

McCurdy, Lauren

From: Robert L. Kehr [rlkehr@kscllp.com]
Sent: Tuesday, September 29, 2009 8:27 PM
To: Melchior, Kurt W; Kevin Mohr
Cc: hbsondheim@verizon.net; Difuntorum, Randall; McCurdy, Lauren
Subject: RE: RRC_Rule 1.7
Attachments: Rule 1.7 - Compare - Introduction - DFT2.1 (09-29-09).doc; 1.7 [3-310] Dashboard DFT2 (09-29-09).doc; Rule 1.7 Public Comment Chart - By Commenter - DFT2 (09-29-09).doc; Rule 1.7 - Compare - RuleComment - DFT2 (09-29-09).doc

Kurt and Kevin: I have attached a final, unmarked version of the Introduction. It accepts all of the changes you made in my earlier version. My only changes here are a change to the first part of the first sentence b/c of a comment by Kurt, the removal of one reference to "a majority" of the Commission in line with Kevin's recommendation, and two minor punctuation changes.

The attached Dashboard is Kevin's revision of my initial draft, with all his changes accepted, but with one spelling error corrected.

The attached public comment chart is Kevin's revision of my initial draft. B/c Kevin's draft did not have the changes marked, I could not compare and accept whatever he did. I don't have the time, energy, or inclination to dig into this and prefer to focus on other matters.

The attached rule comparison chart accepts all of Kevin's edits, all of which were stylistic and are fine with me. Kevin's two footnotes about Comment numbering of course are right, but I had thought we were going to hold the renumbering for final editing b/c of all of the other Rules that refer to these Comment paragraphs.

rlk

From: Melchior, Kurt W [mailto:kmelchior@nossaman.com]
Sent: Tuesday, September 29, 2009 7:08 PM
To: Kevin Mohr; Robert L. Kehr
Cc: hbsondheim@verizon.net; Difuntorum, Randall; McCurdy, Lauren
Subject: RE: RRC_Rule 1.7

[some redline suggestions -- no big deal.](#)

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Monday, September 28, 2009 10:34 PM
To: Robert L. Kehr
Cc: Melchior, Kurt W; hbsondheim@verizon.net; Difuntorum, Randall; McCurdy, Lauren
Subject: Re: RRC_Rule 1.7

Bob:

I've attached revised versions of your materials, all in red-line version and denominated Draft 2 (9/28/09)RLK-KEM - Cf. to DFT1. All are in Word.

Some Comments:

1. Dashboard: I've modified the summary to conform to our style and to include a reference to rule 1.11. I've also added a reference to rule 3-310. Let's face it. If we didn't already have that rule, our proposed Rule 1.7 would not look like it does. Finally, I've referenced a stakeholder in that box (i.e., MoFo).

2. Introduction. Please see my suggested edits. Some points and observations:

a. I have eliminated the references to "a majority of the Commission." I know a number of members want that phrase, but I think it is a mistake. The majority is the Commission's position, even if it is a 7-6 vote. The dashboard will tell the tale of the actual vote, but I think that we should simply state the Commission's position as being that of the Commission, not "a majority of the Commission." I believe all everyone on the Commission wants the same thing -- to provide guidance to lawyers to ensure compliance with their duties to their clients. To speak in terms of a majority vs. a minority in so many rules suggests the Commission is Balkanized on the issue of ethics. Yes, there are strong disagreements on some rules, but ultimately I have to believe we're all on the same page.

b. I added a paragraph on the advance waiver issue. That seems to have been the most controversial provision and I think we should call it to the attention of BOG and the S.Ct. Alternatively, we could place a reference in the "very controversial" box to the public comment re Comment [33].

3. Rule & Comment Chart. Mostly, I've added cross-references to Explanations or the Introduction. However, please see footnotes 1-3 about numbering a comment [3-A] and having some comments "Reserved" when we've rejected the Model Rule comment nearly in toto.

4. Public Comment Chart. No changes of substance. All I've done is re-sort the commenters alphabetically and change the name of the "Commentator" column.

5. In addition to the materials you sent, I want to insert the following observation I made a while back about proposed paragraph 1.7(d). I have long argued that 3-310(B) [and now 1.7(d)] should require informed written consent. As explained below, I don't buy the argument given for why just requiring written disclosure strikes the proper balance. The following is taken from my 10/21/08 e-mail to Kehr, cc Melchior & Staff:

4. Comment [21] became more troublesome as I worked on it (see ¶B.40 of Kevin's meeting notes). Paragraph (d)(4) is absolute and involves no standard of materiality. While I agree with Steve Lewis's concern, the kind of softening of the Rule that he has in mind would be at variance with the language of the Rule. My suggestion ignores this under the theory that no one could seriously think that a trivial mutual fund investment should be of any concern. My alternative suggestion is to drop the Comment, but on balance I prefer keeping it. What do you think? **KEM: Keep the comment w/o revision.**

However, my biggest problem with the Rule is 1.7(d). I understand the theory for requiring only disclosure and not informed written consent (disclose a broader swath of information to the client),

but I've finally come to conclude it is flawed in practice. I just don't see that lawyers will disclose any more to their clients than they would if informed written consent were required. Moreover, unless a client is required to sign off on something he or she receives from a lawyer, the client is not going to read it very carefully. After all, how many folks (besides the members of the Commission) do you think actually read those rate notices that come with our electric and other utility bills? That in fact may be why we've taken the position that disclosure is sufficient; we're a skewed (i.e., compulsive) distribution of the general public). I would prefer to see a narrower requirement of disclosure, but requiring written client consent. I think lawyers will be more careful about their disclosures, and clients will pay more attention, and therefore be better protected.

Again, please don't hold up circulation of the draft for this or even include my thoughts. I just wanted to preserve this thought for consideration before we send out the Rule for the final public comment.

