

Lee, Mimi

**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Monday, November 23, 2009 6:57 AM  
**To:** Marlaud, Angela  
**Cc:** Robert L. Kehr; Kurt Melchior; Dominique Snyder; Stan Lamport; Harry Sondheim; Hawley, Robert; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G  
**Subject:** RRC - 1.7 [3-310] - V.A. December 11-12, 2009 Agenda Materials  
**Attachments:** RRC - 3-310 [1-7] - E-mails, Rule Draft 14.2, Adv. Consent Compar - COMBO- REV (11-23-09).pdf

Angela:

To save a little time, I've attached the following (on behalf of Bob Kehr):

A single, scaled PDF file that includes the following documents for the Rule (please use this e-mail as the cover memo for the agenda item):

1. E-mail compilation excerpt, which includes the e-mail exchanges between and among the drafters, chair & staff following the RAC meeting that was held on 11/12/09;
2. Rule, Draft 14.2 (11/22/09), redline, ;
3. Chart, showing side-by-side comparison of MR 1.7, cmt. [22] to proposed Rule 1.7, draft 14.2 [Advance Consent comment].

**NOTES FOR THE COMMISSION:**

1. At its 11/12/09 meeting, the Regulation, Admissions and Competence Board Committee requested that the Commission revisit proposed Rule 1.7 on a number of issues. See 11/14/09 Difuntorum E-mail to RRC.
  - a. I've included some sketchy notes I took during that meeting in the e-mail compilation, at pages 195-196.
  - b. The lead drafter has tried to address the issues raised in Item #2.
2. The attached rule draft 14.2 includes changes made to Comments [5], [10], [16], [17], [18], and [31].
  - a. These changes were made in an attempt to address concerns Board members raised concerning (i) the difference between paragraphs (a) and (c); (ii) paragraph (b); (iii) paragraph (d)(4); and (iv) Comment [31] (advance consent).
  - b. In understanding the revisions, it will be helpful to review the 11/21/09 Kehr E-mail (@ 3:00 p.m.) and the two 11/22/09 Kehr E-mails that run from the bottom of page 197 to the top of page

198 of the Compilation. It would also be helpful to review the 11/21/09 KEM E-mail at pages 194-95, as well as the 11/22/09 Difuntorum E-mails on page 198.

3. The Comparison Chart between MR 1.7, cmt. [22] and proposed Rule 1.7, cmt. [31] is intended to provide Commissioners w/ a clean, side-by-side comparison of the two provisions.

To avoid confusion over what should be included in the agenda mailing, I'll send on the underlying Word documents later.

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

Kevin

--  
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**RRC – Rule 3-310 [1.7 to 1.12]  
E-mails, etc. – Revised (12/8/2009)**

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**November 14, 2009 Difuntorum E-mail to RRC:**

At the RAC's meeting on Thursday, all rules in Batches 1, 2 & 3 were adopted for recommendation to the full Board with the exception of the following: Rule 8.3 (Reporting Misconduct) - tabled until Jan. meeting - RAC meeting time expired before this rule could be discussed.

**Rule 1.8.1** (Bus. Transactions/Adv. Interests) - tabled until Jan. meeting - (no motion to adopt due to concerns about the "modification of fee agreement" comments)

**Rule 1.8.10** (Sex w/client) - referred back to RRC for further work (revising the definition in para. (b), concern that the "touching" language is too limiting)

**Rule 1.7** (Conflicts of Interests: Current Clients) - referred back to RRC for further work (concerns about the "advance waiver" concept and about perceived overlap and ambiguity in the provisions of the rule)

Given the above action, the December assignments have been revised by the Chair to delete the Batch 5 assignments in Section V. The caption for those two items that are now off the December agenda are pasted below for convenient reference.

Substituted for those items are new assignments to reconsider the rules that have not been adopted by RAC due to substantive concerns, namely, Rules: 1.7; 1.8.1; and 1.8.10. Staff is trying to obtain the audio recording of the RAC meeting for the respective drafting teams for these rules as hearing the concerns expressed by the Board members will be the best way for the drafting teams to get a sense of the desired direction for those rules. In addition, RAC Chair Michael Marcus asked the Board members who expressed concerns to make themselves available to provide direct input to the RRC drafting teams.

A revised assignments agenda and more information will be sent early next week. After the full Board meets today, if there is any variation from the result at the RAC meeting, I will send a message with an update. Thanks. -Randy D.

**ASSIGNMENTS THAT ARE NOW DELETED FROM THE DECEMBER ASSIGNMENTS  
AGENDA:**

\*FOY

Julien

Peck A. Proposed Rule 1.14 [N/A]. Client with Diminished Capacity

\*TUFT

Foy

Peck B. Proposed Rule 3.8 [N/A]. Responsibilities of a Prosecutor

**November 16, 2009 Difuntorum E-mail to RRC:**

Attached please find a revised December assignments agenda. As previously reported, the Board Committee has referred a few rules back to the Commission for further consideration. These rules have been placed in section V of assignments agenda (and are pasted below). The previous assignments that would've started the Commission's review of the public comment on the Batch 5 rules are now deleted.

\*KEHR  
Melchior  
Mohr  
Snyder

- A. Rule 1.7 Conflicts of Interests: Current Clients [3-310]**  
(Codrafters are assigned to prepare a revised draft rule in response to the concerns raised at the Board Committee's November 12, 2009 meeting, for submission to staff by **Sunday, November 22, 2009** to distribute with the December meeting agenda materials. An audio recording of the Board Committee's meeting will be provided. The Board Committee expressed concerns about the inclusion of the "advanced waiver" concept and also about overlap and ambiguity among the provisions of the rule, in particular paragraphs (a), (c) and (d)(4).)

\*LAMPOR

- B. Rule 1.8.1 Business Transactions and Adverse Interests [3-300]**  
(Codrafters are assigned to prepare a revised draft rule in response to the concerns raised at the Board Committee's November 12, 2009 meeting, for submission to staff by **Sunday, November 22, 2009** to distribute with the December meeting agenda materials. An audio recording of the Board Committee's meeting will be provided. The Board Committee expressed concerns about the comments describing the application of the rule to a modification of a fee agreement.)

