraphs (a) and (c): The comments at the RAC meeting illustrate that lawyers view paragraphs (a) and (c) as covering the same territory. As I read them, they both cover the Flatt situation. Any claimed differences between (a) and (c) are illusory. Therefore, if we want to retain (c) because Flatt relied on it (albeit erroneously), or to maintain consistency and continuity, then we should delete (a), but keep (c). The Rule would then analytically track current 3-310(c).

Paragraph (d): This paragraph is incredibly long, convoluted, and dwarfs the rest of the rule in unnecessary tonnage. It has too many permutations and combinations. To streamline this paragraph I suggest something like the following:

A lawyer shall not accept or continue representation of a client without the client's informed written consent where the lawyer has [or had] a legal, business, financial, professional, or personal relationship with a party, witness or a lawyer representing another party in the same matter if the relationship could reasonably affect the lawyer's representation of the client.

As used in this Rule "personal relationship" refers to a (i) a spousal, parental, or sibling relationship; (ii) a cohabitational relationship; or (iii) an intimate personal relationship.

This approach collapses attorney-client relationships addressed in (d)(5) and (d)(6) in to the main paragraph. I would delete former relationships from paragraph (d) so that it covers only existing relationships. What is the rationale for (d)(3) and (d)(4) with respect to a lawyer's former relationships? So what if a former client is affected by a current representation.

Also, if informed written consent is required, the rule in my view should be limited to situations where the relationship adversely affects the representation of the client. The client should not be entitled to block representation if the relationship does not affect the lawyer's representation of the client. If this were merely a "disclosure" rule (like our present rule), then this would not be a problem.

And if the relationship must adversely affect the representation of the client, then we don't need to engage in the agony of defining "professional," "business" or "financial" relationships. The focus is on the effect on the representation, not on an exact definition of those relationships. While we could define these relationships (professional, business, etc.), I think that would be a fools errand. At a minimum, a definition of "personal relationship" is necessary given the inherent uncertainty in that concept. This approach merges the material limitation concept of the ABA rule with the categorical approach the RRC taken with respect to this rule. The mere existence of a "professional," "business" or "financial" relationship is not as important as the effect the relationship has on the lawyer's representation of the client.

December 6, 2009 Tuft E-mail to Martinez, cc RRC:

Raul, I agree that paragraphs (a) and (c) are two sides of the same coin. For those few lawyers and judges who may get it, the nuance between the two paragraphs depends which of the two client matters occurs first. It seems to me that Model Rule 1.7(a)(1) adequately addresses representing concurrent clients with direct adverse interests and is consistent with the rule virtually every where else. I haven't heard a good reason why we need to be different.

Paragraph (d) is another story. I could not agree more with your penultimate paragraph (and depending on how that turns out, perhaps even your final paragraph). Requiring informed written consent in a conflicts rule where there is no conflict will not improve our standing in the legal community. The question has always been the wording that should be use to identify those situations where a lawyer's other responsibilities create a significant risk of impairment of client loyalty and professional independence. The Restatement employs "materially and adversely" while the rule in most jurisdictions follows MR 1.7(a)(2). This is another area where our rule needs to be simpler and more consistent with the rule in other jurisdictions.

December 6, 2009 Lampert E-mail to Martinez, cc RRC:

1. Raul, you are right that there was some confusion about (c) at the RAC meeting. We need (a), which fills a gap in our rules that has existed for some time (accepting a representation that is adverse to an existing client). Indeed, *Flatt* was decided the way it was (not based on our rules, but on common law) because we did not have (a). Rule 1.7(a) covers the most common scenario. I think there is a place for (c), which covers a different situation (where the adverse party is not a client when the representation begins, but becomes a client while the representation is pending).

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2. If we were to keep only one of the two rules, we would have to keep (a). Paragraph (a) is the only one of the two that says you can't take on a representation that is directly adverse to an existing client.
3. I suppose the overlap between between (a) and (c) is that (a) uses the phrase "accept or continue the representation of a client." The "or continue the representation" language arguably would pick up the (c) scenario which only arises once the representation has begun. However, there are two problems with this approach. First, (a) puts the burden on the first client (the one the lawyer is representing against another client). Read literally, if (a) were the only rule that applies to the (c) scenario, it basically says that the lawyer would have to cease representing the innocent client once the lawyer takes on the representation of the adverse party, if the adverse party refuses to consent to the lawyer's continuing representation of the innocent existing client. That is not a good result for the client who did not cause the conflict. Paragraph (c), on the other hand, puts the burden on the adverse party who becomes the client. Paragraph (c) basically says that the lawyer cannot accept the representation of the adverse party unless the lawyer obtains the consent of the current client (as well as the adverse party). That allows that current client to veto the new representation, which protects the current client. That is good result for the client who did not cause the conflict.
4. Second, (c) has been in our rules since 1989. If we take (c) out now, people are going to assume that we intended a substantive change when we, in fact, did not. This is something that I raised at the RAC meeting and I think board members agreed with my point.
5. For these reasons, I think we have to keep both (a) and (c). My sense of RAC's concern focused on the explanation of what (c) applies to. However, I am not sure how to address the concern because I think Comment [16] does that job. Perhaps it would be helpful to add a comment that explains the difference between (a) and (c). Jon Streeter was the BOG member who raised the concern on this aspect of the Rule. It would be useful to engage him on this, as Michael Marcus encouraged us to do.
6. As for (d), I agree with you that (d)(5), (d)(6) and (d)(7) are hard to follow initially. I had to read them more than once in the process of familiarizing myself with these Rules. However, I recognize that these three paragraphs cover three separate concepts (i) the lawyer's (or lawyer's law firm's) representation of another party's lawyer, (ii) the other party's lawyer's (or that lawyer's law firm's) representation of the lawyer, and (iii) the lawyer's family, cohabitation or intimate relationship with another party's lawyer. Paragraphs (d)(5) and (d)(6) concern lawyer-client and client-lawyer relationships with another party's lawyer. They are two sides of the same coin (as Mark would say). However, unlike (d)(7), (d)(5) and (6) extend to representations of or by the lawyer's law firm. The law firm reference is not in (d)(7).
7. I have several concerns with your suggested revision. First, your suggestion does not pick up (d)(5) and (d)(6). By the time you add an explanation that addresses (d)(5) and (d)(6), I think you will be pretty much back to where we are with (d)(5) and (d)(6).
8. Second, your suggested definition would unduly limit the scope of personal relationships with another party or witness to those specified in your definition. However, the scope of personal relationships (d)(1) covers with respect to parties or witnesses is broader than what is covered under (d)(7). A close friendship would trigger application of (d)(1) with respect to a party or witness; but it would not trigger (d)(7). Your suggested definition would exclude

friendships and other personal relationships with a party or witness that could affect a lawyer's independent judgment.

9. Third, your suggested language would expand (d)(7) to include categories of relationships between lawyers that are not in (d)(5) and (d)(6). In particular, your suggested language would make professional relationships subject to the Rule. It would mean that if another party's lawyer is someone you know through a bar activity or a trade organization, you would need to obtain a client's consent. I think there is good reason to keep (d)(1) and (d)(7) separate. The differences in their scope would be lost if they are combined.
10. I am interested in your idea about adding an adverse effect concept in (d)(1). Certainly *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000 held that a violation of current Rule 3-310(B) does not result in a forfeiture of fees unless the violations are serious, are inconsistent with the character of the profession or involve an unresolved conflict of interest. I agree with Mark that the current Rule applies in situations where there is no conflict or other adverse effect on the lawyer client relationship. I think the concept could be added not only to (d)(1), but to the rest of (d) (or, at a minimum, (d)(1) through (d)(3) or (4). However, I think your language needs to say "if the relationship reasonably could affect the lawyer's representation of the client adversely."

~~December 7, 2009 McCurdy E-mail to RRC List:~~

~~Commission Members, Liaisons & Interested Persons:~~

~~The Commission's consideration of Rule 1.7 -- Conflicts of Interests: Current Clients [3-310] (Agenda Item V.A.) -- has been specially set for 3:00 pm on Friday, December 11th.~~

~~Please see attached comment letters received concerning Rule 1.7 (a group letter from legal ethics professors, and a group letter from law firm general counsels).~~

~~December 7, 2009 McCurdy E-mail to Sondheim, cc Drafters, Leadership & Staff:~~

~~See message below from Richard Zitrin. He would like to address the Commission on Rule 1.7 as well and is not available at 3:00 pm on Friday. Any possibility for accommodation? I realize a notice has already been sent out, but wanted to convey his wishes nonetheless.~~

~~December 7, 2009 Richard Zitrin E-mail to McCurdy:~~

~~Lauren, I would really like to attend this meeting, but I'm not available Friday afternoon. Can it be set Friday a.m. or on Saturday by any chance?~~

~~December 7, 2009 KEM E-mail to Sondheim, cc Drafters, Leadership & Staff:~~

~~I think it important that we give Richard an opportunity to speak. Perhaps the best resolution is to find out if John Steele can be present either during the morning session or on Saturday. He is the one for whom we set the special set at 3:00 p.m. If he is not, I note from Randy's 12/4/09 e-mail below, that other interested parties who favor an advance waiver clause are also~~

~~interested in attending so one of them might be able to make the case. I think it important that we hear from both sides on this issue; my guess is that RAC/BOG would want us to do so.~~

~~Note, however, that it is important that we accommodate the Commission members. If the hearing is to be on Saturday, we should probably set it for the afternoon, perhaps immediately after lunch. I believe Mark has an abiding interest in this issue and he is unable to attend on Saturday morning.~~

~~Just a few suggestions to facilitate the input of comment to the Commission.~~

~~**December 7, 2009 Kehr E-mail to Sondheim, cc Drafters, Leadership & Staff:**~~

~~While it would be ideal for both sides to be present, if that proves impossible they still could appear separately and with the Commission's deliberations at the end of the process.~~

~~**December 7, 2009 Vapnek E-mail to Drafters, Leadership & Staff:**~~

~~It would be great to accommodate everyone but that may not be possible. Saturday right after lunch works for me, but not later as I will have to leave mid afternoon.~~

~~**December 7, 2009 Tuft E-mail to Drafters, Leadership & Staff:**~~

~~Saturday right after lunch works best for me as well as I will miss much of the morning session on Saturday.~~

December 8, 2009 Yen E-mail to RRC:

I apologize for jumping in late, and you may already have covered this ground. However, here are my notes of the discussion of 1.7 at the RAC meeting. Those of you who attended, please feel free to correct me if needed:

Jon Streeter's comment re the difference between (a) and (c) was that this rule is used as a weapon, so to the extent these 2 categories are areas of uncertainty because of ambiguities in their difference, it could lead to wasteful litigation.

Jon Streeter comment re (d)(4): what does it mean when the lawyer has an interest in the subject matter? Stan provided as examples - when the lawyer has an interest in the outcome, when the lawyer's judgment is influenced by something other than the attorney-client relationship. Jon replied that what Stan said makes sense, but that he did not get that from "lawyer interest in the subject matter". Bill Heber agreed with Jon. Joe Chairez agreed with Jon Streeter, he also sees ambiguity in the (d)(4) language.

Bill Hebert was disturbed by advance waivers. He voiced that one cannot have a truly "knowing" advance waiver. Waiving a right to disqualification versus waiving in advance a conflict? Can't have it. Russ Weiner agreed, saying that advance waivers will be a nightmare to prosecute, because how can attorneys anticipate unknown potential risks? He does not see how OCTC will be able to prosecute it. Blanket advance waivers are a

problem. Jon Street is also concerned with advance waivers. It's more than disqualification, it is waiving a client's right to zealous representation. Sophisticated clients with complex businesses are the ones with complex issues, so it could be a problem for them. Rex Heinke is troubled by advance waivers too, as they would apply to clients other than those who are highly sophisticated. Stan commented that Comment (22) (or (21)?) is an attempt to parse it out. A member (who?) said he read the comment but did not see it sufficiently.

December 8, 2009 Kehr E-mail to Yen, cc RRC:

Thank you for these additional comments. I will review them before the next meeting.

December 8, 2009 Yen E-mail to RRC:

Harry, Kevin and Randy spoke too. I just tried to focus on the Board members' comments so you would have a sense of their concerns.

~~**December 9, 2009 Sondheim E-mail to RRC:**~~

~~There are a number of differing points of view regarding what to do with this rule, and I propose to do the following:~~

- ~~1. Vote on whether to adopt paragraph (a) of the ABA rule.~~
- ~~2. If paragraph (a) of the ABA rule is rejected, vote on whether to adopt Jerry's proposal in point 4 of his e-mail.~~
- ~~3. If Jerry's proposal is rejected, vote on whether to delete either paragraph (a) or (c) of our proposed rule.~~
- ~~4. If (a) is retained, vote on Jerry's point 3.~~
- ~~5. If the vote is to retain both paragraphs, discuss the comments relating to paragraphs (a), (b) and (c) as noted in Kevin's covering e-mail of Nov. 23 as point 2.~~
- ~~6. Discuss Jerry's point 2.~~
- ~~7. As to paragraph (d), vote on whether to adopt Raul's revision.~~
- ~~8. If the revision is not accepted, discuss the issue in his penultimate paragraph.~~
- ~~9. Discuss the issue in his last paragraph.~~
- ~~10. Discuss the issue in Stan's last paragraph.~~
- ~~11. Discuss the comments relating to (d) (4) as noted in Kevin's covering e-mail of November 23 in point 2.~~

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~~12. Jerry's points 6-9 are nits and, subject to the results of the foregoing items, will be deemed approved unless a Commission member objects at the meeting.~~

~~13. With regard to comment 31, vote on whether to retain comment 31, after hearing from Richard Zitrin by telephone at 1:30 and other persons attending the special setting at 3 p.m.~~

~~If I have overlooked something, please let me know as I tried to cover all the permutations of the issues related to this rule.~~

December 16, 2009 Kehr E-mail to Drafters (Melchior, KEM), cc Lamport, Chair & Staff:

Kurt and Kevin (and Stan, who kindly offered to assist on this): I've attached the first of multiple installments on Rule 1.7. This one is limited to the effort to combine paragraphs (a) and (c). While I don't think that the representation of an adversary logically belongs as part of paragraph (a) (b/c it does not fit into the category of addressing a representation directly adverse to a current client), there is no question that current rule 3-310(C) and the pending Rule 1.7 proposal have created considerable confusion. Do you think this will help, or that it can be redrafted to be more accessible?