Well, this is pretty much the final public comment stage. It's not clear that there will even be a final public comment, so I want to raise it one last time.

Finally, thanks for your very hard work on this Rule. I don't entirely agree with Commission's approach that you have ably implemented. I'd prefer the Model Rule approach in 1.7(a)(2) and I'm even OK w/ 1.7(b) (except for the "confirmed in writing"), but only w/ something more akin to our proposed comment. Regardless of my position, I believe the work you have put into this Rule is extraordinarily thoughtful and you should be very satisfied with the result of your countless hours.

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

Kevin

Kevin Mohr wrote:

Bob:

I can't get to your materials until later tonight. I'll get you my thoughts by early morning. Thanks,

Kevin

Robert L. Kehr wrote:

Kurt and Kevin: My message to you yesterday transmitting my initial drafts of the Rule 1.7 October meeting materials should have highlighted that my drafts do not highlight the proposal's continuity with the current California rule. I did reconsider this before sending out my drafts, and my conclusion, for the reasons I previously gave, is that it would be wiser to explain the Commission's proposal on its merits rather by appearing to hide behind the current California rule. Rule 1.6 seems to me to be a different kettle of fish in this regard, for reasons I think I previously explained.

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Proposed Rule 1.7 [3-310] “Conflicts of Interest: Current Clients”

(Draft # 12.1, 10/28/08)

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

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

Primary Factors Considered

- Existing California Law

Rules

RPC 3-310

Statute

Case law

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

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

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

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Representatives of a large law firm urged the adoption of a provision concerning advance waivers of conflicts. See Explanation of Changes for proposed Comment [33].

Very Controversial – Explanation:

A substantial minority of the Commission favors the Model Rule approach. See Introduction.

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.7* Conflict of Interest: Current Clients

October 2009

(Draft rule following consideration of public comment)

INTRODUCTION:

Rule 1.7 is the basic conflicts of interest rule. It addresses conflicts of interest in the representation of current clients, and it is the point of reference for several other conflicts rules, including possible conflicts of interest that might arise because of continuing duties to former clients (Rule 1.9) and conflicts of interest affecting current and former government lawyers (Rule 1.11). The Commission generally agrees with the Model Rule's identification of situations that create potential or actual conflicts of interest for a lawyer. Nevertheless, the Commission largely has rejected the Model Rule because it believes that the format and certain of substantive elements of the Model Rule create significant gaps in, and limitations on, the protection of vital client interests. The failures of the Model Rule include the following:

First, Model Rule 1.7(a)(2) attempts to be all-encompassing by classifying as a conflict every circumstance in which "there is a significant risk that the representation of one or more clients will be materially limited" by the lawyer's other responsibilities or the lawyer's personal interests. The Commission agrees with the spirit of this statement, which is an admirable principle, but the Commission believes it is fundamentally flawed as a disciplinary rule. That statement of principle provides no guidance. Instead, it leaves to a lawyer attempting to comply with the Rule the unenviable task of working through 35 paragraphs of Comment to try to understand when a representation "will be materially limited". The Commission believes that the client protection purpose of this Rule requires that it be drafted with specificity in order to maximize the likelihood that a lawyer will understand precisely which situations raise conflicts issues, and which therefore require the lawyer to make disclosures to the client and obtain the client's consent, or which compel the lawyer to limit, or even decline a representation. Placing in the Comment discursive materials on common conflicts situations, as has been done in Model Rule 1.7, rather than stating them specifically and in the Rule, would materially increase the likelihood that lawyers will embark on conflicted representations, with multiple possibilities of injury to the client and to

* Proposed Rule 1.7, Draft 12.1 (10/28/08).

the lawyer. These possibilities – which are more likely to be avoided by a more specific and more accessible rule – include: (i) a lawyer’s failure to fully perform duties to a client because of the lawyer’s conflicting duties, relationships, or interests; (ii) the cost, delay, and disruption of later disqualification proceedings; (iii) a client’s loss of selected counsel through disqualification; and (iv) the risk that a particularly conscientious lawyer will reject representations unnecessarily, causing the client to lose its choice of counsel, delaying the client in obtaining legal representation, making the legal process more costly and less efficient, and causing the lawyer to lose an appropriate client relationship.

Second, Model Rule 1.7(b) permits a lawyer to represent a client, despite the existence of a conflict under paragraph (a), if certain conditions are met. The Commission has rejected two of these conditions as not being sufficiently client protective. One, expressed in paragraph (b)(1), is that “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” This requirement invites a lawyer to use his or her professional skills as a lawyer to craft a self-serving argument for why the lawyer may accept a representation – when doing so might advance the lawyer’s short-term financial and professional interest but imperil the interests of the client. The Commission also has rejected Model Rule 1.7(b)(4), which provides that a lawyer may obtain the client’s “informed consent, confirmed in writing”. The Commission’s proposal utilizes California’s higher, more client protective standard of “informed written consent” in all of the more serious conflict situations.

Third, Model Rule 1.7’s indefiniteness leaves clients exposed to compromised representation, and it exposes lawyers to disciplinary proceedings that they are less able to predict or protect themselves against. Particularly in California, with a full-time, professional disciplinary staff, it is important that the grounds for professional discipline be easily ascertainable by both practicing lawyers and the disciplinary staff.

Minority.

Public Comment. The Commission received a substantial amount of public comment, much of it addressed to Comment [33], concerning advance waivers of conflicts of interest, and much of it opposing the proposed comment. The proposed comment uses Model Rule 1.7, cmt. [22] as its starting point, but has been heavily edited to make it more specific and less discursive in order to provide better guidance to lawyers. The Commission carefully considered the opposing viewpoints but ultimately concluded that omitting Comment [33] would not add to lawyers' understanding of this important subject, and recommends that it be adopted.