\*RUVOLO  
Foy  
Julien

- C. Rule 1.8.10 Sexual Relations With Client [3-120]**  
(Codrafters are assigned to prepare a revised draft rule in response to the concerns raised at the Board Committee's November 12, 2009 meeting, for submission to staff by **Sunday, November 22, 2009** to distribute with the December meeting agenda materials. An audio recording of the Board Committee's meeting will be provided. The Board Committee requested modification of the definition of "sexual relations" in paragraph (b) due to concerns that the "touching" language is too limited as it could exclude sexual exploitation that does not involve touching.)

**November 17, 2009 McCurdy E-mail to RRC:**

At the Board Committee on Regulation and Admission's (RAC) meeting on Thursday, November 12th, all Batch 1, 2 & 3 rules presented to RAC were adopted for recommendation to the full Board with the exception of the following:

1. Rule 8.3 (Reporting Misconduct) – tabled until January 7th meeting – RAC meeting time expired before this rule could be discussed;
2. Rule 1.8.1 (Bus. Transactions/Adv. Interests) – tabled until January 7th meeting – no motion to adopt due to concerns about the "modification of fee agreement" comments;

**RRC – Rule 3-310 [1.7 to 1.12]  
E-mails, etc. – Revised (12/8/2009)**

3. Rule 1.8.10 (Sex w/client) – referred back to RRC for further work (modification to the definition of “sexual relations” in para. (b) was requested due to concerns that the "touching" language is too limiting); and

4. Rule 1.7 (Conflicts of Interests: Current Clients) – referred back to RRC for further work (concerns about the "advance waiver" concept and about perceived overlap and ambiguity in the provisions of the rule).

At the full meeting of the Board of Governors on Saturday, November 14th, the Board concurred with the recommendation of RAC and approved all Batch 1, 2 & 3 rules presented to RAC, with the exception of the four rules mentioned above.

Given the above action, the four rules mentioned above will be placed on the Commission's December 11 & 12, 2009 meeting agenda for further discussion of only those concerns expressed by the Board members.

**November 20, 2009 McCurdy E-mail to RRC:**

If you are interested in listening to the discussion of the subject rules that occurred at RAC's November 12th meeting, use the links below to connect to the audio clips. Due to the large size of these files it is necessary for us to use MediaFire.com as a web hosting site. A copy of these clips on CD have been sent by mail to the lead drafters of each of these rules, as the redrafts of these rules are assigned for the Commission's December meeting agenda.

**RULE 1.7 (KEHR, Melchior, Mohr, Snyder):**

File name: RAC - Proposed Rule 1.7 Discussion - Nov 2009.mp3:

**RULE 1.8.1 (LAMPOR):**

File name: RAC - Proposed Rule 1.8.1 Discussion - Nov 2009.mp:

**RULE 1.8.10 (RUVOLO, Foy, Julien):**

File name: RAC - Proposed Rule 1.8.10 - Nov 2009.mp3:

**November 21, 2009 @ 2:06 p.m. Kehr E-mail to KEM:**

The latest draft I have of this is 13, but I think you removed the Rule 1.4 reference in Comment [18]. Am I right that RAC had a later draft? If so, can you send it to me? I want to be certain I'm working from the correct version.

**November 21, 2009 @ 3:00 p.m. Kehr E-mail to Drafters (Melchior, Snyder & KEM), cc Lamport, Chair, Hawley & Staff:**

I have just finished listening to the recording of the recent RAC discussion of this Rule, but unfortunately the quality of recording made it impossible for me to catch everything that was said. I therefore am sending this message to those who attended the meeting in the hope they will be able to supplement my understanding of what occurred.

I will set out in this message all of the comments I heard, each with my reply:

- 1 One Governor seemed to say that he couldn't understand the difference between paragraphs (a) and (c). I hope that the explanation, I think principally by Randy, will be sufficient. I don't recommend any change to the Rule as I don't see how to make the difference any clearer (particularly given the paragraph titles, which I think should serve as extremely helpful guidance).
- 2 Another Governor was puzzled by the (d)(4) use of "professional interest in the subject matter of the representation." See my suggested changes to Comment [18] (my edits are based on what I think is the penultimate draft, but it is the latest I have).
- 3 Someone raised an issue about the time at which compliance with the Rule is measured, or perhaps when the existence of a conflict is measured (this was one of the spots where the audio faded). In either event, I don't see what there is to add to the rule. Each paragraph states either that the lawyer shall not "accept or continue" or shall not "accept" a particular representation. This seems to me to be a complete and correct statement.
- 4 There were a number of comments about advance consents. I was able to catch only one specific comment, which seemed to be an expression of concern that a lawyer who obtains an advance consent might not have all of the usual duties to that client while the representation continues. I can understand the concern in the context of joint representations because of the potential conflict created by the fact of a joint representation, but I cannot this in any other context. I've nevertheless attempted to address this by adding a sentence at the end of Comment [31]. As for the other comments, which seemed to be generalized expressions of concern, I've repeatedly and carefully reread [31] and cannot find any place where I think it is inconsistent with published case authority or common sense. Also, there is one aspect of the explanation for advance consents that I heard mentioned only indirectly (this was in one of Kevin's comments). This is that, while advance consents are a matter of financial significance to large firms (where conflicts are a major problem), there is client protection aspect to permitting advance consents. This is the client's freedom to choose counsel. I've tinkered to try to address the generalized concern.

To summarize, the only suggested changes are in Comments [18] and [31] (and I corrected a typo in the title to paragraph (c)). I'd be grateful for any clarification from those who attended the meeting.