I want to remind you of the alternative of dropping paragraph (c) from the Rule. It is a situation that occurs only rarely, and I think it is significantly more important to be clear about paragraph (a) than to include paragraph (c). Nevertheless, I'll be pleased if something along the lines of the attached does the job.

Let me know what you think.

Attached:

RRC - 3-310 [1-7] - Rule - DFT 14.3 (12-16-09) - Cf. to DFT 13.2-Part1.doc

December 18, 2009 Kehr E-mail to Drafters (Melchior, KEM), cc Lampert, Chair, Martinez & Staff:

The second part of my drafting assignment on this rule was to consider the possibility of collapsing paragraph (d) in light of Raul's 12/6/09 e-mail. To put everything in one place for everyone's convenience, I first will copy Raul's message, beginning with his suggested revision of (d) and followed by Raul's comments ---

(d)

(1) A lawyer shall not accept or continue representation of a client without the client's informed written consent where the lawyer has [or had] a legal, business, financial, professional, or personal relationship with a party, witness or a lawyer representing another party in the same matter if the relationship could reasonably affect the lawyer's representation of the client.

(2) As used in this Rule "personal relationship" refers to a (i) a spousal, parental, or sibling relationship; (ii) a cohabitational relationship; or (iii) an intimate personal relationship.

This approach collapses attorney-client relationships addressed in (d)(5) and (d)(6) in to the main paragraph. I would delete former relationships from paragraph (d) so that it covers only existing relationships. What is the rationale for (d)(3) and (d)(4) with respect to a lawyer's former relationships? So what if a former client is affected by a current representation.

Also, if informed written consent is required, the rule in my view should be limited to situations where the relationship adversely affects the representation of the client. The client should not be entitled to block representation if the relationship does not affect the lawyer's representation of the client. If this were merely a "disclosure" rule (like our present rule), then this would not be a problem.

And if the relationship must adversely affect the representation of the client, then we don't need to engage in the agony of defining "professional," "business" or "financial" relationships. The focus is on the effect on the representation, not on an exact definition of those relationships. While we could define these relationships (professional, business, etc.), I think that would be a fools errand. At a minimum, a definition of "personal relationship" is necessary given the inherent uncertainty in that concept. This approach merges the material limitation concept of the ABA rule with the categorical approach the RRC taken with respect to this rule. The mere existence of a "professional," "business" or "financial" relationship is not as important as the effect the relationship has on the lawyer's representation of the client.

Before commenting on the details of Raul's suggestion, I want to express my general agreement with his concerns. While I voted against some of the additions to (d), their full impact doesn't show until one looks at the entire list. I fear that we have turned paragraph (d) into something of a treasure hunt. By trying too hard to cover every permutation, we are left with something that is not accessible and therefore will not help guide lawyers in proper conduct.

Raul makes several points. I will reply to them and intersperse my own comments where I think they fit best:

1. Raul suggests the addition of if the relationship could reasonably affect the lawyer's representation of the client. His reason is that the client should not be entitled to block a representation if there is no effect on the lawyer's representation, and that is the consequence of the informed written consent requirement. I don't agree with the logic of this although I voted against the informed written consent standard. My disagreement is that the current disclosure standard still gives the client the opportunity to reject the representation (or to monitor it differently or to restrict the scope of the engagement). What the informed written consent standard does is to obligate the lawyer to make the disclosure in writing and receive the consent in writing. This is procedural rather than substantive. However, this does not mean that a substantiality standard is out of the question, and in fact we have it in (d)(2) and (3). We could expand it, for example by keeping it in a combined (1) and (2), but I don't recommend doing that. I don't believe that (1) should be limited to a standard of substantiality. My view is that the client always should have a disclosure of the fact that its lawyer has a relationship with a party or witness in the matter.
2. Raul asks what the policy reason is for (d)(3) and (4), asking why is it important if a person with whom the lawyer formerly had a relationship would be affected. I think he intends to refer only to (d)(3). On that assumption, I agree with Raul. I think we have over-written (d)(3) in identifying as a conflict the situation in which a "previously had a ... relationship with a party or witness in the same matter, and the previous relationship would substantially affect the lawyer's representation". While I agree that this element can be removed, I don't think that that doing so materially simplifies paragraph (d) as a whole.
3. If we remove the former relationship element of (d)(3), we are left only with current relationships that "would substantially affect the lawyer's representation". This current relationship aspect of (d)(3) is a subset of (d)(1). Any current relationship that would come up in (3) also would come up in (1) (but not *vice versa*). I therefore believe that (3) can be eliminated entirely.
4. Raul's proposal merges paragraphs (d)(5) and (6). My attached redraft attempts this in a different way.
5. Although not mentioned by Raul, I think that paragraph (d)(7) is terribly difficult to read. Compare current rule 3-310 to proposed (d)(7). The current rule makes the straight-forward declaration that "A member shall not represent a client in a matter in which another party's lawyer is a spouse ... unless the member informs the client in writing of the relationship." Proposed (d)(7) inverts the order in saying: "A lawyer shall not accept or continue representation of a client without the client's informed written consent where: ... (7)The lawyer knows that the lawyer representing another person involved in the matter has one of the following relationships with the lawyer or with another lawyer associated in the lawyer's law firm" The attachment contains alternative suggestions on how to simplify this, the second of which more closely tracks current rule 3-320 by eliminating the references to other lawyers involved in a law firm. My preference is the second version b/c, although less complete, it addresses the more important issue and is easy to understand.

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6. The attached shows marked and clean versions of the revised paragraph (d). The clean version uses my preferred version of what currently is (d)(7). It shortens (d) by 11 lines (compared to the December meeting version (Draft 14.2)) and by two subparagraphs, and I think is a good deal easier to read.
7. To further collapse this as Raul has urged, I also offer Alt. 2. This version places the relationships with other lawyers in (d)(1) b/c they are subsets of personal or professional relationships. A lawyer who represents or lives with another lawyer in the matter has a professional or personal relationship. This version reduces the rule by an additional nine lines and removes two subparagraphs. All told, this would reduce the paragraph from 35 lines to 15 lines and from seven subparagraphs to three. Note that Alt. 2 does not include relationships between the opposing lawyer and someone else in the first lawyer's firm. I dropped this in the process of attempting to simplify.

Raul: Please tell me if I have overlooked or misunderstood any of your comments.

I look forward to hearing your thoughts on the attached.

Attached:

RRC - 3-310 [1-7] - Rule - DFT 14.3 (12-16-09) - Cf. to DFT 13.2-Part2.doc

January 8, 2009 Kehr E-mail to Drafters, cc Chair, Lamport, Martinez & Staff:

Having had no reply to my earlier drafts, and the deadline looming, I've gone ahead with the drafting of the balance of the Rule 1.7 documents. A few comments ---

1. The requested combination of paragraphs (a) and (c) is labeled as "Part One".
2. The reorganization of what was paragraph (d) is attached as a separate document that is labeled as "Part Two". This continues to provide the alternative versions that I sent out 12/16/09.
3. I've now redrafted the Comments. It is attached and labeled as "Comment". This redraft assumes that paragraphs (a) and (c) will be combined in a way that places direct adversity in paragraph (a)(1) and what was paragraph (c) in paragraph (a)(2). I don't expect that the exact drafting will affect the related Comments as long as the organization remains. However, the paragraph (c) [former paragraph (d)] Comments will have to be completed after the completion of the Rule.
4. The attached Dashboard is what I think was submitted to RAC the last time around. I see nothing in it that would be affected by any of the suggested changes.
5. I have done nothing with the Rule comparison chart b/c it will depend so much on what the Commission finally does with paragraphs (a) and (c) [using the new numbering]. This will have to wait until after the January meeting.
6. The commenter chart should be complete except for the need to revise the paragraph (c) [former paragraph [d] RRC responses once the Commission has finalized that

paragraph. I don't think that any additional editing of paragraphs (a)(1) or (2) will alter the commenter chart.

7. I don't know if any thought has been given to how we communicate to RAC our responses to the reconsideration it required of us, but I've taken a first stab at this in the Introduction.

I think that's all. I'll be in and out of my home office this afternoon and tomorrow morning but won't be available tomorrow afternoon. There is a lot here to consider, but this at least is a start. I look forward to hearing the suggestions and corrections of others.

Attached:

Dashboard, Draft 2 (9/29/09)

Introduction, Draft 2.2 (1/8/09)*

RRC - 3-310 [1-7] - Rule - DFT 14.3 (01-08-10) - Cf. to DFT 13.2-Part1.doc

RRC - 3-310 [1-7] - Rule - DFT 14.3 (01-08-10) - Cf. to DFT 13.2-Part2.doc

RRC - 3-310 [1-7] - Rule - DFT 14.3 (01-08-10) - COMMENT - Cf. to DFT 13.2.doc

Public Comment Chart, Draft 2.1 (01-08-10)*

* Files marked * were not based on most recent versions of documents. See 1/10/10 KEM E-mail to Drafters, etc.

January 9, 2010 Lamport E-mail to Drafters, cc Chair, Martinez & Staff:

I have been working on this and have some comments that I hope to send to you tomorrow morning. I am not in a place to finish it at the moment, but do expect something. I will look at these attachments before I send my comments out.

January 9, 2010 Difuntorum E-mail to Kehr, cc Drafters, Chair, Lamport, Martinez & Staff:

This is just food for thought. Attached is a possible different approach to the changes being made to RPC 3-310(B). Because the standard is being elevated from written disclosure to informed written consent, this different approach would require that a lawyer must know or reasonably should know that any of the triggering interests or relationships would substantially affect the lawyer's representation.

My suggestion is based on the fact that the State Bar's 1991 rule filing explains that the Commission's approach to current RPC 3-310(B) reflected a trade off, namely "expanding the universe of relationships and interests" that trigger compliance but lowering the protocol to "written disclosure" from the informed written consent standard in the 1989 version of RPC 3-310(B). I also believe that this different approach could be pitched as an adaptation of the Model Rule 1.7 concept of materially limited.

Attached:

RRC - 3-310 [1-7] - Rule - DFT 14.4 (01-09-10)RD - Cf. to DFT 14.3-Part2.doc

January 9, 2010 Lamport E-mail to Drafters, cc Chair, Martinez & Staff:

I can't open the attachment at the moment, but I was going to suggest a similar approach. I think Raul also made a suggestion along these lines.

January 9, 2010 Martinez E-mail to Drafters, cc Chair, Lamport & Staff:

Here are my comments.

Paragraph (a).

This paragraph now creates duties to "potential" clients, which is troubling and appears contrary to *Flatt* which held that the duties to the existing client are paramount to those of the "new" or potential client.

Para (a)(1) --I'm not sure how a client can be "directly" adverse to another client if the lawyer's representation is in "another matter." And if we are concerned with adverse representation why does it make a difference if the representation is in a different matter? In other words, the vice is representation of persons with adverse interests regardless whether the representation is in the same or a different matter. If so, then para (b) would cover the water front if we remove the reference to "in a matter" in para (b). Para (b) would then read "accept or continue representation of more than one client where the interests of the clients...conflict."

If we broaden (b) in this fashion (removing the reference to "in a matter"), we could delete (a)(1) entirely. (Note the ABA rule does not distinguish conflicts of interests arising in different "matters". ABA rule 1.7 prohibits "the representation of one client ... directly adverse to another client"--i.e., regardless of the "matter.")

Para (a)(2)-As noted above, this paragraph is inconsistent with the duties granted to "potential" clients in the predicate sentence of (a). In other words, (a)(2) flatly prohibits accepting the second person as a client, whereas the predicate sentence of (a) allows either person to squelch the representation. The *Flatt* case gives the existing client priority. By requiring consent from both persons, the fundamental duty of loyalty noted in *Flatt* is compromised. Therefore, the only consent that should be required under para (a)(2) should be from the first client, not the second or potential client.

Paragraph (d)

1. I agree with Randy's earlier e-mail, and would limit the rule to written disclosure, rather than informed written consent. I also appreciate Randy's attempt to simplify paragraph (d).

However, under both Bob's and Randy's versions, the word "or" appears 6 times in paragraph (d)(1) alone, which tells me the rule still has too many parts.

2. Paragraph (d)(1)(ii) in Randy's version could be simplified to read:

"(ii) a lawyer or law firm for another party or witness in the matter."

3. I would delete the "or had" language in paragraphs (d)(1) and (d)(1), especially if informed consent is the test. We need to be cognizant of the fact that the concept of "informed consent"

gives clients the right to limit a lawyer's practice of law. The existence of a former relationship should not give the client the right to block the representation.