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

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.7 Conflicts of Interest: Current Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:</p> <p>(1) the representation of one client will be directly adverse to another client; or</p> <p>(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.</p>	<p>(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:</p> <p>(1) the representation of one client will be directly adverse to another client; or</p> <p>(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.</p>	<p>The Commission has recommended the deletion of the black letter of Model Rule 1.7 in its entirety. See Introduction for an explanation of this recommendation.</p> <p>Paragraph (a) of Model Rule 1.7 and of the Commission's proposed Rule 1.7 state the threshold principle that a lawyer would have a conflict of interest in any representation that is directly adverse to a current client of the lawyer. The two are substantively the same, but with the Commission's proposal restated because of: (i) the Commission's rejection of Model Rule paragraphs (a)(2) and (b)(1) [see Introduction]; and (ii) the Commission's rejection of the Model Rules' "informed consent, confirmed in writing" in favor of California's more client-protective "informed written consent" [see Introduction].</p>

* Proposed Rule 1.7, Draft 12.1 (10/28/08). Redline/strikeout showing changes to the ABA Model Rule

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<p>(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:</p> <p>(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;</p> <p>(2) the representation is not prohibited by law;</p> <p>(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and</p> <p>(4) each affected client gives informed consent, confirmed in writing.</p>	<p>(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:</p> <p>(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;</p> <p>(2) the representation is not prohibited by law;</p> <p>(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and</p> <p>(4) each affected client gives informed consent, confirmed in writing.</p>	<p>See Explanation of Changes for Model Rule 1.7(a).</p>
	<p><u>(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client in a matter in which the lawyer's representation of that client will be</u></p>	<p>See Explanation of Changes for Model Rule 1.7(a), above.</p>

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	<p><u>directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client.</u></p>	
	<p>(b) Representation of multiple clients in one matter. <u>A lawyer shall not, without the informed written consent of each client:</u></p>	<p>Paragraph (b) places in the Rule the key conflicts topic of joint representations – the representation of multiple clients in a single matter. In the Model Rule, this topic is given in Comment [8] as an example of a situation that might cause a “material limitation”. In the proposed Rule, joint representations are stated more definitively as an area of conflicts.</p>
	<p><u>(1) Accept or continue representation of more than one client in a matter in which the interests of the clients potentially conflict; or</u></p> <p><u>(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.</u></p>	<p>To increase client protection, the subparagraphs (b)(1) and (2) distinguish between the potential conflict that generally exists when a lawyer accepts a joint representation and the actual conflict that sometimes arises because of developments during a joint representation, such as can happen because the lawyer receives inconsistent instructions from the clients. Subparagraph (b)(2) requires the lawyer to make a new disclosure and obtain a new informed written consent when a potential conflict becomes an actual conflict.</p>
	<p>(c) Representation of an Adverse Party. <u>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</u></p>	<p>A lawyer's representation of a client's current adversary endangers the lawyer-client relationship by suggesting to the first client that the lawyer's loyalty to the client has been compromised. As a result, paragraph (c) identifies this as a conflict situation that requires the lawyer to make a disclosure and obtain the client's informed written consent. This topic is not identified in the Model</p>

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	<p><u>of each client.</u></p>	<p>Rule or its Comment.</p>
	<p><u>(d) Disclosure of relationships and interests. A lawyer shall not accept or continue representation of a client without providing written disclosure to the client where:</u></p> <p><u>(1) The lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or</u></p> <p><u>(2) The lawyer knows or reasonably should know that:</u></p> <p><u>(a) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and</u></p> <p><u>(b) the previous relationship would substantially affect the lawyer's representation; or</u></p> <p><u>(3) The lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity and the lawyer knows or reasonably should know that either the relationship or the</u></p>	<p>Model Rule 1.7 discusses in its Comment [10] the impact on a lawyer's representation that can be caused by the lawyer's personal interests. That discussion says that the lawyer's personal interests "... should not be permitted to have an adverse effect on representation of a client." This amounts only to a caution to the assiduous lawyer who studies the Comment, and the Model Rule does not require any notice to or consent from the client. The Model Rule entirely overlooks the possibility that a lawyer's personal relationships (as opposed to the lawyer's personal interests) might interfere with a representation. Paragraph (d) places the lawyer's personal relationships and interests in the Rule as information the lawyer is required to disclose to the client. This allows the client to make an informed decision on hiring the lawyer, and if the client does so, also allows the client to supervise and monitor the lawyer with an awareness of the potential risk to the quality of the representation.</p>

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	<p>person or entity would be affected substantially by resolution of the matter; or</p> <p>(4) The lawyer has or had a legal, business, financial, or professional interest in the subject matter of the representation.</p>	

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.</p>	<p>[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.</p>	<p>See Explanation of Changes for proposed Rule 1.7, comment [1], below.</p>
<p>[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a</p>	<p>[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a</p>	