**Attachment:**

RRC - 3-310 [1-7] - Rule - DFT14 (11-21-09) - Cf. to DFT13.doc

**November 21, 2009 KEM E-mail to Kehr, cc Drafters, Lamport, Chair, Hawley & Staff:**

1. I've attached some relatively sketchy notes I took during the RAC meeting. Because I was trying to respond to many of the inquiries, the notes are less than complete but they might be of some help.
2. I've also attached a new draft 14.1 (11/21/09), compared to draft 13.2 (10/20/09), the most recent draft. I've simply inserted your revisions in the attached except that in Comment [31], I've

substituted substituting "timely and effectively" (the phrase we've used concerning screens) for your "timely and fully".

3. I invite others who were at the meeting to comment but my impression was that the Board members wanted more than just some revisions to a couple of comments. On the other hand, despite requests for more clarity and an invitation that they provide us with some language, we did not receive any. A couple of BOG members did comment in response to my statement that it is a rule of discipline something along the the following lines: "but the rule typically only has application in disqualification, there is very little discipline if any. Lawyers need guidance and this rule is very confusing." The focus then turned to specifics, e.g., paragraph (d)(4) and the advance waiver comment.

4. Resolving this may require a few passes before the BOG members are satisfied. However, I'm not sure that the changes you've made will be sufficient w/o a covering memo that explains the approach the Commission took and why in better detail than I provided at the meeting. Then again, by the time the Rule returns to them, they may have moved on.

5. Any further thoughts from Harry, Bob Hawley, Randy, Stan?

Please let me know if you have any questions.

***Attachments:***

RRC - 3-310 [1-7] - 11-14-09 RAC Meeting - KEM.pdf

RRC - 3-310 [1-7] - Rule - DFT14.1 (11-21-09) - Cf. to DFT 13.2.doc

***November 12, 2009 RAC Meeting Notes (KEM) re Rule 1.7:***

D. **RULE 1.7.**

1. Marcus: Gives an introduction to the Rule.
2. Randy: Explains advance waiver.
3. KEM: Explains our approach and notes divergence from the ABA's
4. Jon Streeter: Likes the clarity of the rule.
  - a. Nevertheless, there are ambiguities.
  - b. What is the difference between (a) and (c)?
  - c. What is a "professional interest" in (d)(4)?
5. Randy: Discusses the difference between (a) and (c) ["sleeping w/ the enemy"].
6. Bob: The Rule needs to be designed for discipline; a court can easily extrapolate.
7. Jon: What is a "professional interest" in (d)(4)?

- a. Stan: E.g., lawyer involved in professional organization that stands to benefit.
8. Bill Hebert: Also disturbed by an advance waiver.
  - a. No client on earth can know the future.
  - b. There can never be a knowing advance waiver.
9. Russ Weiner: Agrees with Bill Hebert.
  - a. What will these agreements look like?
  - b. How will we prosecute these?
10. Chairez: There's an ambiguity in the application of some of these provisions.
11. Heinke: Asks about advance waivers.
  - a. Wants it to be more restricted in its description.
  - b. KEM: Explains what is the intent. Not intended to broadly permit blanket waivers; the key is the disclosure to make the client's consent informed.
12. MOTION: Refer back for further consideration  
YES:            NO:            ABSTAIN:
  - a. Streeter: Not just a waiver of the right to a DQ down the road, but rather to the right to competent representation.
    - (1) Thinks this is a good direction to go in w/ the rule, but has a real problem with the rule.
  - b. Chairez: Good work but needs some changes to make it better.
13. Marcus: Streeter, Heinke, Chairez, Aguirre work together and perhaps make some suggestions.
14. Harry: What are the issues?
  - a. Advance waivers?
  - b. Aguirre: AW is not an abrogation of the lawyer's duties in Comment [1]. Lay them out more prominently. It is not the trap it appears to be.
  - c. Jon Streeter: Also concerned w/ paragraph (b).

- d. Harry: So (a), (c), (b), (d), & advance waivers.

**November 21, 2009 Sondheim E-mail to Kehr, cc Drafters, Lampport, Hawley & Staff:**

First a nit. There is some sort of typo in comment 18 regarding "if the lawyer is a party to a contract being litigation."

More importantly, we need to clarify the difference between paragraphs (a) and (c). If we do not do so, I believe some members of the BOG will remain confused. Reading the text of (a) and (c) could lead to the conclusion that they are identical since (a) talks about representing a current client while accepting the representation of another client, which is what (c) also talks about. In comment 16 you use the example of clients A and B. Perhaps if you use a similar example of A and B for one of the comments explaining (a), the difference between the two paragraphs could be sharpened, but without an explanation of the difference, I must say that I too have the same concerns expressed by members of the BOG.

**November 22, 2009 Kehr E-mail to Drafters, cc Lampport, Chair, Hawley & Staff:**

With the help of Kevin's RAC meeting notes, which disclosed some things I could not hear in the audio, and Harry's message of last night, I have revised my draft of yesterday (working from Kevin's reformatted version of my draft) and have these additional comments:

1. On Harry's message, I have changed "being litigation" to "being litigated" at line 266. Thank you for catching that one.
2. I sympathize with anyone who is confused by paragraph (c). I have a definite recollection of not understanding the earlier version of it when I first saw it in the 1989 rules, and of how I worked it out (algebraically). I have seen rule 3-310(C)(3) cause confusion with others on a number of occasions and, given how unusual the situation is, on more than one occasion have wondered whether it is more trouble than it is worth. One possibility is to remove it. While my view is the same as the one Stan voiced at the RAC meeting, which is that removing what is a long-standing California rule would cause its own set of issues, I suggest that we raise this possibility at our next meeting. In the meantime, I have suggested some changes to Comments [5] and [16], the former of which takes into account Harry's message of last night.
3. One of the things I didn't hear in the audio was the Streeter comment that he is concerned about paragraph (b). I'm afraid I have no idea what the problem might be. Nevertheless, I have added a sort of topic sentence to Comment [10]. For the sake of consistency, I then did roughly the same with Comment [17].

As always, I look forward to everyone's comments on this.

Kevin: I will be unavailable by e-mail once I leave my office, so I would appreciate your waiting for any comments from those who receive this message, and then sending in whatever is needed for the agenda package. Thank you.