4. I would drop paragraph (d)(2) because I don't know what an "interest in the subject matter of the representation" means. Does this mean the rule applies to a plaintiff's lawyer handling a case on a contingency so that a basic retainer agreements now has to provide enhanced disclosures and informed consent? Does this mean that a lawyer who has an interest in a business involved in litigation in which the client also has an interest has to comply with this rule, even if there is no conflict, and in addition to the other conflict rules? It is at least arguable that relationships falling short of a conflict of interest should mandate written disclosure, not informed consent.

5. Also, if this is going to be an "informed consent" rule, then I think the "substantially affects the representation" requirement should apply to all subparagraphs in (d).

January 10, 2010 KEM E-mail to Drafters, cc Chair, Lamport, Martinez & Staff:

~~I hope this is in time before Stan or anyone else attempts to revise the documents that have been circulating. I just spent a couple of hours revising them because the wrong drafts were used as a launching point for revising certain of the documents. Please, in the future, check with Lauren or me about what is the most recent draft. I'm going to be very school marmish in this e-mail but given our time constraints, I have to ask for your cooperation in the preparation of documents. Please read. This might appear trite but it is important.~~

~~At any rate, I've attached the following, all in Word:~~

~~1. **Public Comment Chart, Draft 5 (01-08-10)RLK-KEM – Cf. to DFT4 (10-20-09).** Draft 4 is the draft that was submitted to BOG/RAC for its November 2009 meeting and had a number of changes approved at the Commission's October 2009 meeting and also some comments from OCTC that had not been picked up in earlier versions of the chart. I have added Bob's revisions to new draft 5.~~

~~a. **Please keep the footers intact.** That's the only way we can keep track of what version we're using. Otherwise, I have to go through and spend a lot of time eyeballing it or, if I'm lucky, just go through the hassle of creating clean copies and then doing a comparison of the new file and what I know is the previous file to ascertain whether there was anything that was not picked up. When we make a submission to RAC/BOG or send something out for public comment, the footer identifying the document appears in the lower left corner of the document. That's how we know where to start with the next draft. You should check those submissions, all of which Mimi has bookmarked so you can quickly navigate to the Rule you need to confirm that you have the correct starting version. If you don't, please contact Lauren, Randy or me and we'll get you the correct version.~~

~~b. **Stan:** I know your firm's system strips out the footer but before you start work, PLEASE go into the footer, copy the file name and insert it in the actual body of the document. That way I know what you started with and I can re-insert the footer once you send it to me. This is a minor hassle for you but if you don't do it you create a potentially major hassle for us. We simply don't have the time to go back and re-create documents as I had to do this morning.~~

c. **Bob:** Please use the track changes feature in Word. You've been manually ~~underling and striking out~~. That means that we have to go through and manually remove the changes to make a clean copy rather than simply accept the changes as we can if you have used track changes. In addition, the manual removal of markings runs the risk of us missing an important change. This has already happened. Eventually, we'll catch these but the odds of missing them in our submissions to BOG/RAC are increased if you don't use track changes.

d. **A tip about track changes.** Some of you have complained that you can't copy changes that have been made from the tracked change document to a new document. The new document will often "accept" the changes. Actually, you can copy the actual changes into a new document w/o them being accepted. However, before you copy and paste, **YOU HAVE TO TURN OFF TRACK CHANGES IN THE ORIGINAL DOCUMENT.** Then the changes will be transferred as you made them and will appear in the second document.

e. **Naming files.** You can name the files whatever you want to so long as you put a draft number and date on them. I will change them to my own byzantine nomenclature for consistency, but it's important that you put a draft number and date on the draft. It also helps if you put your initials on the file name but it's not necessary.

(1) For what it's worth, I change a draft number from, say, 13 to 14, only after one of our meetings. All drafts between meetings I simply change by a decimal point. It helps keep track. That's been working for this rule but other rules have been a problem (e.g., 1.9).

~~2. **Introduction: RRC - 3-310 [1-7] - Compare - Introduction - DFT4 (01-10-10)RLK-KEM - Cf. to DFT3.doc.** Again, the introduction that was used as a starting point was the wrong version. After the October meeting, we inserted minority positions and other information. See attached.~~

~~3. **Rule, Draft 14.3 (1/8/10)RLK Part 1.** No substantive changes. Just some formatting changes, including an added footer. Please retain them. As near as I can tell, this draft, although with a changed date, is identical to the draft Bob circulated on 12/16/09.~~

~~4. **Rule, Draft 14.3 (1/8/10)RLK Part 1.** Again, no substantive changes. Just some formatting changes, including an added footer. Please retain them. As near as I can tell, this draft, although with a changed date, is identical to the draft Bob circulated on 12/16/09.~~

~~5. **Rule Comment, Draft 14.3 (1/8/10).** There are no earlier drafts of the "14" series. However, Bob has wisely numbered the comment to track the rule drafts.~~

~~6. **Rule, Draft 14.4 (1/9/10)RD - Part2, redline, compared to Draft 14.3 (1/8/10)RLK.** This is Randy's suggested revision of Bob's draft 14.3 of Part 2 (i.e., paragraph (c), which was formerly paragraph (d)). Again, I've reformatted this and added a footer. I've also re-lettered the paragraph as "(c)".~~

~~7. **Dashboard, Draft 3 (10/20/09)RLK-KEM-LM.** This is the most recent version of the Dashboard. It includes the vote tally, etc.~~

Some Comments (as if I haven't made enough already):

1. Comment [31]. I noted during our last meeting that we should not use language such as "effective". Our rule don't make conclusions of law. We discussed this previously and changed the "effective" language to "complies with the Rule." I don't see how this is any different from the preoccupation of some of the members of the Commission w/ the use of the "D" word (disqualification). You keep saying we can't intrude on the province of the courts but that is exactly what we are doing by suggesting that if you follow this you will have an "effective" waiver. If you believe this provides guidance to courts, then we need to go back to all of our conflicts rules and start restoring the word disqualify where we have previously removed it. Frankly, I would be fine with that but I understand we won't be going there any time soon.

2. Randy's Draft, which Raul comments on below. Maybe I'm missing something, but it seems that if we adopt Randy's suggested language, we would be getting awfully close to Model Rule 1.7(a)(2). If you think we should, as Raul suggests, make the "substantially affect" language applicable to all subsections of proposed 1.7(c) [formerly (d)] (which I think was Randy's intent; he used "and" before (c)(3)), then I would urge us to simply adopt MR 1.7(a)(2) and then put what is currently 3-310(B) in a comment to clarify the boundaries of the Rule. I realize this is heresy, but as we keep refining the rule, we get closer to the Model Rule, which I think is a good thing.

a. If you keep Randy's suggested approach w/o going all the way (to the Model Rule, that is), then I suggest we substitute "materially affect" for "substantially affect". We've used the former in other rules to replace the concept of "materially limit" in MR 1.7(b)(2).

3. There are other things that I've seen but they'll have to await the e-mail period. I've run out of time. The new semester begins tomorrow and I have to prepare for my first classes.

Please let me know if you have any questions. I will be checking e-mail regularly.

January 10, 2010 Martinez E-mail to Drafters, cc Chair, Lampont & Staff:

As we squeeze more and more "water" out of our draft, and simplify its concepts, the more it looks like the ABA rule. I would be in favor of the following:

1. Adopt paragraphs (a)(1) and (a)(2) ABA Rule (at least in substance).
2. Leave open for discussion whether to adopt all or portions of paragraph (b) of the ABA rule.
3. Include the "personal relationships" obligations of our draft paragraph (d) (or para (c) in Kevin's version) in a separate disclosure rule like we have in current Rule 3-320 (written disclosure, but not informed consent).

Does anyone agree with this approach--or as Kevin suggests--is this heresy?

January 10, 2010 Tuft E-mail to Drafters, cc Chair & Staff:

Might I re-inquire, why are we so insistent on being uniquely different from the rest of the country in writing a basic a rule on what constitutes a concurrent conflicts of interest when the law has become sufficiently developed and is reasonably uniform? Surely, it cannot be because our rule is intended to be simply a disciplinary rule.

January 11, 2010 Lamport E-mail to Drafters, cc Chair, Martinez & Staff:

Attached are my comments on the proposed redraft of the rule. I saved the documents locally, so that should avoid the footer problem we have had.

Paragraph (a)

1. Bob, I think there is a way to reconcile the two rules under one heading. Direct adversity is the common element in both rules. I retiled the paragraph (a) accordingly.
2. I agree with Raul that we don't need the "potential client" language. The conflict comes from accepting or continuing the representation of a client. You only have to get the consent if the person is to become a client. If the person never becomes a client, there is no need for their consent. So the reference to a potential client is unnecessary. It also is potentially confusing in that it suggests that the rule applies even if you do not accept the person as a client. We would be in another one of those places where people think we meant something substantive when we did not intend a substantive change at all.
3. I think I found a way in my revision of (a)(2) to get rid of the first matter reference that seems to confuse people and lead to Governor Streeter's concerns.

Paragraph (c)

1. I disagree with removing the former relationship rule. Former relationship conflicts can arise in two ways. First, the former relationship could be one in which the lawyer assumed duties that would conflict with the duties the lawyer owes the current client, such as when the lawyer formerly represented the person. In this sense, current 3-3-310(B)(2) is the companion to 1.9, which only requires the former client's consent. There is nothing in our rules that requires the current client's consent. Our current (B)(2) and (B)(3) are those companion rules. Second, the former relationship could be one that affects the lawyer's independent judgment (animosities, prior love interests, whatever). We are taking significant protections out of the rule by deleting the former client provisions.
2. I disagree with removing our current (B)(3) from the rule. First, our current (B)(1) applies only to parties and witnesses, which is a pretty narrow universe and may yet be limited to litigation matters notwithstanding what we say in Comment [17] (remember the AG opinion on direct contact of a represented "party?") That is the only rule Bob would carry forward in (d)(1). (B)(3) expands the net to non-parties and non-witnesses, who would trigger a concern. For example, when I pursue entitlements, there may be neighboring projects who are or were clients. They are not parties to my matter. Nor are they witnesses. But they will be affected substantially by my representation. I may owe them duties that conflict with the duties to my client or the relationship may mess with my independent judgment. Without (B)(3), there would be no coverage for something that would be a conflict.

3. I agree that (d) has become quite the lengthy rule. But I think we solve this problem not by cutting down on the relationships, particularly relationship rules that have been with us for 17 years. I think we solve it by separating out the lawyer relationship rules in a separate paragraph.

4. I agree that a substantial effect standard is required if we are going to a written consent requirement, which I still don't support. Our current (B) is too broad and is picking up situations that are not conflicts and have no realistic impact on the lawyer client relationship. *Pringle v. La Chapelle* illustrates the point. There are going to be situations where obtaining client consent is not practical. If we are going down this road, we need to focus the rule on actual conflicts, so that we are not penalizing lawyers in situations that do not affect the lawyer client relationship appreciably.

5. With these thoughts in mind, I revised Randy's draft to incorporate my approach.

Comment [8A]

1. I do not like the first two sentences of Comment [8A]. First, the Rule does not address a second loyalty violation. It involves the same type of conflict, but in a different situation. Second, I do not like the reference to the second representation seeming to be disloyal to the current client. That makes it sound like it is not a real conflict, when it is. I recommend that we delete the first two sentences of the Comment.

2. I agree with Kevin's comments on Comment [31], particularly given my "preoccupation" with the "D" word.

Response to Raul

1. I think it is apparent from my foregoing comments that I do not agree with Raul's approach or Mark's comment this morning. I don't think the Model Rule is clear. The "personal relationship" standard is vague. I think a rule that requires lawyers to research the law that has evolved in other states to understand our rule is a prescription for failure. Lawyers should be able to glean their responsibilities from reading the rule. They should not have to research the law in other states to figure out what the heck the ABA means with the fuzzy personal interests rule in the Model Rule.

Attached:

RRC - 3-310 [1-7] - Rule - DFT 14.4 (01-11-10)SWL - Cf. to DFT 13 2-Part1.doc

RRC - 3-310 [1-7] - Rule - DFT 14.5 (01-11-10)SWL - Cf to DFT 14.3-RD-Part2.doc

**RRC – Rule 3-310 [1.7 to 1.12]
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~~December 4, 2009 Sondheim E-mail to Leadership, Drafters, cc Hawley & Staff:~~

~~I agree with Kurt and Mark about the special setting at 3 p.m. on Friday and sending Zitrin a copy of the letters.~~

~~December 5, 2009 Kehr E-mail to KEM:~~

~~There has been mention of a letter from Richard to the Board regarding advance consents. Can you forward a copy of it to me?~~

~~December 5, 2009 KEM E-mail to Kehr:~~

~~I've attached the following three files:~~

~~1. 11/10/09 Zitrin Letter to BOG re Batches 1, 2 & 3, in PDF and Word (in case you want to copy and paste from his letter; I haven't proofed the Word document, just ran it through my OCR program but typically it's pretty accurate in transforming a PDF image file to a word processing file you can copy, paste & edit);~~

~~a. The 1.7 comments are at pages 3-5; the advance consent comment begins on page 4.~~

~~2. 6/6/08 Letter from Zitrin & Law Profs re 1.7 and 1.8.1. In Word.~~

~~I've copied staff so they also have a copy of the 11/11/09 Word file described in 1.~~

~~Please let me know if you have any questions.~~

December 6, 2009 Martinez E-mail to RRC:

Paragraphs (a) and (c): The comments at the RAC meeting illustrate that lawyers view paragraphs (a) and (c) as covering the same territory. As I read them, they both cover the Flatt situation. Any claimed differences between (a) and (c) are illusory. Therefore, if we want to retain (c) because Flatt relied on it (albeit erroneously), or to maintain consistency and continuity, then we should delete (a), but keep (c). The Rule would then analytically track current 3-310(c).