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.</p>	<p>former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.</p>	
	<p><u>General Principles Applicable to All Conflicts Rules (Rules 1.7, 1.8 series, and 1.9)</u></p> <p><u>[1] This rule and the other conflict rules seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. For the purpose of considering whether the lawyer's duties to a client or other person could impair the lawyer's ability to fulfill the lawyer's duties to another client, a lawyer should consider all of the following: (1) the duty of undivided loyalty (including the duty to handle client funds and property as directed by the client); (2) the duty to exercise independent professional judgment for the client's benefit, not influenced by the lawyer's duties to or relationships with others, and not influenced by the lawyer's own interests; (3) the duty to maintain the confidentiality of client information; (4) the duty to represent the client competently within the bounds of the law; and (5) the duty to make full</u></p>	<p>The proposed Comment amounts to a nearly complete rewriting of the Model Rule Comment. The Commission has done so because: (i) of its rejection of elements of the Model Rule [see Introduction and Explanation of Changes for Model Rule 1.7(a) and (b), above]; (ii) to permit more robust and focused discussion of proposed paragraphs (b), (c), and (d) [client-protective topics not included in the Model Rule – see proposed Comments [10] through [26]]; (iii) to reorder the Comment into a more logical sequence [e.g., compare Model Rule Comment [1], which discusses duties to former clients although the topic of the Rule is duties to current clients, with proposed Comment [1], which discusses general principles applicable to all conflicts of interest]; (iv) to include more detailed and organized discussion of some complex topics [e.g., compare Model Rule Comment [22] with proposed Comment [33] regarding the important question of when and how a lawyer can obtain an effective consent to a future conflict of interest]; (v) to add citations to a number of California appellate opinions that are important to understanding</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>and candid disclosure to the client of all information and developments material to the client's understanding of the representation and its control and direction of the lawyer. [See Rule 1.2(a) regarding the allocation of authority between lawyer and client.]</p>	<p>conflicts of interest; and (vi) to include discussion of topics not covered by the Model Rule Comment such as conflicts for insurer-appointed defence counsel – see proposed Comments [37] and [38].</p>
	<p>[2] The first step in a lawyer's conflict analysis is to identify his or her client(s) in a current matter or potential client(s) in a new matter. In considering his or her ability to fulfill the foregoing duties, a lawyer should also be mindful of the scope of each relevant representation of a client or proposed representation of a potential client. Only then can the lawyer determine whether a conflict rule prohibits the representation, or permits the representation subject to a disclosure to the client or the informed written consent of the client or a former client. Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules. [For guidance in determining whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment 4 to Rule 1.3.]</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain</p>	<p>[43] Loyalty and independent judgment are essential elements in the lawyer's relationship to This rule describes a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities duties to another client, a former client or a third person or from the lawyer's own</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).</p>	<p>interestscurrent clients. For <u>Additional</u> specific Rulesrules regarding certain concurrentcurrent clients are set out in Rules 1.8.1 to [1.8.12]. [For conflicts of interest duties to former clients, see Rule 1.8. For former client conflicts of interest, see Rule 1.9.] [For conflicts of interest involving prospective clients, see Rule 1.18.] [For definitions of "disclosure," "informed consent" and "confirmed in writing/written," see Rule 1.0(e) and (b), <u>and see Comments [18] - [20].</u>]</p>	
<p>[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).</p>	<p>[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.</p>	<p>[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].</p>	<p>[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>Lawyer Acting in Dual Roles</u></p> <p>[3-A]¹ 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., <i>William H. Raley Co, Inc. v. Superior Court</i> (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].)</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).</p>	<p>[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).</p>	<p>See Explanation of Changes for Comment [1].</p>

¹ **Consultant's Note:** Given the Commission's decision to effectively reject the Model Rule comment, it makes little sense to number a comment [3-A]. It should be numbered [4] and the subsequent comments renumbered.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Identifying Conflicts of Interest: Directly Adverse</p> <p>[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated</p>	<p>Identifying Conflicts of InterestParagraph (a): Representation Directly Adverse to Current Client</p> <p>[64] Loyalty toA lawyer owes a <u>duty of undivided loyalty to each</u> current client prohibits undertaking representation directly adverse to. <u>For purposes of paragraph (a), the duty of undivided loyalty means that client,</u> without that client'sthe informed <u>written consent.</u>Thus, absent consent of each affected client, a lawyer may not act as an advocate <u>or counselor</u> in onea matter against a person <u>or organization</u> the lawyer represents in some other<u>another</u> matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out<u>duty of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest</u><u>loyalty reflected</u> in <u>retaining the current client.</u> Similarly, paragraph (a) directly</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>matters of clients whose interests are only generally economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.</p>	<p>adverse conflict may arise when <u>applies equally in transactional and litigation matters. For example, a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require</u> <u>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</u> respective clients <u>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).)</u></p>	
<p>[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated</p>	<p>[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>matter, the lawyer could not undertake the representation without the informed consent of each client.</p>	<p>matter, the lawyer could not undertake the representation without the informed consent of each client.</p>	
	<p>[5] <u>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.</u></p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>[6] <u>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,</u></p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>a lawyer's work could be directly adverse to a non-party if that non-party is an identifiable target of a litigation or non-litigation representation, or a competitor for a particular transaction (as would occur, for example, if one client were in competition with another of the lawyer's clients on other matters to purchase or lease an asset or to acquire an exclusive license). Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. (See <i>Hernandez v. Paicius</i> (2003) 109 Cal.App.4th 452, 463-469 [134 Cal.Rptr.2d 756, 764-767].)</p>	
<p>Identifying Conflicts of Interest: Material Limitation</p> <p>[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the</p>	<p>Identifying Conflicts of Interest: Material Limitation</p> <p>[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.</p>	<p>client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.</p>	
	<p><u>[7] Not all representations that might be harmful to the interests of a client create direct adversity governed by paragraph (a). The following are among the instances that ordinarily would not constitute direct adversity: (1) the representation of business competitors in different matters, even if a positive outcome for one might strengthen its competitive position against the other; (2) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, e.g., if a client is the landlord of, or a lender to, the non-client; (3) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, e.g., if the lawyer were advocating inconsistent positions in front of the same tribunal; and (5)</u></p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute.</p>	
	<p>[8] [RESERVED]²</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>Lawyer's Responsibilities to Former Clients and Other Third Persons</p> <p>[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.</p>	<p>Lawyer's Responsibilities to Former Clients and Other Third Persons</p> <p>[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>[9] If a conflict under paragraph (a) arises during a representation, the lawyer must in all events continue to protect the confidentiality of information of each affected client and former client. [Regarding former clients, see Rule 1.9(c).]</p>	<p>See Explanation of Changes for Comment [1].</p>

² **Consultant's Note:** Given the Commission's decision to effectively reject the Model Rule comment, it makes little sense to label a comment "[RESERVED]." The reference should be deleted entirely and the subsequent comments renumbered.