***Attachment:***

RRC - 3-310 [1-7] - Rule - DFT 14.2 (11-22-09) - Cf. to DFT 13.2.doc

**November 22, 2009 Kehr E-mail to KEM, cc Drafters, Lampport, Chair, Hawley & Staff:**

I omitted one point in my message of a moment ago, which was that I intended to express agreement with your comment about a memo to RAC or the Board. I had the same thought while I was struggling to listen to the audio yesterday. The alternative that I see would be to get some of the RAC members to our December meeting, but I have no idea if that is possible.

**November 22, 2009 Difuntorum E-mail to Kehr, cc Drafters, Lampport, Chair, Hawley & Staff:**

Because some Board members expressed concern with the essential concept of advance consents and because OCTC seemed to agree with those concerns, I believe that the Commission should take a vote on the complete deletion of the relevant comments.

There are two hurdles that this rule must overcome: (1) perceived lack of clarity in the prohibition language; and (2) distrust of advance consents. Eliminating the latter hurdle altogether gives the Commission a better chance at getting the rule adopted. The risk that the Commission takes by offering only a modest response to the Board's concerns is that the Board might direct the Commission to simply use the Model Rule with the advance consents comments deleted.

**November 22, 2009 Kehr E-mail to Difuntorum, cc Drafters, Lampport, Chair, Hawley & Staff:**

I wonder why you think the alternative is the Model Rule without a Comment on advance consents, as opposed to our Rule without such a Comment, or our Rule with the Model Rule Comment. I have attached the Model Rule and our proposed advance consent Comments. I see the result of the Commission's work on this as being a more mandatory and informative discussion, but I would not object to simply using the MR version without its first sentence. I don't think it is wrong, only less informative than it could be.

***Attachment:***

RRC - 3-310 [1-7] - CHART - Advance Waiver - MR Cf. to Rule 1.7 (11-22-09).doc

**November 22, 2009 Difuntorum E-mail to Kehr, cc Drafters, Lampport, Chair, Hawley & Staff:**

I was simply calling out the worst case scenario. It would be perceived as the easiest thing to do in limited time available for Board consideration.

1 **Rule 1.7: Conflict Of Interest: Current Clients**  
2

- 3 (a) **Representation directly adverse to current client.** A lawyer shall not accept  
4 or continue representation of a client in a matter in which the lawyer's  
5 representation of that client will be directly adverse to another client the lawyer  
6 currently represents in another matter, without informed written consent from  
7 each client.  
8
- 9 (b) **Representation of multiple clients in one matter.** A lawyer shall not, without  
10 the informed written consent of each client:  
11
- 12 (1) Accept or continue representation of more than one client in a matter in  
13 which the interests of the clients potentially conflict; or  
14
- 15 (2) Accept or continue representation of more than one client in a matter in  
16 which the interests of the clients actually conflict.  
17
- 18 (c) **Representation of an adverse party.** While representing a client in a first  
19 matter, a lawyer shall not, in a second matter, accept the representation of a  
20 person or organization who is directly adverse to the lawyer's client in the first  
21 matter, without the informed written consent of each client.  
22
- 23 (d) **Personal relationships and interests.** A lawyer shall not accept or continue  
24 representation of a client without the client's informed written consent where:  
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- 26 (1) The lawyer has a legal, business, financial, professional, or personal  
27 relationship with a party or witness in the same matter; or  
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- 29 (2) The lawyer knows or reasonably should know that:  
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- 31 (a) the lawyer previously had a legal, business, financial, professional,  
32 or personal relationship with a party or witness in the same matter;  
33 and  
34
- 35 (b) the previous relationship would substantially affect the lawyer's  
36 representation; or  
37
- 38 (3) The lawyer has or had a legal, business, financial, professional, or  
39 personal relationship with another person or entity and the lawyer knows  
40 or reasonably should know that either the relationship or the person or  
41 entity would be affected substantially by resolution of the matter; or  
42
- 43 (4) The lawyer has or had a legal, business, financial, or professional interest  
44 in the subject matter of the representation; or  
45

- 46 (5) The lawyer knows that the lawyer, the lawyer’s law firm, or a lawyer who is  
47 associated in that law firm is a client of another lawyer involved in the  
48 matter; or  
49
- 50 (6) The lawyer knows that another lawyer involved in the matter, the other  
51 lawyer’s law firm, or a lawyer associated in that law firm is the lawyer’s  
52 client; or  
53
- 54 (7) The lawyer knows that the lawyer representing another person involved in  
55 the matter has one of the following relationships with the lawyer or with  
56 another lawyer associated in the lawyer’s law firm: (i) a spousal, parental,  
57 or sibling relationship; (ii) a cohabitational relationship; or (iii) an intimate  
58 personal relationship.  
59

60 **Comment**

61  
62 **General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)**  
63

64 [1] This rule and the other conflict rules seek to protect a lawyer’s ability to carry out  
65 the lawyer’s basic fiduciary duties to each client. For the purpose of considering  
66 whether the lawyer’s duties to a client or other person could impair the lawyer’s ability to  
67 fulfill the lawyer’s duties to another client, a lawyer should consider all of the following:  
68 (1) the duty of undivided loyalty (including the duty to handle client funds and property  
69 as directed by the client); (2) the duty to exercise independent professional judgment for  
70 the client’s benefit, not influenced by the lawyer’s duties to or relationships with others,  
71 and not influenced by the lawyer’s own interests; (3) the duty to maintain the  
72 confidentiality of client information; (4) the duty to represent the client competently  
73 within the bounds of the law; and (5) the duty to make full and candid disclosure to the  
74 client of all information and developments material to the client’s understanding of the  
75 representation and its control and direction of the lawyer. See Rule 1.2(a) regarding the  
76 allocation of authority between lawyer and client.  
77

78 [2] The first step in a lawyer’s conflict analysis is to identify his or her client(s) in a  
79 current matter or potential client(s) in a new matter. In considering his or her ability to  
80 fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant  
81 representation of a client or proposed representation of a potential client. Only then can  
82 the lawyer determine whether a conflict rule prohibits the representation, or permits the  
83 representation subject to a disclosure to the client or the informed written consent of the  
84 client or a former client. Determining whether a conflict exists may also require the  
85 lawyer to consult sources of law other than these Rules.  
86

87 [3] This rule describes a lawyer’s duties to current clients. Additional specific rules  
88 regarding current clients are set out in Rules 1.8.1 to [1.8.12]. For conflicts duties to  
89 former clients, see Rule 1.9. For conflicts of interest involving prospective clients, see  
90 Rule 1.18. For definitions of “informed consent” and “written,” see Rule 1.0.1(e) and (b).  
91 See also Comments [26] – [30] to this Rule.