Paragraph (d): This paragraph is incredibly long, convoluted, and dwarfs the rest of the rule in unnecessary tonnage. It has too many permutations and combinations. To streamline this paragraph I suggest something like the following:

A lawyer shall not accept or continue representation of a client without the client's informed written consent where the lawyer has [or had] a legal, business, financial, professional, or personal relationship with a party, witness or a lawyer representing another party in the same matter if the relationship could reasonably affect the lawyer's representation of the client.

As used in this Rule "personal relationship" refers to a (i) a spousal, parental, or sibling relationship; (ii) a cohabitational relationship; or (iii) an intimate personal relationship.

**RRC – Rule 3-310 [1.7 to 1.12]
E-mails, etc. – Revised (1/19/2010)**

This approach collapses attorney-client relationships addressed in (d)(5) and (d)(6) in to the main paragraph. I would delete former relationships from paragraph (d) so that it covers only existing relationships. What is the rationale for (d)(3) and (d)(4) with respect to a lawyer's former relationships? So what if a former client is affected by a current representation.

Also, if informed written consent is required, the rule in my view should be limited to situations where the relationship adversely affects the representation of the client. The client should not be entitled to block representation if the relationship does not affect the lawyer's representation of the client. If this were merely a "disclosure" rule (like our present rule), then this would not be a problem.

And if the relationship must adversely affect the representation of the client, then we don't need to engage in the agony of defining "professional," "business" or "financial" relationships. The focus is on the effect on the representation, not on an exact definition of those relationships. While we could define these relationships (professional, business, etc.), I think that would be a fools errand. At a minimum, a definition of "personal relationship" is necessary given the inherent uncertainty in that concept. This approach merges the material limitation concept of the ABA rule with the categorical approach the RRC taken with respect to this rule. The mere existence of a "professional," "business" or "financial" relationship is not as important as the effect the relationship has on the lawyer's representation of the client.

December 6, 2009 Tuft E-mail to Martinez, cc RRC:

Raul, I agree that paragraphs (a) and (c) are two sides of the same coin. For those few lawyers and judges who may get it, the nuance between the two paragraphs depends which of the two client matters occurs first. It seems to me that Model Rule 1.7(a)(1) adequately addresses representing concurrent clients with direct adverse interests and is consistent with the rule virtually every where else. I haven't heard a good reason why we need to be different.

Paragraph (d) is another story. I could not agree more with your penultimate paragraph (and depending on how that turns out, perhaps even your final paragraph). Requiring informed written consent in a conflicts rule where there is no conflict will not improve our standing in the legal community. The question has always been the wording that should be use to identify those situations where a lawyer's other responsibilities create a significant risk of impairment of client loyalty and professional independence. The Restatement employs "materially and adversely" while the rule in most jurisdictions follows MR 1.7(a)(2). This is another area where our rule needs to be simpler and more consistent with the rule in other jurisdictions.

December 6, 2009 Lampion E-mail to Martinez, cc RRC:

1. Raul, you are right that there was some confusion about (c) at the RAC meeting. We need (a), which fills a gap in our rules that has existed for some time (accepting a representation that is adverse to an existing client). Indeed, *Flatt* was decided the way it was (not based on our rules, but on common law) because we did not have (a). Rule 1.7(a) covers the most common scenario. I think there is a place for (c), which covers a different situation (where the adverse party is not a client when the representation begins, but becomes a client while the representation is pending).

**RRC – Rule 3-310 [1.7 to 1.12]
E-mails, etc. – Revised (1/19/2010)**

2. If we were to keep only one of the two rules, we would have to keep (a). Paragraph (a) is the only one of the two that says you can't take on a representation that is directly adverse to an existing client.
3. I suppose the overlap between between (a) and (c) is that (a) uses the phrase "accept or continue the representation of a client." The "or continue the representation" language arguably would pick up the (c) scenario which only arises once the representation has begun. However, there are two problems with this approach. First, (a) puts the burden on the first client (the one the lawyer is representing against another client). Read literally, if (a) were the only rule that applies to the (c) scenario, it basically says that the lawyer would have to cease representing the innocent client once the lawyer takes on the representation of the adverse party, if the adverse party refuses to consent to the lawyer's continuing representation of the innocent existing client. That is not a good result for the client who did not cause the conflict. Paragraph (c), on the other hand, puts the burden on the adverse party who becomes the client. Paragraph (c) basically says that the lawyer cannot accept the representation of the adverse party unless the lawyer obtains the consent of the current client (as well as the adverse party). That allows that current client to veto the new representation, which protects the current client. That is good result for the client who did not cause the conflict.
4. Second, (c) has been in our rules since 1989. If we take (c) out now, people are going to assume that we intended a substantive change when we, in fact, did not. This is something that I raised at the RAC meeting and I think board members agreed with my point.
5. For these reasons, I think we have to keep both (a) and (c). My sense of RAC's concern focused on the explanation of what (c) applies to. However, I am not sure how to address the concern because I think Comment [16] does that job. Perhaps it would be helpful to add a comment that explains the difference between (a) and (c). Jon Streeter was the BOG member who raised the concern on this aspect of the Rule. It would be useful to engage him on this, as Michael Marcus encouraged us to do.
6. As for (d), I agree with you that (d)(5), (d)(6) and (d)(7) are hard to follow initially. I had to read them more than once in the process of familiarizing myself with these Rules. However, I recognize that these three paragraphs cover three separate concepts (i) the lawyer's (or lawyer's law firm's) representation of another party's lawyer, (ii) the other party's lawyer's (or that lawyer's law firm's) representation of the lawyer, and (iii) the lawyer's family, cohabitation or intimate relationship with another party's lawyer. Paragraphs (d)(5) and (d)(6) concern lawyer-client and client-lawyer relationships with another party's lawyer. They are two sides of the same coin (as Mark would say). However, unlike (d)(7), (d)(5) and (6) extend to representations of or by the lawyer's law firm. The law firm reference is not in (d)(7).
7. I have several concerns with your suggested revision. First, your suggestion does not pick up (d)(5) and (d)(6). By the time you add an explanation that addresses (d)(5) and (d)(6), I think you will be pretty much back to where we are with (d)(5) and (d)(6).
8. Second, your suggested definition would unduly limit the scope of personal relationships with another party or witness to those specified in your definition. However, the scope of personal relationships (d)(1) covers with respect to parties or witnesses is broader than what is covered under (d)(7). A close friendship would trigger application of (d)(1) with respect to a party or witness; but it would not trigger (d)(7). Your suggested definition would exclude

friendships and other personal relationships with a party or witness that could affect a lawyer's independent judgment.

9. Third, your suggested language would expand (d)(7) to include categories of relationships between lawyers that are not in (d)(5) and (d)(6). In particular, your suggested language would make professional relationships subject to the Rule. It would mean that if another party's lawyer is someone you know through a bar activity or a trade organization, you would need to obtain a client's consent. I think there is good reason to keep (d)(1) and (d)(7) separate. The differences in their scope would be lost if they are combined.
10. I am interested in your idea about adding an adverse effect concept in (d)(1). Certainly *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000 held that a violation of current Rule 3-310(B) does not result in a forfeiture of fees unless the violations are serious, are inconsistent with the character of the profession or involve an unresolved conflict of interest. I agree with Mark that the current Rule applies in situations where there is no conflict or other adverse effect on the lawyer client relationship. I think the concept could be added not only to (d)(1), but to the rest of (d) (or, at a minimum, (d)(1) through (d)(3) or (4). However, I think your language needs to say "if the relationship reasonably could affect the lawyer's representation of the client adversely."

December 7, 2009 McCurdy E-mail to RRC List:

Commission Members, Liaisons & Interested Persons:

The Commission's consideration of Rule 1.7 -- Conflicts of Interests: Current Clients [3-310] (Agenda Item V.A.) -- has been specially set for 3:00 pm on Friday, December 11th.

Please see attached comment letters received concerning Rule 1.7 (a group letter from legal ethics professors, and a group letter from law firm general counsels).

December 7, 2009 McCurdy E-mail to Sondheim, cc Drafters, Leadership & Staff:

See message below from Richard Zitrin. He would like to address the Commission on Rule 1.7 as well and is not available at 3:00 pm on Friday. Any possibility for accommodation? I realize a notice has already been sent out, but wanted to convey his wishes nonetheless.

December 7, 2009 Richard Zitrin E-mail to McCurdy:

Lauren, I would really like to attend this meeting, but I'm not available Friday afternoon. Can it be set Friday a.m. or on Saturday by any chance?

December 7, 2009 KEM E-mail to Sondheim, cc Drafters, Leadership & Staff:

I think it important that we give Richard an opportunity to speak. Perhaps the best resolution is to find out if John Steele can be present either during the morning session or on Saturday. He is the one for whom we set the special set at 3:00 p.m. If he is not, I note from Randy's 12/4/09 e-mail below, that other interested parties who favor an advance waiver clause are also

interested in attending so one of them might be able to make the case. I think it important that we hear from both sides on this issue; my guess is that RAC/BOG would want us to do so.

Note, however, that it is important that we accommodate the Commission members. If the hearing is to be on Saturday, we should probably set it for the afternoon, perhaps immediately after lunch. I believe Mark has an abiding interest in this issue and he is unable to attend on Saturday morning.

Just a few suggestions to facilitate the input of comment to the Commission.

December 7, 2009 Kehr E-mail to Sondheim, cc Drafters, Leadership & Staff:

While it would be ideal for both sides to be present, if that proves impossible they still could appear separately and with the Commission's deliberations at the end of the process.

December 7, 2009 Vapnek E-mail to Drafters, Leadership & Staff:

It would be great to accommodate everyone but that may not be possible. Saturday right after lunch works for me, but not later as I will have to leave mid afternoon.

December 7, 2009 Tuft E-mail to Drafters, Leadership & Staff:

Saturday right after lunch works best for me as well as I will miss much of the morning session on Saturday.

December 8, 2009 Yen E-mail to RRC:

I apologize for jumping in late, and you may already have covered this ground. However, here are my notes of the discussion of 1.7 at the RAC meeting. Those of you who attended, please feel free to correct me if needed:

Jon Streeter's comment re the difference between (a) and (c) was that this rule is used as a weapon, so to the extent these 2 categories are areas of uncertainty because of ambiguities in their difference, it could lead to wasteful litigation.

Jon Streeter comment re (d)(4): what does it mean when the lawyer has an interest in the subject matter? Stan provided as examples - when the lawyer has an interest in the outcome, when the lawyer's judgment is influenced by something other than the attorney-client relationship. Jon replied that what Stan said makes sense, but that he did not get that from "lawyer interest in the subject matter". Bill Heber agreed with Jon. Joe Chairez agreed with Jon Streeter, he also sees ambiguity in the (d)(4) language.

Bill Hebert was disturbed by advance waivers. He voiced that one cannot have a truly "knowing" advance waiver. Waiving a right to disqualification versus waiving in advance a conflict? Can't have it. Russ Weiner agreed, saying that advance waivers will be a nightmare to prosecute, because how can attorneys anticipate unknown potential risks? He does not see how OCTC will be able to prosecute it. Blanket advance waivers are a

problem. Jon Street is also concerned with advance waivers. It's more than disqualification, it is waiving a client's right to zealous representation. Sophisticated clients with complex businesses are the ones with complex issues, so it could be a problem for them. Rex Heinke is troubled by advance waivers too, as they would apply to clients other than those who are highly sophisticated. Stan commented that Comment (22) (or (21)?) is an attempt to parse it out. A member (who?) said he read the comment but did not see it sufficiently.

December 8, 2009 Kehr E-mail to Yen, cc RRC:

Thank you for these additional comments. I will review them before the next meeting.

December 8, 2009 Yen E-mail to RRC:

Harry, Kevin and Randy spoke too. I just tried to focus on the Board members' comments so you would have a sense of their concerns.

December 9, 2009 Sondheim E-mail to RRC:

There are a number of differing points of view regarding what to do with this rule, and I propose to do the following:

1. Vote on whether to adopt paragraph (a) of the ABA rule.
2. If paragraph (a) of the ABA rule is rejected, vote on whether to adopt Jerry's proposal in point 4 of his e-mail.
3. If Jerry's proposal is rejected, vote on whether to delete either paragraph (a) or (c) of our proposed rule.
4. If (a) is retained, vote on Jerry's point 3.
5. If the vote is to retain both paragraphs, discuss the comments relating to paragraphs (a), (b) and (c) as noted in Kevin's covering e-mail of Nov. 23 as point 2.
6. Discuss Jerry's point 2.
7. As to paragraph (d), vote on whether to adopt Raul's revision.
8. If the revision is not accepted, discuss the issue in his penultimate paragraph.
9. Discuss the issue in his last paragraph.
10. Discuss the issue in Stan's last paragraph.
11. Discuss the comments relating to (d) (4) as noted in Kevin's covering e-mail of November 23 in point 2.

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12. Jerry's points 6-9 are nits and, subject to the results of the foregoing items, will be deemed approved unless a Commission member objects at the meeting.

13. With regard to comment 31, vote on whether to retain comment 31, after hearing from Richard Zitrin by telephone at 1:30 and other persons attending the special setting at 3 p.m.

If I have overlooked something, please let me know as I tried to cover all the permutations of the issues related to this tute.