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>Paragraph (b): Representation of multiple clients in a matter</u></p> <p>[10] Paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or other common enterprise. Examples of a transaction or common enterprise include the formation of a business organization for multiple investors, the preparation of an ante-nuptial agreement for both parties, and the preparation of a post-nuptial agreement, a trust or wills, and the resolution of an "uncontested" marital dissolution, for both spouses. In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer knows or reasonably should know it is reasonably possible that the lawyer's performance of the lawyer's duties to one of the joint clients will or does interfere with the lawyer's full performance of the duties owed to another of the joint clients. See Comment [38] with respect to the application of paragraph (b) to an insurer's</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>appointment of counsel to defend an insured.</p>	
	<p>[11]³ RESERVED</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>[12] The following are examples of actual conflicts in representing multiple clients in a single matter: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer's duty requires the lawyer to advise each client about how to advance that client's position relative to the other's position, because the lawyer cannot be expected to exercise independent judgment in that circumstance; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the</p>	<p>See Explanation of Changes for Comment [1].</p>

³ See footnote 2, above.

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); and (6) the clients make inconsistent demands for the original file.</p>	
	<p>[13] A lawyer's representation of two or more clients in a single matter can create potential confidentiality issues on which the lawyer must obtain each client's informed written consent under paragraph (b). First, although each client's communications with the lawyer are protected as to third persons by the lawyer's duty of confidentiality and the lawyer-client privilege, the communications might not be privileged in a civil dispute between the joint clients. (See Business and Professions Code section 6068, subdivision (e), Rule 3-100, and Evidence Code sections 952 and 962.) Second, because the lawyer is obligated to make disclosures to each jointly represented client to the full extent required by Rule 1.4, and because the lawyer may not favor one joint client over any other, each joint client normally should expect that its communications with the lawyer will be shared with other jointly represented clients. [See Cal. State Bar Form Opn. 1999-153 regarding potential conflicts]</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[14] If a lawyer obtains the consent of multiple clients to the lawyer's representation of them in a matter notwithstanding the existence of a potential conflict under paragraph (b)(1), the lawyer must obtain a new, informed written consent from each client pursuant to paragraph (b)(2) if a potential conflict becomes an actual conflict. Likewise, if a previously unanticipated or unidentified potential or actual conflict arises, the lawyer then must obtain consent of each client in the matter under paragraph (b)(1). Clients may provide such consents in advance of the conflict arising, subject to the criteria set forth below in Comment [33].</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>[15] Even if the clients have a dispute about one aspect of the matter, there often remain issues about which they have aligned interests. In litigation, for instance, joint clients might have an interest in presenting a unified front to the opposing party and in reducing their litigation expenses, but have an actual conflict about allocation of the proceeds of the litigation (for plaintiffs) or of liability (for defendants). A lawyer might be able to benefit the clients by representing them on issues on which they have aligned interests while excluding from the scope of the representation the areas in which they have a dispute or different interests, subject to the informed written consent requirements of paragraph (b). [See Rule 1.2 (c) (limiting the scope of representation)].</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[16] A client, who has consented to a joint representation under paragraph (b), may terminate the lawyer's representation at any time with or without a reason. If a jointly represented client terminates the lawyer-client relationship, the lawyer may not continue to represent the other jointly represented client or clients if the continued representation would be directly adverse to the client who terminated the representation unless the client terminating the representation consents or previously did so.</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>[17]⁴ [RESERVED]</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>Paragraph (c): Representation of an Adverse Party.</p> <p>[18] Paragraph (c) applies when a lawyer represents client A in a matter adverse to B, and B proposes to retain the lawyer on another matter in</p>	<p>See Explanation of Changes for Comment [1].</p>

⁴ See footnote 2, above.