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137

**Lawyer Acting in Dual Roles**

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

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

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

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

[7] Generally speaking, a lawyer’s work on a matter will not be directly adverse to a person if that person is not a party to the matter, even if the non-party’s interests could be affected adversely by the outcome of the matter. However, in some situations, a lawyer’s work could be directly adverse to a non-party if that non-party is an identifiable

138 target of a litigation or non-litigation representation, or a competitor for a particular  
139 transaction (as would occur, for example, if one client were in competition with another  
140 of the lawyer's clients on other matters to purchase or lease an asset or to acquire an  
141 exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a  
142 non-party witness who is the lawyer's client in another matter, if the examination is likely  
143 to harm or embarrass the witness. (See *Hernandez v. Paicius* (2003) 109 Cal.App.4th  
144 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)  
145

146 [8] Not all representations that might be harmful to the interests of a client create  
147 direct adversity governed by paragraph (a). The following are among the instances that  
148 ordinarily would not constitute direct adversity: (1) the representation of business  
149 competitors in different matters, even if a positive outcome for one might strengthen its  
150 competitive position against the other; (2) a representation adverse to a non-client  
151 where another client of the lawyer is interested in the financial welfare or the profitability  
152 of the non-client, as might occur, e.g., if a client is the landlord of, or a lender to, the  
153 non-client; (3) working for an outcome in litigation that would establish precedent  
154 economically harmful to another current client who is not a party to the litigation; (4)  
155 representing clients having antagonistic positions on the same legal question that has  
156 arisen in different cases, unless doing so would interfere with the lawyer's ability to  
157 represent either client competently, as might occur, e.g., if the lawyer were advocating  
158 inconsistent positions in front of the same tribunal; and (5) representing two clients who  
159 have a dispute with one another if the lawyer's work for each client concerns matters  
160 other than the dispute.  
161

162 [9] If a conflict under paragraph (a) arises during a representation, the lawyer must  
163 in all events continue to protect the confidentiality of information of each affected client  
164 and former client. Regarding former clients, see Rule 1.9(c).  
165

166 **Paragraph (b): Representation of multiple clients in a matter**  
167

168 [10] When a lawyer represents multiple clients in a single matter, the lawyer's duties  
169 to one of the clients often can interfere with the full performance of the duties the lawyer  
170 owes to the other clients. As a result, pParagraph (b) applies when a lawyer represents  
171 multiple clients in a single matter, as when multiple clients intend to work cooperatively  
172 as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a  
173 transaction or other common enterprise. Examples of a transaction or common  
174 enterprise include the formation of a business organization for multiple investors, the  
175 preparation of an ante-nuptial agreement for both parties, and the preparation of a post-  
176 nuptial agreement, a trust or wills, and the resolution of an "uncontested" marital  
177 dissolution, for both spouses. In some situations, the employment of a single counsel  
178 might have benefits of convenience, economy or strategy, but paragraph (b) requires  
179 the lawyer to make disclosure to, and to obtain informed written consent from, each  
180 client whenever the lawyer knows or reasonably should know it is reasonably possible  
181 that the lawyer's performance of the lawyer's duties to one of the joint clients will or  
182 does interfere with the lawyer's performance of the duties owed to another of the joint

**RRC – Rule 1.7 [3-310]**  
**Draft 14.2 (11/22/09) – COMPARED TO DFT 13.2 (10/20/09)**  
**December 11-12, 2009 Meeting; Agenda Item V.A [Post-11/12/09 RAC Meeting]**

183 clients. See Comment [36] with respect to the application of paragraph (b) to an  
184 insurer's appointment of counsel to defend an insured.

185  
186 [11] The following are examples of actual conflicts in representing multiple clients in a  
187 single matter: (1) the lawyer receives conflicting instructions from the clients and the  
188 lawyer cannot follow one client's instructions without violating another client's  
189 instruction; (2) the clients have inconsistent interests or objectives so that it becomes  
190 impossible for the lawyer to advance one client's interests or objectives without  
191 detrimentally affecting another client's interests or objectives; (3) the clients have  
192 antagonistic positions and the lawyer's duty requires the lawyer to advise each client  
193 about how to advance that client's position relative to the other's position, because the  
194 lawyer cannot be expected to exercise independent judgment in that circumstance; (4)  
195 the clients have inconsistent expectations of confidentiality because one client expects  
196 the lawyer to keep secret information that is material to the matter; (5) the lawyer has a  
197 preexisting relationship with one client that affects the lawyer's independent  
198 professional judgment on behalf of the other client(s); and (6) the clients make  
199 inconsistent demands for the original file.

200  
201 [12] A lawyer's representation of two or more clients in a single matter can create  
202 potential confidentiality issues on which the lawyer must obtain each client's informed  
203 written consent under paragraph (b). First, although each client's communications with  
204 the lawyer are protected as to third persons by the lawyer's duty of confidentiality and  
205 the lawyer-client privilege, the communications might not be privileged in a civil dispute  
206 between the joint clients. (See Business and Professions Code section 6068(e)(1), Rule  
207 1.6, and Evidence Code sections 952 and 962.) Second, because the lawyer is  
208 obligated to make disclosures to each jointly represented client to the full extent  
209 required by Rule 1.4, and because the lawyer may not favor one joint client over any  
210 other, each joint client normally should expect that its communications with the lawyer  
211 will be shared with other jointly represented clients.