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December 16, 2009 Kehr E-mail to Drafters (Melchior, KEM), cc Lamport, Chair & Staff:

Kurt and Kevin (and Stan, who kindly offered to assist on this): I've attached the first of multiple installments on Rule 1.7. This one is limited to the effort to combine paragraphs (a) and (c). While I don't think that the representation of an adversary logically belongs as part of paragraph (a) (b/c it does not fit into the category of addressing a representation directly adverse to a current client), there is no question that current rule 3-310(C) and the pending Rule 1.7 proposal have created considerable confusion. Do you think this will help, or that it can be redrafted to be more accessible?

I want to remind you of the alternative of dropping paragraph (c) from the Rule. It is a situation that occurs only rarely, and I think it is significantly more important to be clear about paragraph (a) than to include paragraph (c). Nevertheless, I'll be pleased if something along the lines of the attached does the job.

Let me know what you think.

Attached:

RRC - 3-310 [1-7] - Rule - DFT 14.3 (12-16-09) - Cf. to DFT 13.2-Part1.doc

December 18, 2009 Kehr E-mail to Drafters (Melchior, KEM), cc Lamport, Chair, Martinez & Staff:

The second part of my drafting assignment on this rule was to consider the possibility of collapsing paragraph (d) in light of Raul's 12/6/09 e-mail. To put everything in one place for everyone's convenience, I first will copy Raul's message, beginning with his suggested revision of (d) and followed by Raul's comments ---

(d)

(1) A lawyer shall not accept or continue representation of a client without the client's informed written consent where the lawyer has [or had] a legal, business, financial, professional, or personal relationship with a party, witness or a lawyer representing another party in the same matter if the relationship could reasonably affect the lawyer's representation of the client.

(2) As used in this Rule "personal relationship" refers to a (i) a spousal, parental, or sibling relationship; (ii) a cohabitational relationship; or (iii) an intimate personal relationship.

This approach collapses attorney-client relationships addressed in (d)(5) and (d)(6) in to the main paragraph. I would delete former relationships from paragraph (d) so that it covers only existing relationships. What is the rationale for (d)(3) and (d)(4) with respect to a lawyer's former relationships? So what if a former client is affected by a current representation.

Also, if informed written consent is required, the rule in my view should be limited to situations where the relationship adversely affects the representation of the client. The client should not be entitled to block representation if the relationship does not affect the lawyer's representation of the client. If this were merely a "disclosure" rule (like our present rule), then this would not be a problem.

And if the relationship must adversely affect the representation of the client, then we don't need to engage in the agony of defining "professional," "business" or "financial" relationships. The focus is on the effect on the representation, not on an exact definition of those relationships. While we could define these relationships (professional, business, etc.), I think that would be a fools errand. At a minimum, a definition of "personal relationship" is necessary given the inherent uncertainty in that concept. This approach merges the material limitation concept of the ABA rule with the categorical approach the RRC taken with respect to this rule. The mere existence of a "professional," "business" or "financial" relationship is not as important as the effect the relationship has on the lawyer's representation of the client.

Before commenting on the details of Raul's suggestion, I want to express my general agreement with his concerns. While I voted against some of the additions to (d), their full impact doesn't show until one looks at the entire list. I fear that we have turned paragraph (d) into something of a treasure hunt. By trying too hard to cover every permutation, we are left with something that is not accessible and therefore will not help guide lawyers in proper conduct.

Raul makes several points. I will reply to them and intersperse my own comments where I think they fit best:

1. Raul suggests the addition of if the relationship could reasonably affect the lawyer's representation of the client. His reason is that the client should not be entitled to block a representation if there is no effect on the lawyer's representation, and that is the consequence of the informed written consent requirement. I don't agree with the logic of this although I voted against the informed written consent standard. My disagreement is that the current disclosure standard still gives the client the opportunity to reject the representation (or to monitor it differently or to restrict the scope of the engagement). What the informed written consent standard does is to obligate the lawyer to make the disclosure in writing and receive the consent in writing. This is procedural rather than substantive. However, this does not mean that a substantiality standard is out of the question, and in fact we have it in (d)(2) and (3). We could expand it, for example by keeping it in a combined (1) and (2), but I don't recommend doing that. I don't believe that (1) should be limited to a standard of substantiality. My view is that the client always should have a disclosure of the fact that its lawyer has a relationship with a party or witness in the matter.
2. Raul asks what the policy reason is for (d)(3) and (4), asking why is it important if a person with whom the lawyer formerly had a relationship would be affected. I think he intends to refer only to (d)(3). On that assumption, I agree with Raul. I think we have over-written (d)(3) in identifying as a conflict the situation in which a "previously had a ... relationship with a party or witness in the same matter, and the previous relationship would substantially affect the lawyer's representation". While I agree that this element can be removed, I don't think that that doing so materially simplifies paragraph (d) as a whole.
3. If we remove the former relationship element of (d)(3), we are left only with current relationships that "would substantially affect the lawyer's representation". This current relationship aspect of (d)(3) is a subset of (d)(1). Any current relationship that would come up in (3) also would come up in (1) (but not *vice versa*). I therefore believe that (3) can be eliminated entirely.
4. Raul's proposal merges paragraphs (d)(5) and (6). My attached redraft attempts this in a different way.
5. Although not mentioned by Raul, I think that paragraph (d)(7) is terribly difficult to read. Compare current rule 3-310 to proposed (d)(7). The current rule makes the straight-forward declaration that "A member shall not represent a client in a matter in which another party's lawyer is a spouse ... unless the member informs the client in writing of the relationship." Proposed (d)(7) inverts the order in saying: "A lawyer shall not accept or continue representation of a client without the client's informed written consent where: ... (7)The lawyer knows that the lawyer representing another person involved in the matter has one of the following relationships with the lawyer or with another lawyer associated in the lawyer's law firm" The attachment contains alternative suggestions on how to simplify this, the second of which more closely tracks current rule 3-320 by eliminating the references to other lawyers involved in a law firm. My preference is the second version b/c, although less complete, it addresses the more important issue and is easy to understand.

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6. The attached shows marked and clean versions of the revised paragraph (d). The clean version uses my preferred version of what currently is (d)(7). It shortens (d) by 11 lines (compared to the December meeting version (Draft 14.2)) and by two subparagraphs, and I think is a good deal easier to read.
7. To further collapse this as Raul has urged, I also offer Alt. 2. This version places the relationships with other lawyers in (d)(1) b/c they are subsets of personal or professional relationships. A lawyer who represents or lives with another lawyer in the matter has a professional or personal relationship. This version reduces the rule by an additional nine lines and removes two subparagraphs. All told, this would reduce the paragraph from 35 lines to 15 lines and from seven subparagraphs to three. Note that Alt. 2 does not include relationships between the opposing lawyer and someone else in the first lawyer's firm. I dropped this in the process of attempting to simplify.

Raul: Please tell me if I have overlooked or misunderstood any of your comments.

I look forward to hearing your thoughts on the attached.

Attached:

RRC - 3-310 [1-7] - Rule - DFT 14.3 (12-16-09) - Cf. to DFT 13.2-Part2.doc

January 8, 2009 Kehr E-mail to Drafters, cc Chair, Lamport, Martinez & Staff:

Having had no reply to my earlier drafts, and the deadline looming, I've gone ahead with the drafting of the balance of the Rule 1.7 documents. A few comments ---

1. The requested combination of paragraphs (a) and (c) is labeled as "Part One".
2. The reorganization of what was paragraph (d) is attached as a separate document that is labeled as "Part Two". This continues to provide the alternative versions that I sent out 12/16/09.
3. I've now redrafted the Comments. It is attached and labeled as "Comment". This redraft assumes that paragraphs (a) and (c) will be combined in a way that places direct adversity in paragraph (a)(1) and what was paragraph (c) in paragraph (a)(2). I don't expect that the exact drafting will affect the related Comments as long as the organization remains. However, the paragraph (c) [former paragraph (d)] Comments will have to be completed after the completion of the Rule.
4. The attached Dashboard is what I think was submitted to RAC the last time around. I see nothing in it that would be affected by any of the suggested changes.
5. I have done nothing with the Rule comparison chart b/c it will depend so much on what the Commission finally does with paragraphs (a) and (c) [using the new numbering]. This will have to wait until after the January meeting.
6. The commenter chart should be complete except for the need to revise the paragraph (c) [former paragraph [d] RRC responses once the Commission has finalized that

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paragraph. I don't think that any additional editing of paragraphs (a)(1) or (2) will alter the commenter chart.

7. I don't know if any thought has been given to how we communicate to RAC our responses to the reconsideration it required of us, but I've taken a first stab at this in the Introduction.

I think that's all. I'll be in and out of my home office this afternoon and tomorrow morning but won't be available tomorrow afternoon. There is a lot here to consider, but this at least is a start. I look forward to hearing the suggestions and corrections of others.

Attached:

Dashboard, Draft 2 (9/29/09)

Introduction, Draft 2.2 (1/8/09)*

RRC - 3-310 [1-7] - Rule - DFT 14.3 (01-08-10) - Cf. to DFT 13.2-Part1.doc

RRC - 3-310 [1-7] - Rule - DFT 14.3 (01-08-10) - Cf. to DFT 13.2-Part2.doc

RRC - 3-310 [1-7] - Rule - DFT 14.3 (01-08-10) - COMMENT - Cf. to DFT 13.2.doc

Public Comment Chart, Draft 2.1 (01-08-10)*

* Files marked * were not based on most recent versions of documents. See 1/10/10 KEM E-mail to Drafters, etc.

January 9, 2010 Lamport E-mail to Drafters, cc Chair, Martinez & Staff:

I have been working on this and have some comments that I hope to send to you tomorrow morning. I am not in a place to finish it at the moment, but do expect something. I will look at these attachments before I send my comments out.

January 9, 2010 Difuntorum E-mail to Kehr, cc Drafters, Chair, Lamport, Martinez & Staff:

This is just food for thought. Attached is a possible different approach to the changes being made to RPC 3-310(B). Because the standard is being elevated from written disclosure to informed written consent, this different approach would require that a lawyer must know or reasonably should know that any of the triggering interests or relationships would substantially affect the lawyer's representation.

My suggestion is based on the fact that the State Bar's 1991 rule filing explains that the Commission's approach to current RPC 3-310(B) reflected a trade off, namely "expanding the universe of relationships and interests" that trigger compliance but lowering the protocol to "written disclosure" from the informed written consent standard in the 1989 version of RPC 3-310(B). I also believe that this different approach could be pitched as an adaptation of the Model Rule 1.7 concept of materially limited.

Attached:

RRC - 3-310 [1-7] - Rule - DFT 14.4 (01-09-10)RD - Cf. to DFT 14.3-Part2.doc

January 9, 2010 Lamport E-mail to Drafters, cc Chair, Martinez & Staff:

I can't open the attachment at the moment, but I was going to suggest a similar approach. I think Raul also made a suggestion along these lines.

January 9, 2010 Martinez E-mail to Drafters, cc Chair, Lamport & Staff:

Here are my comments.

Paragraph (a).

This paragraph now creates duties to "potential" clients, which is troubling and appears contrary to *Flatt* which held that the duties to the existing client are paramount to those of the "new" or potential client.

Para (a)(1) --I'm not sure how a client can be "directly" adverse to another client if the lawyer's representation is in "another matter." And if we are concerned with adverse representation why does it make a difference if the representation is in a different matter? In other words, the vice is representation of persons with adverse interests regardless whether the representation is in the same or a different matter. If so, then para (b) would cover the water front if we remove the reference to "in a matter" in para (b). Para (b) would then read "accept or continue representation of more than one client where the interests of the clients...conflict."

If we broaden (b) in this fashion (removing the reference to "in a matter"), we could delete (a)(1) entirely. (Note the ABA rule does not distinguish conflicts of interests arising in different "matters". ABA rule 1.7 prohibits "the representation of one client ... directly adverse to another client"--i.e., regardless of the "matter.")

Para (a)(2)-As noted above, this paragraph is inconsistent with the duties granted to "potential" clients in the predicate sentence of (a). In other words, (a)(2) flatly prohibits accepting the second person as a client, whereas the predicate sentence of (a) allows either person to squelch the representation. The *Flatt* case gives the existing client priority. By requiring consent from both persons, the fundamental duty of loyalty noted in *Flatt* is compromised. Therefore, the only consent that should be required under para (a)(2) should be from the first client, not the second or potential client.

Paragraph (d)

1. I agree with Randy's earlier e-mail, and would limit the rule to written disclosure, rather than informed written consent. I also appreciate Randy's attempt to simplify paragraph (d).

However, under both Bob's and Randy's versions, the word "or" appears 6 times in paragraph (d)(1) alone, which tells me the rule still has too many parts.

2. Paragraph (d)(1)(ii) in Randy's version could be simplified to read:

"(ii) a lawyer or law firm for another party or witness in the matter."

3. I would delete the "or had" language in paragraphs (d)(1) and (d)(1), especially if informed consent is the test. We need to be cognizant of the fact that the concept of "informed consent"

gives clients the right to limit a lawyer's practice of law. The existence of a former relationship should not give the client the right to block the representation.

4. I would drop paragraph (d)(2) because I don't know what an "interest in the subject matter of the representation" means. Does this mean the rule applies to a plaintiff's lawyer handling a case on a contingency so that a basic retainer agreements now has to provide enhanced disclosures and informed consent? Does this mean that a lawyer who has an interest in a business involved in litigation in which the client also has an interest has to comply with this rule, even if there is no conflict, and in addition to the other conflict rules? It is at least arguable that relationships falling short of a conflict of interest should mandate written disclosure, not informed consent.

5. Also, if this is going to be an "informed consent" rule, then I think the "substantially affects the representation" requirement should apply to all subparagraphs in (d).