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>which the lawyer's work will not be adverse to A. The purposes of paragraph (c) include (1) ensuring that client A's relationship with, and trust in, the lawyer are not disturbed by the lawyer accepting the representation of client A's adversary, B, without A's informed written consent; and (2) ensuring that B understands that the lawyer will continue to owe all of his or her duties in the first matter solely to A, notwithstanding the lawyer's representation of B on another matter. If B were to seek to retain the lawyer in a matter directly adverse to A, then paragraph (a) would apply, not paragraph (c).</u></p>	
	<p><u>Paragraph (d): Disclosure of Relationships and Interests</u></p> <p><u>[19] Paragraph (d) requires a lawyer to disclose to a potential or current client certain of the lawyer's present or past relationships with others, and the lawyer's own interest in the subject matter of the representation. The purpose of this disclosure is to permit the client or potential client to make a more informed decision about whether and on what conditions to retain, or continue to retain, the lawyer. Paragraph (d) applies in litigation and in non-litigation representations.</u></p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Personal Interest Conflicts</p> <p>[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).</p>	<p>Personal Interest Conflicts</p> <p>[10] The lawyer's own interests <u>A lawyer</u> should not be permitted <u>allow his or her own interests</u> to have an adverse effect on <u>the</u> representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A Similarly, when <u>Paragraph (d)(4) requires</u> a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with <u>to make</u> a law firm representing the opponent, such discussions could materially limit the lawyer's representation of <u>disclosure to</u> the client. In addition, a <u>when the</u> lawyer may not allow related business interests to affect representation, for example, by referring clients to <u>has an enterprise interest in the subject matter of the representation. Examples of this include the following: (1) the lawyer represents a client in litigation with a corporation</u> in which the lawyer has an undisclosed financial interest <u>is a shareholder; and (2) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. In addition, the subject of a representation might raise questions about the lawyer's own conduct, such as questions about the correctness of the lawyer's earlier advice to the client; this situation would be governed by Paragraph (d)(4) unless the lawyer and client have agreed to take a common position in</u></p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>compliance with Rule 1.4, as might occur, for example, in response to a motion for discovery sanctions. [See Rule 4-81.8.1 through 1.8.12 for specificadditional Rules pertaining to a number of other personal interest conflicts, including business transactions with clients. See also, and Rule 4.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm)3.7 concerning lawyer as witness.]</p>	
<p>[11]When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.</p>	<p>[11]When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[21] <u>When a lawyer owns an interest in a publicly-traded investment vehicle, such as a mutual fund, paragraph (d)(4) does not require the lawyer to investigate whether the investment vehicle owns an interest in parties to a matter. However, if the lawyer knows that a publicly-traded investment vehicle in which the lawyer owns an interest owns an interest in a party to the matter, must disclose the interest to the client whenever it reasonably could be expected to affect the lawyer's representation of the client.</u></p>	<p>See Explanation of Changes for Comment [1].</p>
<p>[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).</p>	<p>[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>[22] <u>Paragraph (d)(4) requires disclosure to the lawyer's client if the lawyer <i>has been having, or when the lawyer decides to have, substantive discussions concerning possible employment with an opponent of the lawyer's client or with a lawyer or law firm representing the opponent.</i></u></p>	<p>See Explanation of Changes for Comment [1]. The italicized language is taken verbatim from Model Rule 1.7, cmt. [10].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[23] Paragraph (d) applies only to a lawyer's own relationships and interests, unless the lawyer knows that another lawyer in the same firm as the lawyer has or had a relationship with another party or witness, or has or had an interest in the subject matter of the representation. [See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).]</p>	<p>See Explanation of Changes for Comment [1]. The italicized language is taken verbatim from Model Rule 1.7, cmt. [10].</p>
<p>Interest of Person Paying for a Lawyer's Service</p> <p>[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.</p>	<p>Interest of Person Paying for a Lawyer's Service</p> <p>[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[24] Paragraph (d) does not apply to the relationship of a lawyer to another person's lawyer. [See Rule 1.8.12].</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>[25] Paragraph (d) requires disclosures only to current clients. Rule 1.9 specifies when a lawyer must obtain informed written consent from a former client.</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>[26] Paragraph (a) applies, rather than paragraph (d)(1) or (3), whenever a representation is directly adverse to another current client of the lawyer. (See Comment [4].)</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>Prohibited Representations</p> <p>[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.</p>	<p>Prohibited Representations</p> <p>[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.</p>	<p>See Explanation of Changes for Comment [1].</p>

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	<p>[27] There are some situations governed by this Rule for which a lawyer cannot obtain effective client consent. These include at least the following: (1) when the lawyer cannot provide competent representation to each affected client (See Rule 1.8.8(a)); (2) when the lawyer cannot make an adequate disclosure, for example, because of confidentiality obligations to another client or former client (See Business and Professions Code section 6068, subdivision (e) and Rule 3-100); (3) when the representation would involve the assertion of a claim by one client against another client, where the lawyer is asked to represent both clients in that matter. (See <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] [“the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a [marital] dissolution action”]; <i>Klemm v. Superior Court</i> (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] [attorney may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict]; and <i>Forrest v. Baeza</i> (1997) 58 Cal.App.4th 65, 74-75 [67 Cal.Rptr.2d 857, 863] [attorney may not represent both a closely-held corporation and directors/shareholders who are accused of wrongdoing or whose interests are otherwise adverse to the corporation]); and (4) when the person who grants consent lacks capacity or authority. (See Civil Code section 38, and see Rule 1.14 regarding clients with diminished capacity.)</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).</p>	<p>[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p><u>[28] If a lawyer seeks permission from a tribunal to terminate a representation and that permission is denied, the lawyer is obligated to continue the representation even if the representation creates a conflict to which not all affected clients have given consent, and even if the lawyer has a conflict to which client consent is not available. (See Rule 1.16(c).)</u></p>	<p>See Explanation of Changes for Comment [1].</p>
<p>[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the</p>	<p>[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.</p>	<p>former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.</p>	
<p>[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).</p>	<p>[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>Informed Consent</p> <p>[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks</p>	<p><u>Disclosure and Informed Written Consent</u></p> <p>[18] Informed consent requires that the lawyer to disclose in writing to each affected client be aware of the relevant circumstances and of the material actual and reasonably foreseeable ways that the conflict could have adverse effects on consequences to the interests of that client or former client.] See Rule 1.0(e) (informed <u>written</u></p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).</p>	<p>consent).] The information required depends <u>facts and explanation the lawyer must disclose will depend</u> on the nature of the <u>potential or actual</u> conflict and the nature of the risks involved <u>for the client or potential client</u>. When <u>undertaking the</u> representation of multiple clients in a single matter is undertaken, the information must include the implications of the common <u>joint</u> representation, including possible effects on loyalty, confidentiality and the attorney <u>confidentiality and lawyer</u>-client privilege and the advantages and risks involved. <u>See Comments</u> issues described in Comment [30] <u>[30]</u> and [31] (effect of common representation on confidentiality).</p>	
<p>[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.</p>	<p>[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Consent Confirmed in Writing</p> <p>[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.</p>	<p>Consent Confirmed in Writing</p> <p>[20][29-A] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.]</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>Revoking Consent</p> <p>[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may</p>	<p>Revoking Consent</p> <p>[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.</p>	<p>terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.</p>	
	<p>[30] <u>A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the material facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and, if applicable, obtaining a new written consent under paragraph (a), (b), or (c).</u></p>	<p>See Explanation of Changes for Comment [1].</p>
	<p>[31] <u>If the lawyer is required by this Rule or another Rule to make a disclosure, but the lawyer cannot do so without violating a duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. (See, e.g., Business and Professions Code section 6068, subdivision (e), Rule 3-100.) A lawyer might be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients,</u></p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>because of other fiduciary relationships such as service on a board directors, or because of contractual or court-ordered restrictions.</p>	
	<p>[32] In some situations, Rule 1.13(g) limits who has authority to grant consent on behalf of an organization.</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>Consent to Future Conflict</p> <p>[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that</p>	<p>Consent to Future Conflict</p> <p>[2233] Whether a lawyer Lawyers may properly request a client ask clients to waive give advance consent to conflicts that might arise in the future, but this is subject to the test of paragraph usual requirement that a client's consent must be "informed" to comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comment [30] (b) informed written consent). The effectiveness of such waivers is generally determined by However, an advance consent can comply with this Rule even where the extent lawyer cannot provide all the information and explanation Comment [30] ordinarily requires. Whenever seeking an advance consent, the lawyer's disclosure to which the client reasonably understands the material risks should include an explanation that the</p>	<p>See Explanation of Changes for Comment [1]. Proposed Comment [33] shares much with the substance of Model Rule Comment [22]. However, this proposal eliminates the reference to Rule paragraph (b) because of that reference is not pertinent to the Commission's recommended Rule. Also, the proposed Comment has been heavily edited to make it more specific and less discursive in order to provide better guidance to lawyers.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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>waiver entails <u>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.</u> The more-comprehensive <u>lawyer also should disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, including litigation, or whether there will be any limits on the scope of the consent.</u> <u>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 representations <u>conflicts</u> that might arise and <u>of</u> the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that <u>to the client will have; (2) the requisite understanding. Thus, if the client agrees to consent to a particular type</u> <u>client's degree</u> <u>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</u> <u>experience as a</u> <u>user of the legal services involved and is reasonably informed regarding, including experience with</u> <u>the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., type of legal services involved; (3) whether</u> <u>the client is independently represented by other counsel in</u> <u>has</u></u></p>	