212  
213 [13] If a lawyer obtains the consent of multiple clients to the lawyer's representation of  
214 them in a matter notwithstanding the existence of a potential conflict under paragraph  
215 (b)(1), the lawyer must obtain a new, informed written consent from each client pursuant  
216 to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a  
217 previously unanticipated or unidentified potential or actual conflict arises, the lawyer  
218 then must obtain consent of each client in the matter under paragraph (b)(1). Clients  
219 may provide such consents in advance of the conflict arising, subject to the criteria set  
220 forth below in Comment [31].

221  
222 [14] Even if the clients have a dispute about one aspect of the matter, there often  
223 remain issues about which they have aligned interests. In litigation, for instance, joint  
224 clients might have an interest in presenting a unified front to the opposing party and in  
225 reducing their litigation expenses, but have an actual conflict about allocation of the  
226 proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be  
227 able to benefit the clients by representing them on issues on which they have aligned  
228 interests while excluding from the scope of the representation the areas in which they

229 have a dispute or different interests, subject to the informed written consent  
230 requirements of paragraph (b). See Rule 1.2 (c) (limiting the scope of representation).

231  
232 [15] A client, who has consented to a joint representation under paragraph (b), may  
233 terminate the lawyer's representation at any time with or without a reason. If a jointly  
234 represented client terminates the lawyer-client relationship, the lawyer may not continue  
235 to represent the other jointly represented client or clients if the continued representation  
236 would be directly adverse to the client who terminated the representation unless the  
237 client terminating the representation consents or previously did so.

238  
239 **Paragraph (c): Representation of an Adverse Party.**

240  
241 [16] If a lawyer were to accept the representation of a current client's adversary, it is  
242 likely the lawyer would seem to be disloyal to the current client. As a result, pParagraph  
243 (c) ~~applies~~ identifies as a conflict the situation in which when a lawyer, who represents  
244 client A in a matter adverse to B, and is asked by B ~~proposes to retain the lawyer for~~  
245 representation on another matter ~~in which the lawyer's work will not be adverse to A.~~  
246 The purposes of paragraph (c) include (1) ensuring that client A's relationship with, and  
247 trust in, the lawyer are not disturbed by the lawyer accepting the representation of client  
248 A's adversary, B, without A's informed written consent; and (2) ensuring that B  
249 understands that the lawyer will continue to owe all of his or her duties in the first matter  
250 solely to A, notwithstanding the lawyer's representation of B on another matter. If B  
251 were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a)  
252 would apply, not paragraph (c).

253  
254 **Paragraph (d): Personal Relationships and Interests**

255  
256 [17] A lawyer's personal relationships and interests might interfere with the lawyer's  
257 full performance of all duties owed to a client. As a result, pParagraph (d) requires a  
258 lawyer to obtain a client's informed written consent when the lawyer has any of certain  
259 present or past relationships with others. The purpose of this requirement is to permit  
260 the client or potential client to make a more informed decision about whether and on  
261 what conditions to retain, or continue to retain, the lawyer. Paragraph (d) applies in  
262 litigation and in non-litigation representations.

263  
264 [18] A lawyer also should not allow his or her own interests to have an adverse effect  
265 on the representation of a client. Paragraph (d)(4) requires a lawyer to obtain the client's  
266 informed written consent when the lawyer has an interest in the subject matter of the  
267 representation. Examples of this include the following: (1) a lawyer would have a legal  
268 interest if the lawyer is a party to a contract being litigated; (2) a lawyer would have a  
269 business and financial interest if the lawyer represents a client in litigation with a  
270 corporation in which the lawyer is a shareholder; and ~~(2)(3)~~ a lawyer would have a  
271 professional interest if the lawyer represents a landlord in lease negotiations with a  
272 professional organization of which the lawyer is a member. ~~In addition, Some situations~~  
273 might come within more than one of the paragraph (d)(4) categories, such as when the  
274 subject of a representation might raise questions about the lawyer's own conduct, such

275 as questions about the correctness of the lawyer’s earlier advice to the client; this  
276 situation would be governed by paragraph (d)(4) unless the lawyer and client have  
277 agreed to take a common position, as might occur, for example, in response to a motion  
278 for discovery sanctions. See Rules 1.8.1 through 1.8.12 for additional rules pertaining  
279 to other personal interest conflicts, including business transactions with clients, and  
280 Rule 3.7 concerning lawyer as witness.

281  
282 [19] When a lawyer owns an interest in a publicly-traded investment vehicle, such as  
283 a mutual fund, paragraph (d)(4) does not require the lawyer to investigate whether the  
284 investment vehicle owns an interest in parties to a matter. However, if the lawyer knows  
285 that a publicly-traded investment vehicle in which the lawyer owns an interest owns an  
286 interest in a party to the matter, the lawyer must disclose the interest to the client and  
287 obtain the client’s informed written consent to the lawyer’s continued representation of  
288 the client.

289  
290 [20] Paragraph (d)(4) requires a lawyer to obtain the informed written consent of the  
291 lawyer’s client if the lawyer has been having, or when the lawyer decides to have,  
292 substantive discussions concerning possible employment with an opponent of the  
293 lawyer’s client or with a lawyer or law firm representing the opponent.

294  
295 [21] Paragraph (d) applies only to a lawyer’s own relationships and interests, except:  
296 (1) when the lawyer knows that another lawyer in the same firm as the lawyer has or  
297 had a relationship with another party or witness, or has or had an interest in the subject  
298 matter of the representation; or (2) as stated in paragraph (d)(5), (6), or (7). See also  
299 Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other  
300 lawyers in a law firm).

301  
302 [22] Paragraph (d) requires informed written consent only from current clients. Rule  
303 1.9 specifies when a lawyer must obtain informed written consent from a former client.