January 10, 2010 KEM E-mail to Drafters, cc Chair, Lamport, Martinez & Staff:

I hope this is in time before Stan or anyone else attempts to revise the documents that have been circulating. I just spent a couple of hours revising them because the wrong drafts were used as a launching point for revising certain of the documents. Please, in the future, check with Lauren or me about what is the most recent draft. I'm going to be very school-marmish in this e-mail but given our time constraints, I have to ask for your cooperation in the preparation of documents. Please read. This might appear trite but it is important.

At any rate, I've attached the following, all in Word:

1. **Public Comment Chart, Draft 5 (01-08-10)RLK-KEM - Cf. to DFT4 (10-20-09)**. Draft 4 is the draft that was submitted to BOG/RAC for its November 2009 meeting and had a number of changes approved at the Commission's October 2009 meeting and also some comments from OCTC that had not been picked up in earlier versions of the chart. I have added Bob's revisions to new draft 5.

a. **Please keep the footers intact.** That's the only way we can keep track of what version we're using. Otherwise, I have to go through and spend a lot of time eyeballing it or, if I'm lucky, just go through the hassle of creating clean copies and then doing a comparison of the new file and what I know is the previous file to ascertain whether there was anything that was not picked up. When we make a submission to RAC/BOG or send something out for public comment, the footer identifying the document appears in the lower left corner of the document. That's how we know where to start with the next draft. You should check those submissions, all of which Mimi has bookmarked so you can quickly navigate to the Rule you need to confirm that you have the correct starting version. If you don't, please contact Lauren, Randy or me and we'll get you the correct version.

b. **Stan:** I know your firm's system strips out the footer but before you start work, PLEASE go into the footer, copy the file name and insert it in the actual body of the document. That way I know what you started with and I can re-insert the footer once you send it to me. This is a minor hassle for you but if you don't do it you create a potentially major hassle for us. We simply don't have the time to go back and re-create documents as I had to do this morning.

c. **Bob:** Please use the track changes feature in Word. You've been manually underling and striking out. That means that we have to go through and manually remove the changes to make a clean copy rather than simply accept the changes as we can if you have used track changes. In addition, the manual removal of markings runs the risk of us missing an important change. This has already happened. Eventually, we'll catch these but the odds of missing them in our submissions to BOG/RAC are increased if you don't use track changes.

d. **A tip about track changes.** Some of you have complained that you can't copy changes that have been made from the tracked-change document to a new document. The new document will often "accept" the changes. Actually, you can copy the actual changes into a new document w/o them being accepted. However, before you copy and paste, YOU HAVE TO TURN OFF TRACK CHANGES IN THE ORIGINAL DOCUMENT. Then the changes will be transferred as you made them and will appear in the second document.

e. **Naming files.** You can name the files whatever you want to so long as you put a draft number and date on them. I will change them to my own byzantine nomenclature for consistency, but it's important that you put a draft number and date on the draft. It also helps if you put your initials on the file name but it's not necessary.

(1) For what it's worth, I change a draft number from, say, 13 to 14, only after one of our meetings. All drafts between meetings I simply change by a decimal point. It helps keep track. That's been working for this rule but other rules have been a problem (e.g., 1.9).

2. **Introduction: RRC - 3-310 [1-7] - Compare - Introduction - DFT4 (01-10-10)RLK-KEM - Cf. to DFT3.doc.** Again, the introduction that was used as a starting point was the wrong version. After the October meeting, we inserted minority positions and other information. See attached.

3. **Rule, Draft 14.3 (1/8/10)RLK-Part 1.** No substantive changes. Just some formatting changes, including an added footer. Please retain them. As near as I can tell, this draft, although with a changed date, is identical to the draft Bob circulated on 12/16/09.

4. **Rule, Draft 14.3 (1/8/10)RLK-Part 1.** Again, no substantive changes. Just some formatting changes, including an added footer. Please retain them. As near as I can tell, this draft, although with a changed date, is identical to the draft Bob circulated on 12/16/09.

5. **Rule Comment, Draft 14.3 (1/8/10).** There are no earlier drafts of the "14" series. However, Bob has wisely numbered the comment to track the rule drafts.

6. **Rule, Draft 14.4 (1/9/10)RD - Part2, redline, compared to Draft 14.3 (1/8/10)RLK.** This is Randy's suggested revision of Bob's draft 14.3 of Part 2 (i.e., paragraph (c), which was formerly paragraph (d)). Again, I've reformatted this and added a footer. I've also re-lettered the paragraph as "(c)".

7. **Dashboard, Draft 3 (10/20/09)RLK-KEM-LM.** This is the most recent version of the Dashboard. It includes the vote tally, etc.

Some Comments (as if I haven't made enough already):

1. Comment [31]. I noted during our last meeting that we should not use language such as "effective". Our rule don't make conclusions of law. We discussed this previously and changed the "effective" language to "complies with the Rule." I don't see how this is any different from the preoccupation of some of the members of the Commission w/ the use of the "D" word (disqualification). You keep saying we can't intrude on the province of the courts but that is exactly what we are doing by suggesting that if you follow this you will have an "effective" waiver. If you believe this provides guidance to courts, then we need to go back to all of our conflicts rules and start restoring the word disqualify where we have previously removed it. Frankly, I would be fine with that but I understand we won't be going there any time soon.

2. Randy's Draft, which Raul comments on below. Maybe I'm missing something, but it seems that if we adopt Randy's suggested language, we would be getting awfully close to Model Rule 1.7(a)(2). If you think we should, as Raul suggests, make the "substantially affect" language applicable to all subsections of proposed 1.7(c) [formerly (d)] (which I think was Randy's intent; he used "and" before (c)(3)), then I would urge us to simply adopt MR 1.7(a)(2) and then put what is currently 3-310(B) in a comment to clarify the boundaries of the Rule. I realize this is heresy, but as we keep refining the rule, we get closer to the Model Rule, which I think is a good thing.

a. If you keep Randy's suggested approach w/o going all the way (to the Model Rule, that is), then I suggest we substitute "materially affect" for "substantially affect". We've used the former in other rules to replace the concept of "materially limit" in MR 1.7(b)(2).

3. There are other things that I've seen but they'll have to await the e-mail period. I've run out of time. The new semester begins tomorrow and I have to prepare for my first classes.

Please let me know if you have any questions. I will be checking e-mail regularly.

January 10, 2010 Martinez E-mail to Drafters, cc Chair, Lampert & Staff:

As we squeeze more and more "water" out of our draft, and simplify its concepts, the more it looks like the ABA rule. I would be in favor of the following:

1. Adopt paragraphs (a)(1) and (a)(2) ABA Rule (at least in substance).
2. Leave open for discussion whether to adopt all or portions of paragraph (b) of the ABA rule.
3. Include the "personal relationships" obligations of our draft paragraph (d) (or para (c) in Kevin's version) in a separate disclosure rule like we have in current Rule 3-320 (written disclosure, but not informed consent).

Does anyone agree with this approach--or as Kevin suggests--is this heresy?

January 10, 2010 Tuft E-mail to Drafters, cc Chair & Staff:

Might I re-inquire, why are we so insistent on being uniquely different from the rest of the country in writing a basic a rule on what constitutes a concurrent conflicts of interest when the law has become sufficiently developed and is reasonably uniform? Surely, it cannot be because our rule is intended to be simply a disciplinary rule.

January 11, 2010 Lamport E-mail to Drafters, cc Chair, Martinez & Staff:

Attached are my comments on the proposed redraft of the rule. I saved the documents locally, so that should avoid the footer problem we have had.

Paragraph (a)

1. Bob, I think there is a way to reconcile the two rules under one heading. Direct adversity is the common element in both rules. I retiled the paragraph (a) accordingly.
2. I agree with Raul that we don't need the "potential client" language. The conflict comes from accepting or continuing the representation of a client. You only have to get the consent if the person is to become a client. If the person never becomes a client, there is no need for their consent. So the reference to a potential client is unnecessary. It also is potentially confusing in that it suggests that the rule applies even if you do not accept the person as a client. We would be in another one of those places where people think we meant something substantive when we did not intend a substantive change at all.
3. I think I found a way in my revision of (a)(2) to get rid of the first matter reference that seems to confuse people and lead to Governor Streeter's concerns.

Paragraph (c)

1. I disagree with removing the former relationship rule. Former relationship conflicts can arise in two ways. First, the former relationship could be one in which the lawyer assumed duties that would conflict with the duties the lawyer owes the current client, such as when the lawyer formerly represented the person. In this sense, current 3-3-310(B)(2) is the companion to 1.9, which only requires the former client's consent. There is nothing in our rules that requires the current client's consent. Our current (B)(2) and (B)(3) are those companion rules. Second, the former relationship could be one that affects the lawyer's independent judgment (animosities, prior love interests, whatever). We are taking significant protections out of the rule by deleting the former client provisions.
2. I disagree with removing our current (B)(3) from the rule. First, our current (B)(1) applies only to parties and witnesses, which is a pretty narrow universe and may yet be limited to litigation matters notwithstanding what we say in Comment [17] (remember the AG opinion on direct contact of a represented "party?") That is the only rule Bob would carry forward in (d)(1). (B)(3) expands the net to non-parties and non-witnesses, who would trigger a concern. For example, when I pursue entitlements, there may be neighboring projects who are or were clients. They are not parties to my matter. Nor are they witnesses. But they will be affected substantially by my representation. I may owe them duties that conflict with the duties to my client or the relationship may mess with my independent judgment. Without (B)(3), there would be no coverage for something that would be a conflict.

3. I agree that (d) has become quite the lengthy rule. But I think we solve this problem not by cutting down on the relationships, particularly relationship rules that have been with us for 17 years. I think we solve it by separating out the lawyer relationship rules in a separate paragraph.

4. I agree that a substantial effect standard is required if we are going to a written consent requirement, which I still don't support. Our current (B) is too broad and is picking up situations that are not conflicts and have no realistic impact on the lawyer client relationship. *Pringle v. La Chapelle* illustrates the point. There are going to be situations where obtaining client consent is not practical. If we are going down this road, we need to focus the rule on actual conflicts, so that we are not penalizing lawyers in situations that do not affect the lawyer client relationship appreciably.

5. With these thoughts in mind, I revised Randy's draft to incorporate my approach.

Comment [8A]

1. I do not like the first two sentences of Comment [8A]. First, the Rule does not address a second loyalty violation. It involves the same type of conflict, but in a different situation. Second, I do not like the reference to the second representation seeming to be disloyal to the current client. That makes it sound like it is not a real conflict, when it is. I recommend that we delete the first two sentences of the Comment.

2. I agree with Kevin's comments on Comment [31], particularly given my "preoccupation" with the "D" word.

Response to Raul

1. I think it is apparent from my foregoing comments that I do not agree with Raul's approach or Mark's comment this morning. I don't think the Model Rule is clear. The "personal relationship" standard is vague. I think a rule that requires lawyers to research the law that has evolved in other states to understand our rule is a prescription for failure. Lawyers should be able to glean their responsibilities from reading the rule. They should not have to research the law in other states to figure out what the heck the ABA means with the fuzzy personal interests rule in the Model Rule.

Attached:

RRC - 3-310 [1-7] - Rule - DFT 14.4 (01-11-10)SWL - Cf. to DFT 13 2-Part1.doc

RRC - 3-310 [1-7] - Rule - DFT 14.5 (01-11-10)SWL - Cf to DFT 14.3-RD-Part2.doc

January 11, 2010 Kehr E-mail to Drafters, cc Chair, Lamport, Martinez & Chair:

My thanks to all the commenters on my various drafting suggestions, but my advance apologies to them for my oversights and misunderstandings. I was hit almost at once with comments and drafting suggestions from five sources, some of them commenting on each other as well as on my 12/16/09 drafts. I have done my best in my attempt to keep straight so many disparate thoughts and suggestions but I'm certain to have missed something along the way.

The attached attempts to pull all this together and is offered with the following responses to the emails of others (this message is intended to be the cover memo for the agenda materials):

1. Document labeled as Part 1:

a. Paragraph (a) [combining what formerly were paragraphs (a) and (c)]

- i. Stan's suggested change to the paragraph (a) title seems to me to be six of one, etc., but I'm glad to accept it so that we can move on to other matters.
- ii. Stan appears to have accepted my 12/16/09 draft of paragraph (a)(1), and the attached makes no changes in it. I disagree with Raul and Mark on this because use of the Model Rule version of paragraph (a) would destroy the distinction between direct adversity and joint representations. We can't go through this debate again.
 1. Raul's email also asks (in the first sentence of his comment on proposed (a)(1)) how a representation can be directly adverse to another client if the lawyer's representation is in another matter. The answer is that this describes the situation in which a lawyer sues his own client (a lawyer who represents multiple clients in a single matter is covered by paragraph (b)).
 2. Raul's email then goes on to suggest a drafting that would prohibit a representation where the interests of the clients conflict. Again, I don't agree. We so far in this Rule have retained the California appellate law concept that a lawyer has conflict when his duties, relationships, or interests interfere with the lawyer's ability to fulfill all responsibilities owed to a client. To use the example that we employed in the 1996-97 drafting efforts, there is nothing necessarily wrong in representing both Burger King and McDonalds. A lawyer who represents both in different matters has a conflict only if the lawyer represents one against the other (paragraph (a)(1)), and a lawyer who represents them in a single matter is subject to paragraph (b).
- iii. Stan's simplification of my draft of what now is paragraph (a)(2) does not seem to me to work because it materially expands what was paragraph (c). Former paragraph (c), and current rule 3-310(C)(3), apply only when the new client is the adversary in the very matter in which the lawyer represents the current client. Stan's revision would prohibit any lawyer who represents Burger King from ever representing McDonalds, even if

the lawyer does not represent McDonalds against Burger King in any matter, simply because McDonalds and Burger King are adversaries in some matter somewhere. That never has been the intent. The attachment as a result retains my 12/16/09 draft with a minor change to the first few words (this change is non-substantive and is intended only to make subparagraph (2) flow more smoothly from the introduction). If anyone thinks I have misread Stan's suggestion, we will have to thrash that out at the meeting as we are out of time for now.