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>consented to the use of an adequate ethics screen and whether the screen was adequately instituted and maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education and language skills. An advance consent normally will comply with this Rule if it is limited to a particular type of conflict with which the client already is familiar. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, even a general and open-ended advance consent can be in compliance when given by an experienced user of the type of legal services involved. In any case, advance consent cannot will not be effective if the circumstances that materialize in compliance in the future are such as would make the conflict nonconsentable under paragraph circumstances described in Comment [27]. (b) prohibited representations. [See Rule 1.0(g) ("informed consent").]</u></p>	

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Conflicts in Litigation</p> <p>[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.</p>	<p>Conflicts in LitigationRepresentation of a Class</p> <p>[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.</p>	<p>[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.</p>	<p>[25]^[34] When <u>This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of a lawyer who</u> represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get<u>obtain</u> the consent of such a person<u>an unnamed class member</u> before representing a client suing the<u>who is adverse to that</u> person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a <u>party opposing</u> a class action does not typically need the consent of any<u>an</u> unnamed member of the class <u>member</u> whom the lawyer represents in an unrelated matter <u>in order to do so. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.</u></p>	<p>See Explanation of Changes for Comment [1].</p>
<p>Nonlitigation Conflicts</p> <p>[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant</p>	<p>Nonlitigation Conflicts</p> <p>[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].</p>	<p>factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].</p>	
<p>[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.</p>	<p>[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest</p>	<p>[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.</p>	<p>among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.</p>	
<p>Special Considerations in Common Representation</p> <p>[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation</p>	<p>Special Considerations in Common Representation</p> <p>[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.</p>	<p>or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.</p>	
<p>[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.</p>	<p>[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.</p>	<p>See Explanation of Changes for Comment [1].</p>

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<p>[31]As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.</p>	<p>[31]As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).</p>	<p>[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.</p>	<p>[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.</p>	<p>See Explanation of Changes for Comment [1].</p>
<p>Organizational Clients</p> <p>[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the</p>	<p>Organizational Clients</p> <p>[34]^[35] A lawyer who represents a corporation or other^{an} organization does not, by virtue of that representation alone, necessarily^{alone,} represent any constituent or affiliated of the^{or affiliated of the} organization, such as a parent or subsidiary. (See Rule 1.13(a). Thus, the) <u>The lawyer for an organization is also does not, by virtue of that representation alone, represent any affiliated organization, such as a subsidiary or</u></p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.7 Conflicts of Interest: Current Clients</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.</p>	<p><u>organization under common ownership. The lawyer nevertheless could be</u> barred <u>under case law</u> from accepting <u>a</u> representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse, even in a matter unrelated to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client, <u>under certain circumstances.</u></p>	
<p>[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some</p>	<p>[3536] A lawyer for a corporation or other organization who is also is a member of its board of directors <u>(or a lawyer for another type of organization who has corresponding fiduciary duties to it)</u> should determine whether <u>it is reasonably foreseeable that</u> the responsibilities of the two roles may <u>might</u> conflict. The, for example, because, as its lawyer <u>may, he or she might</u> be called on to advise the corporation in <u>on</u> matters involving actions of the directors. Consideration <u>The lawyer</u> should be given to consider such things as the frequency with which such these situations may <u>might</u> arise, the potential intensity <u>materiality</u> of the conflict, the effect of to the lawyer's resignation from the board <u>performance of his or her duties as a lawyer,</u> and the possibility of the corporation's <u>corporation</u> obtaining legal advice from another lawyer in such these situations. If there</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.</p>	<p>is material risk that the dual role will compromise the lawyer's independenceability to perform any of professional judgmenthis or her duties to the client, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstanceswhenever matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege, and that conflict of interest considerations might require the lawyer's recusallawyer to withdraw as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.</p>	
	<p>Insurance Defense</p> <p>[37] In State Farm Mutual Automobile Insurance Company v. Federal Insurance Company (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that the predecessor to paragraph (c) was violated when a lawyer, retained by an insurer to defend one suit against an insured, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding State Farm, paragraphs (a) and (c) do not apply to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.</p>	<p>See Explanation of Changes for Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.7 Conflicts of Interest: Current Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[38] Paragraph (b) is not intended to modify the tripartite relationship among a lawyer, an insurer, and an insured that is created when the insurer appoints the lawyer to represent the insured under the contract between the insurer and the insured. Although the lawyer's appointment by the insurer makes the insurer and the insured the lawyer's joint clients in the matter, the appointment does not by itself create a potential conflict of interest for the lawyer under paragraph (b).</p>	<p>See Explanation of Changes for Comment [1].</p>
	<p><u>Public Service</u></p> <p>[39][For special rules governing membership in a legal service organization, see Rule 6.3; for participation in law related activities affecting client interests, see Rule 6.4; and for work in conjunction with nonprofit and court-annexed limited legal services programs, see Rule 6.5.]</p>	<p>See Explanation of Changes for Comment [1].</p>