304  
305 [23] Paragraph (a) applies, rather than paragraph (d)(1) or (d)(3), whenever a  
306 representation is directly adverse to another current client of the lawyer. (See Comment  
307 [5] to this Rule.)

308  
309 **Prohibited Representations**

310  
311 [24] There are some situations governed by this Rule for which a lawyer cannot  
312 obtain effective client consent. These include at least the following: (1) when the lawyer  
313 cannot provide competent representation to each affected client (See Rule 1.8.8(a)); (2)  
314 when the lawyer cannot make an adequate disclosure, for example, because of  
315 confidentiality obligations to another client or former client (See Business and  
316 Professions Code section 6068(e)(1) and Rule 1.6); (3) when the representation would  
317 involve the assertion of a claim by one client against another client, where the lawyer is  
318 asked to represent both clients in that matter. (See *Woods v. Superior Court* (1983) 149  
319 Cal.App.3d 931 [107 Cal.Rptr. 185] [“the attorney of a family-owned business, corporate  
320 or otherwise, should not represent one owner against the other in a [marital] dissolution

321 action”]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509]  
322 [attorney may not represent parties at hearing or trial when those parties’ interests in the  
323 matter are in actual conflict]; and *Forrest v. Baeza* (1997) 58 Cal.App.4th 65 [67  
324 Cal.Rptr.2d 857] [attorney may not represent both a closely-held corporation and  
325 directors/shareholders who are accused of wrongdoing or whose interests are otherwise  
326 adverse to the corporation]); and (4) when the person who grants consent lacks  
327 capacity or authority. (See Civil Code section 38; and see Rule 1.14 regarding clients  
328 with diminished capacity.)

329  
330 [25] If a lawyer seeks permission from a tribunal to terminate a representation and  
331 that permission is denied, the lawyer is obligated to continue the representation even if  
332 the representation creates a conflict to which not all affected clients have given consent,  
333 and even if the lawyer has a conflict to which client consent is not available. (See Rule  
334 1.16(c).)

335  
336 **Disclosure and Informed Written Consent**

337  
338 [26] Informed written consent requires the lawyer to disclose in writing to each  
339 affected client the relevant circumstances and the actual and reasonably foreseeable  
340 adverse consequences to the client or former client. See Rule 1.0.1(e) (informed  
341 written consent). The facts and explanation the lawyer must disclose will depend on  
342 the nature of the potential or actual conflict and the nature of the risks involved for the  
343 client or potential client. When undertaking the representation of multiple clients in a  
344 single matter, the information must include the implications of the joint representation,  
345 including possible effects on loyalty, and the confidentiality and lawyer-client privilege  
346 issues described in Comment [12] to this Rule.

347  
348 [27] The requirement of a writing does not supplant the need in most cases for the  
349 lawyer to talk with the client, to explain the risks and advantages, if any, of  
350 representation burdened with a conflict of interest, as well as reasonably available  
351 alternatives, and to afford the client a reasonable opportunity to consider the risks and  
352 alternatives and to raise questions and concerns. Rather, the writing is required in order  
353 to impress upon clients the seriousness of the decision the client is being asked to  
354 make and to avoid disputes or ambiguities that might later occur in the absence of a  
355 writing.

356  
357 [28] A disclosure and an informed written consent are sufficient for purposes of this  
358 Rule only for so long as the material facts and circumstances remain unchanged. With  
359 any material change, the lawyer may not continue the representation without making a  
360 new written disclosure to each affected client and obtaining a new written consent.

361  
362 [29] If the lawyer is required by this Rule or another Rule to make a disclosure, but  
363 the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may  
364 not accept or continue the representation for which the disclosure would be required.  
365 (See, e.g., Business and Professions Code section 6068(e)(1), Rule 1.6.) A lawyer  
366 might be prevented from making a required disclosure because of a duty of

367 confidentiality to former, current or potential clients, because of other fiduciary  
368 relationships such as service on a board directors, or because of contractual or court-  
369 ordered restrictions.

370  
371 [30] In some situations, Rule 1.13(g) limits who has authority to grant consent on  
372 behalf of an organization.

373  
374 **Consent to Future Conflict**

375  
376 [31] Lawyers may ask clients to give advance consent to conflicts that might arise in  
377 the future, but ~~this is subject to the usual requirement that~~ a client's consent must be  
378 "informed" to ~~comply with this Rule~~ be effective. A lawyer who accepts or continues a  
379 representation, subject only to an ineffective consent, has a conflict of interest under the  
380 applicable paragraph of the Rule. Determining whether a client's advance consent is  
381 "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend  
382 first on the factors discussed in Comment [26] (informed written consent). However, an  
383 advance consent can comply with this Rule even where the lawyer cannot provide all  
384 the information and explanation Comment [26] ordinarily requires. ~~Whenever seeking~~  
385 ~~an advance consent, the~~ The lawyer's disclosure to the client ~~should~~ must include: (i) a  
386 disclosure to the extent of known facts and reasonably foreseeable consequences; and  
387 (ii) an explanation that the lawyer is requesting the client to consent to a possible future  
388 conflict that would involve future facts and circumstances that to a degree cannot be  
389 known when the consent is requested. The lawyer also ~~should~~ must disclose to the  
390 client whether the consent permits the lawyer to be adverse to the client on any matter  
391 in the future, ~~including whether the consent permits the lawyer to be adverse to the~~  
392 ~~client in current or future~~ litigation, or ~~and~~ whether there will be any limits on the scope  
393 of the consent. Whether an advance consent complies with this Rule ordinarily also can  
394 depend on such things as the following: (1) the comprehensiveness of the lawyer's  
395 explanation of the types of future conflicts that might arise and of the actual and  
396 reasonably foreseeable adverse consequences to the client; (2) the client's degree of  
397 experience as a user of the legal services, including experience with the type of legal  
398 services involved in the current representation; (3) whether the client has consented to  
399 the use of an adequate ethics screen and whether the screen was ~~adequately~~ timely  
400 and effectively instituted and fully maintained; (4) whether before giving consent the  
401 client either was represented by an independent lawyer of the client's choice, or was  
402 advised in writing by the lawyer to seek the advice of an independent lawyer of the  
403 client's choice and was given a reasonable opportunity to seek that advice; (5) whether  
404 the consent is limited to future conflicts unrelated to the subject of the representation;  
405 and (6) the client's ability to understand the nature and extent of the advance consent.  
406 A client's ability to understand the nature and extent of the advance consent might  
407 depend on factors such as the client's education and language skills. An advance  
408 consent normally will comply with this Rule if it is limited to a particular type of conflict  
409 with which the client already is familiar. An advance consent normally will not comply  
410 with this Rule if it is so general and open-ended that it would be unlikely that the client  
411 understood the potential adverse consequences of granting consent. However, even a  
412 general and open-ended advance consent can be in compliance when given by an