- b. Paragraph (b)
 - i. RAC made no comments on paragraph (b), and it is unchanged.
2. Document labeled as Part 2
- a. Paragraph (c) [formerly paragraph (d)] – the disparateness of the comments is dizzying. One thing that is clear is that everyone seems to have rejected my alternative attempts to simplify the drafting. As a result, we are left with the prior draft that has been reorganized into two paragraphs as Stan suggested (see below).
 - i. Raul suggests that we move back a step from the informed written consent standard to one of written disclosure. Raul says he is agreeing with Randy on this and, although I don't read Randy's message as making that recommendation, we at least can treat it as being Raul's (and one that Stan supports per his message). I also want to point out that there is an alternative now available to us under our defined terms, which is "informed consent". The attached draft makes neither of these changes, but I think they should be considered at the outset as either of these changes might have other drafting consequences.
 - 1. It apparently is because of concerns over the rigidity of the use of the standard of informed written consent in paragraph (c) that Randy suggested, and Raul and Stan (I think in differing ways) supports some kind of materiality standard. Stan gives *Pringle* as an example, but I don't think it is pertinent because: (i) it is a fee award case; (ii) it arose under rule 3-600 rather than 3-310(B); and (iii) because the court's decision was not based on the materiality of the conflict but rather whether the conflict in fact interfered with the lawyer's performance.
 - 2. I don't support the use of a materiality standard to modify all of paragraph (c). I have three independent reasons for this. First, I view what currently is rule 3-310(B) as being as much about a client's trust in the lawyer and the legal system as anything else. Even if a lawyer believes (and even if a lawyer reasonably believes) that a particular current or former relationship would not affect the quality of the representation, the lawyer should disclose those relationships that a client reasonably can be expected to think are significant. Doing so permits the client to decide whether

to hire the lawyer and how to supervise and monitor the lawyer, and strengthens client trust by allowing the client rather than the lawyer to be the decision maker. That element is eliminated if the relationship and interest conflicts are limited to those that the lawyer believes (or reasonably believes) would substantially affect the representation. Second, if the lawyer believes the representation would be substantially affected, the lawyer probably shouldn't even seek client consent (remember that a lawyer cannot obtain advance consent to an incompetent representation under Rule 1.8.8). Third, most of what is in paragraph (c) should be treated as a conflict situation that requires some level of notice to or consent from the client. For example, a lawyer who represents a witness in a matter should not be given the opportunity to find a comforting explanation for why the disclosure or consent is needed (I'm not the sort of person to allow myself to be affected by this). As we can see from *Hernandez v. Paicius*, lawyers will have no trouble in finding that explanation.

- ii. Stan suggests as one way to simplify that we separate out “the lawyer relationship rules” in a separate paragraph. As appears from his suggested revision to my draft, what he has in mind is the subject of current rule 3-320 plus lawyer-client relationship with another person's lawyer (what were (d)(5) and (6) in our prior version). I'm fine with Stan's suggested reorganization. It creates a new paragraph (d), as you will see from the attachment. This version is essentially the same as Stan's suggestion but with three or four minor drafting corrections.
- iii. Stan also suggests as a method for simplifying the draft that we eliminate what currently is paragraph (c)(2) [current rule 3-310(B)(2)]. I have not made that change to the attachment, but it can be done easily if that is the Commission's decision. I do not support this change as I think that a lawyer should be obligated to disclose significant former relationships. If we were to simplify (c)(2), I would suggest doing so by eliminating the materiality standard for the reasons given above.
- iv. The simplification that I suggested for (c)(2) also could be done with (c)(3).

3. Document labeled as Comment

- a. Comment [8A]: Stan disagrees with the first two sentences. I have copied his objection immediately below. I frankly don't understand his thought. If suing one's own client isn't a loyalty violation, what is it? I have retained the first two sentences but reworded them, and I hope this satisfies Stan's concern.

I do not like the first two sentences of Comment [8A]. First, the Rule does not address a second loyalty violation. It involves the same type of conflict, but in a different situation. Second, I do not like the reference to the second representation seeming to be disloyal to the current client. That makes it sound like it is not a real conflict, when it is. I recommend that we delete the first two sentences of the Comment.

- b. Comment [31]: I agree with Kevin’s email about “effective”. I don’t know how I got there, but I have reversed course on that. The attached draft otherwise is almost exactly the same as my 12/16/09 draft.
 - c. Because I don’t know what the Commission will do with what now are paragraphs (c) and (d), I have made no further changes to the related Comments. I can’t locate any suggestions about any of the other Comment changes shown on the attached drafts.
4. We need to wait until after the January meeting to finalize the Introduction, Dashboard, and rule comparison chart, and commenter chart.

Attached:

RRC - 3-310 [1-7] - Rule - DFT 14.5 (01-11-10)RLK - Cf. to DFT 13.2-Part1.doc
RRC - 3-310 [1-7] - Rule - DFT 14.5 (01-11-10)RLK - Cf. to DFT 13.2-Part2.doc
RRC - 3-310 [1-7] - Rule - DFT 14.5 (01-11-10) - COMMENT - Cf. to DFT 13.2.doc

January 11, 2010 Lampport E-mail to Kehr, cc Drafters, Chair, Martinez & Staff:
January 11, 2010 Martinez E-mail to Kehr, cc Drafters, Chair, Lampport & Staff:

STAN: My comments are below in red.

RAUL: Bob, my response to parts of your e-mail are in RED CAPS below.

My thanks to all the commenters on my various drafting suggestions, but my advance apologies to them for my oversights and misunderstandings. I was hit almost at once with comments and drafting suggestions from five sources, some of them commenting on each other as well as on my 12/16/09 drafts. I have done my best in my attempt to keep straight so many disparate thoughts and suggestions but I’m certain to have missed something along the way.

The attached attempts to pull all this together and is offered with the following responses to the emails of others (this message is intended to be the cover memo for the agenda materials):

2. Document labeled as Part 1:

- a. Paragraph (a) [combining what formerly were paragraphs (a) and (c)]
 - i. Stan’s suggested change to the paragraph (a) title seems to me to be six of one, etc., but I’m glad to accept it so that we can move on to other matters.
 - ii. Stan appears to have accepted my 12/16/09 draft of paragraph (a)(1), and the attached makes no changes in it. I disagree with Raul and Mark on this because use of the Model Rule version of paragraph (a) would destroy the distinction between direct adversity and joint representations. We can’t go through this debate again. **[OH SURE WE CAN. WE HAVE TO GET THIS RIGHT AT SOME POINT.]**

1. Raul's email also asks (in the first sentence of his comment on proposed (a)(1)) how a representation can be directly adverse to another client if the lawyer's representation is in another matter. The answer is that this describes the situation in which a lawyer sues his own client (a lawyer who represents multiple clients in a single matter is covered by paragraph (b)). [SO WHY NOT DELETE "IN ANOTHER MATTER" IN YOUR VERSION OF (a)(1)? THE "MATTER" CONTEXT IS NOT THE RELEVANT CONSIDERATION; RATHER, IT IS THE ADVERSITY THAT COUNTS REGARDLESS OF THE CONTEXT OR MATTER. AND IF YOU REMOVE "IN ANOTHER MATTER" FROM (a)(1), THIS TENDS TO MAKE PARAGRAPH (b) SOMEWHAT REDUNDANT. I DON'T SEE WHY WE NEED TO DRAW A DISTINCTION BETWEEN MATTERS, ESPECIALLY IF WE REQUIRE "DIRECT ADVERSITY.]
2. Raul's email then goes on to suggest a drafting that would prohibit a representation where the interests of the clients conflict. [SOUNDS LIKE A STRAW MAN. IF THIS THE CONCERN, IT'S A FUNCTION OF HOW (b)(1) IS DRAFTED.] Again, I don't agree. [NEITHER DO I.] We so far in this Rule have retained the California appellate law concept that a lawyer has conflict when his duties, relationships, or interests interfere with the lawyer's ability to fulfill all responsibilities owed to a client. To use the example that we employed in the 1996-97 drafting efforts, there is nothing necessarily wrong in representing both Burger King and McDonalds. A lawyer who represents both in different matters has a conflict only if the lawyer represents one against the other (paragraph (a)(1)), and a lawyer who represents them in a single matter is subject to paragraph (b). [I DON'T THINK WE NEED TO GO INTO A DISTINCTION BETWEEN THE "SAME" AND "ANOTHER" MATTER. PARAGRAPHS (a) AND (b) SAY MUCH OF THE SAME THING IF WE IGNORE THE "MATTER" CONTEXT. PARAGRAPH (a) REFERS TO THE "REPRESENTATION" BEING ADVERSE, WHEREAS PARAGRAPH (b) REFERS TO THE CLIENTS' "INTERESTS" BEING IN CONFLICT-- FLIP SIDES OF THE SAME COIN. ANALYTICALLY, WE'RE TALKING ABOUT THE SAME THING-- CLIENTS WITH ADVERSE INTERESTS, BUT IN DIFFERENT MATTERS. PARAGRAPHS (a) AND (b) ADDRESS AND PROTECT THE SAME CORE VALUES.]
- iii. Stan's simplification of my draft of what now is paragraph (a)(2) does not seem to me to work because it materially expands what was paragraph (c). Former paragraph (c), and current rule 3-310(C)(3), apply only when the new client is the adversary in the very matter in which the lawyer represents the current client. Stan's revision would prohibit any lawyer who represents Burger King from ever representing McDonalds, even if the lawyer does not represent McDonalds against Burger King in any matter, simply because McDonalds and Burger King are adversaries in some matter somewhere. That never has been the intent. The

attachment as a result retains my 12/16/09 draft with a minor change to the first few words (this change is non-substantive and is intended only to make subparagraph (2) flow more smoothly from the introduction). If anyone thinks I have misread Stan's suggestion, we will have to thrash that out at the meeting as we are out of time for now.

I did not intend the expansion Bob identified here, but agree that what I drafted would, unintentionally, produce that result because it does not link the adversity to the matter in which the lawyer represents the client. I don't have a quick fix to this at the moment, but will go back to the drawing board on this one.

- b. Paragraph (b)
 - i. RAC made no comments on paragraph (b), and it is unchanged.
3. Document labeled as Part 2
- a. Paragraph (c) [formerly paragraph (d)] – the disparateness of the comments is dizzying. One thing that is clear is that everyone seems to have rejected my alternative attempts to simplify the drafting. As a result, we are left with the prior draft that has been reorganized into two paragraphs as Stan suggested (see below).
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Pringle involved both 3-310(B) and 3-600. The court was saying that a violation of the rule does not necessarily prohibit a lawyer from being paid unless the breach is an impropriety that is inconsistent with the character of the profession. The Court got to this conclusion because it realized that while there may (or may not) have

been a breach of the rule, there was no evidence that it had any effect on the representation. My point is that the rule currently covers situations that have no impact on the lawyer-client relationship and, as a result, at least one court was not prepared to apply it strictly. That tells me that the rule is overbroad as it is and should be more closely tailored to conduct involving impropriety that is inconsistent with the character of the profession, which is not the case now. I can't see the justification for disciplining lawyers for technical violations of a rule that is so broad that it encompasses situations that do not impact the representation of a client.

2. I don't support the use of a materiality standard to modify all of paragraph (c). I have three independent reasons for this. First, I view what currently is rule 3-310(B) as being as much about a client's trust in the lawyer and the legal system as anything else. Even if a lawyer believes (and even if a lawyer reasonably believes) that a particular current or former relationship would not affect the quality of the representation, the lawyer should disclose those relationships that a client reasonably can be expected to think are significant. Doing so permits the client to decide whether to hire the lawyer and how to supervise and monitor the lawyer, and strengthens client trust by allowing the client rather than the lawyer to be the decision maker. That element is eliminated if the relationship and interest conflicts are limited to those that the lawyer believes (or reasonably believes) would substantially affect the representation. Second, if the lawyer believes the representation would be substantially affected, the lawyer probably shouldn't even seek client consent (remember that a lawyer cannot obtain advance consent to an incompetent representation under Rule 1.8.8). Third, most of what is in paragraph (c) should be treated as a conflict situation that requires some level of notice to or consent from the client. For example, a lawyer who represents a witness in a matter should not be given the opportunity to find a comforting explanation for why the disclosure or consent is needed (I'm not the sort of person to allow myself to be affected by this). As we can see from *Hernandez v. Paicius*, lawyers will have no trouble in finding that explanation. [THE DEFAULT POSITION SHOULD BE INFORMED DISCLOSURE, AND IF THE RELATIONSHIP ADVERSELY AFFECTS THE REPRESENTATION, THEN INFORMED CONSENT SHOULD BE THE RULE.]

My problem with all of this is that it would lead to discipline for failing to obtain the client's consent to relationships that are not conflicts of interest. I should be disciplined because I failed to obtain a client's informed written consent to a disclosure that I play golf with a custodian of records who appears on an uncontested issue? Why?