413 | experienced user of the type of legal services involved that was independently  
414 | represented regarding the consent. In any case, advance consent will not be in  
415 | compliance in the circumstances described in Comment [24] (prohibited  
416 | representations). See Rule 1.0.1(g) (“informed consent”). A lawyer who obtains an  
417 | effective advance consent from a client will have all the duties of a lawyer to that client  
418 | except as expressly limited by the consent. A lawyer cannot obtain an advance consent  
419 | to incompetent representation. See Rule 1.8.8.

420

## 421 **Representation of a Class**

422

423 [32] This Rule applies to a lawyer’s representation of named class representatives in  
424 a class action, whether or not the class has been certified. For purposes of this Rule,  
425 an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a  
426 client of a lawyer who represents or seeks to represent the class. Thus, the lawyer  
427 does not need to obtain the consent of an unnamed class member before representing  
428 a client who is adverse to that person in an unrelated matter. Similarly, a lawyer  
429 seeking to represent a party opposing a class action does not need the consent of any  
430 unnamed class member whom the lawyer represents in an unrelated matter in order to  
431 do so. A lawyer representing a class or proposed class may owe civil duties to  
432 unnamed class members, and this Comment is not intended to alter those civil duties in  
433 any respect.

434

## 435 **Organizational Clients**

436

437 [33] A lawyer who represents an organization does not, by virtue of that  
438 representation alone, represent any constituent of the organization. (See Rule 1.13(a).)  
439 The lawyer for an organization also does not, by virtue of that representation alone,  
440 represent any affiliated organization, such as a subsidiary or organization under  
441 common ownership. The lawyer nevertheless could be barred under case law from  
442 accepting a representation adverse to an affiliate of an organizational client, even in a  
443 matter unrelated to the lawyer’s representation of the client, under certain  
444 circumstances.

445

446 [34] A lawyer for a corporation who also is a member of its board of directors (or a  
447 lawyer for another type of organization who has corresponding fiduciary duties to it)  
448 should determine whether it is reasonably foreseeable that the responsibilities of the  
449 two roles might conflict, for example, because, as its lawyer, he or she might be called  
450 on to advise the corporation on matters involving actions of the directors. The lawyer  
451 should consider such things as the frequency with which these situations might arise,  
452 the potential materiality of the conflict to the lawyer’s performance of his or her duties as  
453 a lawyer, and the possibility of the corporation obtaining legal advice from another  
454 lawyer in these situations. If there is material risk that the dual role will compromise the  
455 lawyer’s ability to perform any of his or her duties to the client, the lawyer should not  
456 serve as a director or should cease to act as the corporation’s lawyer. The lawyer  
457 should advise the other members of the board whenever matters discussed at board  
458 meetings while the lawyer is present in the capacity of director might not be protected

459 by the attorney-client privilege, and that conflict of interest considerations might require  
460 the lawyer to withdraw as a director or might require the lawyer and the lawyer's firm to  
461 decline representation of the corporation in a matter.

462  
463 **Insurance Defense**

464  
465 [35] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance*  
466 *Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the  
467 predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to  
468 defend one suit against an insured, filed a direct action against the same insurer in an  
469 unrelated action without securing the insurer's consent. Notwithstanding *State Farm*,  
470 paragraphs (a) and (c) do not apply to the relationship between an insurer and a lawyer  
471 when, in each matter, the insurer's interest is only as an indemnity provider and not as a  
472 direct party to the action.

473  
474 [36] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer,  
475 an insurer, and an insured that is created when the insurer appoints the lawyer to  
476 represent the insured under the contract between the insurer and the insured. Although  
477 the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's  
478 joint clients in the matter, the appointment does not by itself create a potential conflict of  
479 interest for the lawyer under paragraph (b).

480  
481 **Public Service**

482  
483 [37] For special rules governing membership in a legal service organization, see Rule  
484 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and  
485 for work in conjunction with certain limited legal services programs, see Rule 6.5.



**RRC – Rule 1.7 [3-310]**  
**Advance Waiver Comments – Comparison of MR Cmt. [22] to Draft 14.2, Cmt. [31]**

Model Rule Comment [22]	RRC Proposed Comment [31] [Draft 14.2 (11/22/09)]
<p>Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).</p>	<p>Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client’s consent must be “informed” to be effective. A lawyer who accepts or continues a representation, subject only to an ineffective consent, has a conflict of interest under the applicable paragraph of the Rule. Determining whether a client’s advance consent is “informed,” and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [26] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comment [26] ordinarily requires. The lawyer’s disclosure to the client must include: (i) a disclosure to the extent of known facts and reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in current or future litigation, and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on such things as the following: (1) the comprehensiveness of the lawyer’s explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client’s degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client’s choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client’s choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client’s ability to understand the nature and extent of the advance consent. A client’s ability to understand the nature and extent of the advance consent might depend on factors such as the client’s education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved that was independently represented regarding the consent. In any case, advance consent will not be in compliance in the circumstances described in Comment [24] (prohibited representations). See Rule 1.0.1(g) (“informed consent”). A lawyer who obtains an effective advance consent from a client will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.</p>