My problem with your first point is that it is not a conflict issue. A conflict of interest is the situation that interferes with the lawyer's ability to fulfill certain basic duties to a client. The basic conflicts that arise in relationship settings are interference with independent professional judgment and the lawyer owing conflicting duties to the client and the person with whom the lawyer has the relationship. What you are describing is not about conflicts. This is more about a duty to inform; but even that duty is qualified as a duty to "reasonably inform" about "significant developments." What you are describing is open ended, with no reasonable limits based on a theoretical client interest that would mandate disclosures and written consent to meaningless relationships that do not advance any meaningful interest. Indeed, it would be broader than the duty to inform, since it is not subject to any of the qualifiers that apply to that duty.

My problem with your second point is that it pushes the substantial effect standard too far. When we say the relationship would substantially affect the representation, we are saying the the relationship *could* affect the lawyer's independent judgment or could create a conflict between the lawyer's duties to the client and the lawyer's duties to the person with whom the lawyer has the relationship. That doesn't mean that the lawyer cannot structure the engagement to avoid the conflict.

Can't say I understand your third point, but it sounds like an elaboration of your second point. It seems to me we could clarify what is meant by the materiality standard in a Comment so that it does not become the free-for-all I think you are suggesting.

- ii. Stan suggests as one way to simplify that we separate out "the lawyer relationship rules" in a separate paragraph. As appears from his suggested revision to my draft, what he has in mind is the subject of current rule 3-320 plus lawyer-client relationship with another person's lawyer (what were (d)(5) and (6) in our prior version). I'm fine with Stan's suggested reorganization. It creates a new paragraph (d), as you will see from the attachment. This version is essentially the same as Stan's suggestion but with three or four minor drafting corrections.
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- iv. The simplification that I suggested for (c)(2) also could be done with (c)(3).

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I do not like the first two sentences of Comment [8A]. First, the Rule does not address a second loyalty violation. It involves the same type of conflict, but in a different situation. Second, I do not like the reference to the second representation seeming to be disloyal to the current client. That makes it sound like it is not a real conflict, when it is. I recommend that we delete the first two sentences of the Comment.

- b. Comment [31]: I agree with Kevin's email about "effective". I don't know how I got there, but I have reversed course on that. The attached draft otherwise is almost exactly the same as my 12/16/09 draft.
- c. Because I don't know what the Commission will do with what now are paragraphs (c) and (d), I have made no further changes to the related Comments. I can't locate any suggestions about any of the other Comment changes shown on the attached drafts.

- 5. We need to wait until after the January meeting to finalize the Introduction, Dashboard, and rule comparison chart, and commenter chart.

January 12, 2010 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair, Lampport, Martinez, Tuft & Staff:

I've attached the following in hopes of moving this forward.

1. E-mail compilation excerpt. In PDF. This includes Bob's cover e-mail of yesterday as the first item. I've also combined Stan's (in red) and Raul's (in red caps) interlineated responses to Bob's e-mail right after it.

2. Rule, Draft 14.5 (1/11/10)RLK- PART1, redline, compared to Draft 13.2 (10/20/09), the draft submitted to RAC/BOG at their November 2009 meeting and which was returned to us for further consideration. The document is denominated as part 1 as it includes only paragraphs (a), (b), and (c) from Draft 13.2. It is identical to the draft Bob circulated last night with only the draft no. changed. Word.

3. Rule, Draft 14.5 (1/11/10)RLK- PART2, redline, compared to Draft 13.2 (10/20/09). The document is denominated as part 2 as it includes only paragraph (d) from Draft 13.2 (now re-lettered as paragraphs (c) and (d)). It is identical to the draft Bob circulated last night with only the draft no. changed. Word.

**RRC – Rule 3-310 [1.7 to 1.12]
E-mails, etc. – Revised (1/19/2010)**

4. Rule COMMENT, Draft 14.5 (1/11/10)RLK, redline, compared to Draft 13.2 (10/20/09). This draft incorporates further changes to the draft that was circulated for the December 2009 RRC meeting. However, it will require further revision, depending upon decisions the Commission makes concerning items 2 & 3, above. Word.

Some notes:

1. I haven't included all of the e-mails that the drafters and other interested RRC members (Stan, Raul and Mark) have circulated since the December meeting. I thought Bob has done a fine job of laying out the issues on these drafts in his cover e-mail, and Stan's and Raul's interlineated comments have further fleshed out the differences of opinion. If you think we should include the rest of the e-mails, please let me know and I'll send them on for insertion AFTER Bob's cover e-mail and Stan's and Raul's interlineated responses to it.
2. I have some comments that I simply don't have time to make right now. I will send them on before the e-mail deadline next Monday.
3. As Bob noted, we can't advance the other documents (Dashboard, Rule & Comment Comparison Chart and Public Comment Chart) until the issues concerning the attached documents are resolved.

Please let me know if you have any questions.

January 12, 2010 Tuft E-mail to Drafters, cc Chair, Lampport, Martinez & Staff:

In order to have a complete record of our work, I request that all of our emails be included in the materials.

January 12, 2010 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair, Lampport, Martinez, Tuft & Staff:

I've attached the remainder of the e-mail exchange in a separate PDF document (page 209-226 of the still growing compilation; I sent out pages 227-235 earlier this morning. Where the e-mails did not address substantive issues, I've stricken them. I think Bob's cover e-mail and Stan's and Raul's responses thereto should still appear first in the agenda package).

Please let me know if you have any questions.

Attached:

RRC - 3-310 [1-7] - E-mails, etc. - REV (01-19-10)_209-226.pdf

January 17, 2010 Vapnek E-mail to RRC:

I have just spent a fair amount of time reviewing all of the materials for this agenda item and confess I can't tell where we are on this Rule. I understand that RAC sent this Rule back primarily because of the advance waiver provision. Am I correct in this? In any event, here are my comments:

1. In the Rule draft (14.5) on page 737 of the agenda materials, I believe we could delete "in another matter" from paragraph (a) (1), third line, as it is redundant. The balance of the sentence would therefore read: "will be directly adverse to another client the lawyer currently represents;"
2. As I read (a) (2), it is a rewrite of 3-310 (C) (3). I continue to believe that the informed written consent of both the current client and the prospective client are required, the current client because he or she may perceive a breach of loyalty problem if th lawyer is going to represent the current client's adversary in a separate matter, and the prospective client should be made aware of the continuing obligations of the lawyer to the original client.
3. I approve of the rewrite as new (d) (1) and (2) of this Rule. I believe we need to retain this provision of our current rule at least in part because it does occur in real life. I worked on a case in which the client-lawyer complained when his counsel (in a legal malpractice case) entered a separate pending action as the lawyer for the defendant. The basis of the complaint was that the client-lawyer would have to disclose the relationship to the plaintiff and would be embarrassed in diclosing the legal mal case. The judge did not agree that this was a proper basis to disqualify the defendant's new lawyer (who had made full disclosure).
4. In Comment 18 at line 224 on page 746 of the agenda materials, I believe we should add the word "substantial" in front of "shareholder" otherwise it will be a nightmare for lawyers trying to determine if they own shares either directly, or more likely, via a mutual fund. Ownership of even a thousand shares of a corporation that has a billion share outstanding should not trigger a disclosure requirement.
5. Comment 31. Looks fine to me as redrafted.

January 18, 2010 KEM E-mail to Vapnek, cc RRC:

To address your inquiry in your opening paragraph, below, concerning why this Rule was sent back, part of the reason was the advance consent comment, but there was more. Gov. Jon Streeter was highly critical of the Rule at RAC's 11/12/09 meeting, when RAC voted to send the Rule back to the Commission. His criticism was general -- he noted it is too complex and, regardless of the RRC's description of it as a rule of discipline, noted that he has to deal w/ it every day in DQ motions and that the rule as proposed provides little guidance.

He was particularly critical of the discrepancy between then paragraphs (a) and (c) [now brought together in paragraph (a); see Part 1 of rule proper at Agenda, p. 737], noting that he thought then-(c) was subsumed by then-(a). He was also critical of then-paragraph (d), which has now been split into paragraphs (c) and (d) in Part 2 of the rule proper [Agenda, pp. 739-40]. He reiterated his concern with the Rule at our 12/11-12/09 meeting. In addition, he sent the following e-mail to Staff prior to the December meeting:

**RRC – Rule 3-310 [1.7 to 1.12]
E-mails, etc. – Revised (1/19/2010)**

With respect to Rule 1.7, I assume from the agenda that the whole rule is going to be discussed. At the BOG meeting, I raised some concerns about the complexity of the proposed Rule as a whole, and I'd like to make sure that the whole Rule is open for discussion, not just the tweaking of specific subsections.

At the December meeting, he participated a bit in the deliberations on Rule 1.7 and again expressed his preference for the Model Rule.

We probably want to have Gov. Streeter involved in our discussions of this Rule at our meeting in a few days. He is on RAC and a persuasive voice in their deliberations.

Please let me know if you have any questions.

January 18, 2010 Sondheim E-mail to RRC:

Based upon the exchange of e-mails, at least two members of the Commission (Stan and Raul) appear to disagree with portions of Bob's draft. TO AID IN THE RESOLUTION OF THESE DIFFERENCES, IT WOULD BE HELPFUL IF STAN AND RAUL, BY 2 PM ON THURSDAY, COULD PROVIDE BY E-MAIL TO THE COMMISSION THEIR VERSIONS OF THIS RULE. This would enable us to vote on each part of Bob's draft in light of possible alternatives. By having these alternative versions, it would make it easier to understand the exchange of e-mails between Bob and Stan and Raul.

January 19, 2010 Sondheim E-mail to Difuntorum & KEM:

I note that the attachment from Randy (see p. 764) is not included with the agenda materials. Would you please e-mail a copy to the Commission members so that we can consider Randy's draft as an alternative to Bob's draft and any drafts that Stan or Raul submit pursuant to my earlier e-mail.

January 19, 2010 KEM E-mail to RRC:

At Harry's request, I've attached the draft Randy proposed as "food for thought" in his 1/9/10 E-mail to Kehr, cc Drafters, Chair, Lamport, Martinez & Staff, which e-mail you can find at page 764 of the Agenda Materials (p. 220 of the compilation). The attached draft is named:

RRC - 3-310 [1-7] - Rule - DFT 14.4 (01-09-10)RD - Cf. to DFT 14.3-Part2.doc

Please let me know if you have any questions.

Lee, Mimi

From: Lamport, Stanley W. [SLamport@coxcastle.com]
Sent: Tuesday, January 19, 2010 4:57 PM
To: Kevin Mohr; Vapnek, Paul W.
Cc: Robert L. Kehr; snyderlaw@charter.net; Ellen R. Peck; hbsondheim@verizon.net; CommissionerJ2@gmail.com; jsapiro@sapirolaw.com; justice.ruvolo@jud.ca.gov; Kevin Mohr G; kmelchior@nossaman.com; McCurdy, Lauren; linda.foy@jud.ca.gov; martinez@lbbslaw.com; Lee, Mimi; mtuft@cwclaw.com; Difuntorum, Randall; Yen, Mary
Subject: RE: RRC Rule 1.7 January 2010 agenda item V. A.

Kevin is correct that the Rule was sent back to deal with (a) and (c) [I refer to them in their pre-combined stated], as well as to deal with the advance consent issue and then paragraph (d). Based on Governor Streeter's comments at RAC and my subsequent conversations with him, I think I understand his concerns and I think we can address them. The concern Governor Streeter has with 1.7(c) really has to do with the fact that the Comment does not explain the difference between (a) and (c). He found it hard to understand when (c) applies and when (a) applies. The issue is not so much with the wording of the Rule, but with the explanation of its application in the Comment. My proposed language for the 1.7 Comment was intended to address his concern, by specifying exactly when (c) applies. In looking over the Comment as a whole, I realize that there is more work to be done to address Governor Streeter's concern. While it will not make the 5 p.m. deadline, I will get a draft of what I have in mind out this evening.

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Monday, January 18, 2010 2:41 PM
To: Vapnek, Paul W.
Cc: Robert L. Kehr; snyderlaw@charter.net; Ellen R. Peck; hbsondheim@verizon.net; CommissionerJ2@gmail.com; jsapiro@sapirolaw.com; justice.ruvolo@jud.ca.gov; Kevin Mohr G; kmelchior@nossaman.com; Lauren McCurdy; linda.foy@jud.ca.gov; martinez@lbbslaw.com; Mimi Lee; mtuft@cwclaw.com; Randall.Difuntorum@calbar.ca.gov; Lamport, Stanley W.; Yen, Mary
Subject: Re: RRC Rule 1.7 January 2010 agenda item V. A.

Paul:

To address your inquiry in your opening paragraph, below, concerning why this Rule was sent back, part of the reason was the advance consent comment, but there was more. Gov. Jon Streeter was highly critical of the Rule at RAC's 11/12/09 meeting, when RAC voted to send the Rule back to the Commission. His criticism was general -- he noted it is too complex and, regardless of the RRC's description of it as a rule of discipline, noted that he has to deal w/ it every day in DQ motions and that the rule as proposed provides little guidance.

He was particularly critical of the discrepancy between then paragraphs (a) and (c) [now brought together in paragraph (a); see Part 1 of rule proper at Agenda, p. 737], noting that he thought then-(c) was subsumed by then-(a). He was also critical of then-paragraph (d), which has now been split into paragraphs (c) and (d) in Part 2 of the rule proper [Agenda, pp. 739-40]. He reiterated his concern with the Rule at our 12/11-12/09 meeting. In addition, he sent the following e-mail to Staff prior to the December meeting:

With respect to Rule 1.7, I assume from the agenda that the whole rule is going to be discussed. At the BOG meeting, I raised some concerns about the complexity of the proposed Rule as a whole, and I'd like to make sure that the whole Rule is open for discussion, not just the tweaking of specific subsections.