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC	M			<p>Comment [9] says that a lawyer “must in all events protect confidentiality” yet Comment [18] contradicts this by indicating that when a lawyer is representing a client’s adversary the lawyer has an obligation to disclose to the lawyer’s client “all information that is material to the representation of the client, including otherwise confidential information of the lawyer’s other client.” COPRAC concerned that disclosure without informed written consent constitutes a breach of duty of confidentiality.</p> <p>Comment [17] relates to a conflict arising from a lawyer’s fiduciary duties to a non-client and should not be placed within the comments relating to paragraph (b) unless the Comment is reworded to state that the term “representation of a client” is not limited to a lawyer’s legal representation of a client in an attorney client relationship, but may also include a lawyer’s fiduciary relationship with a non-client. Alternatively, Comment [17] could be placed with the comments regarding paragraph (d), in which the fiduciary relationship might be described as a legal, financial, or business relationship.</p>	<p>The Commission agreed and made clarifying changes to both [9] and [18].</p> <p>The Commission agreed that Comment [17] is misplaced and moved it forward to immediately after Comment [3].</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Comment [27]'s provision that a lawyer cannot obtain effective client consent where the lawyer cannot provide competent representation to each affected client seems like a significant limitation that could be explained or illustrated better. No specific recommendation.</p> <p>Reference to rule 1.8.8(a) in Comment [27] is inappropriate.</p>	<p>On reconsideration, the Commission is satisfied that the four numbered elements in this Comment correctly describe California law and fairly cover the topic.</p> <p>Commission believes the reference is appropriate. Rule 1.8.8(a) says that a lawyer shall not contract with a client "prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice." Thus, a lawyer cannot under Rule 1.7 obtain consent to a representation that the lawyer cannot handle competently</p>
1	Langford, Carol M.	D			<p>Rule is overly broad as written and more specific guidelines should be included to determine whether there was informed consent. Comment [4] should include guidelines as to how thorough the informed consent would have to be.</p> <p>Blanket waivers should be treated with caution and only permitted where there is some type of limitation in scope. (One suggested limitation that courts have approved is the identification of potentially adverse parties in the waiver or establishing durational boundaries. See Zador Corp v. Kwan, 31 Cal.App.4th 1285; Visa U.S.A., Inc.</p>	<p>The meaning of "informed consent" is contained in Model Rule 1.0 and not in Rule 1.7. It does not appear to be possible to define that term except along the lines of the Model Rule definition, which recognizes that whether a client's consent is informed is inherently fact specific. The Commission therefore did not make this requested change.</p> <p>The Commission agrees that advance consents to future conflicts of interest should be treated with caution but believes it has done so in proposed Comment [33]. Omitting Comment [33] would not add to lawyers' understanding of the subject. There was perhaps no portion of the Commission's work on Rule 1.7 that led to greater public involvement</p>

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

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				(a)	<p>v. First Data Corp., 241 F.Supp.2d 1100). Comment [33] therefore should be taken out unless the rule provides specific guidelines to act as safeguards against uninformed and unintended waivers.</p> <p>Amend 1.7(a) by deleting references to “in that matter.”</p>	<p>and comment. After careful consideration of the public comment, both pro and con, the Commission made no change in Comment [33].</p> <p>This comment overlooks that, when a lawyer represents multiple clients in a single matter, the lawyer is governed by proposed paragraph (b). This is explained in proposed Comment [4]. The commission did not make this requested change. Proposed paragraph (a) states the principle that a lawyer may not represent one client in a matter if that representation would be directly adverse to another current client. Thus, a lawyer cannot represent a client in a matter if a direct adversary in that matter is another current client of the lawyer. Thus, a lawyer may represent that client in matters unrelated to the one in which the client is directly adverse to the lawyer's other client. The same is true under the Model Rule, as appears from Model Rule Comments [6] and [7].</p>
11	Lewis, Steve	M			<p>With regard to 1.7(d)(4), more than disclosure is necessary to protect a client, particularly in the situation where the lawyer makes a mistake. The Rule should require advising the client in writing of opportunity to seek independent counsel. This could be done by</p>	<p>Commission did not make the requested revision. The duty of lawyers and other fiduciaries to disclose their errors is covered by a long line of Supreme Court case law, most recently in <i>Beal Bank v. Arter & Hadden, LLP</i>, 42 Cal.4th 503, 514 (2007), and there is not need to complicate and lengthen the</p>

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					<p>adding a (d)(5) that applies specifically to the situation where an attorney has made a mistake.</p> <p>Comment [10]: second sentence includes phrase "might or does interfere with lawyer's full performance..." The word "might" makes this Comment too broad in scope; change "might" to "might reasonably be expected to."</p> <p>Comment [21] mutual fund disclosure requirement is excessive and should be deleted entirely.</p>	<p>Rules with this addition.</p> <p>The Commission agreed and changed the referenced sentence to read: "In some situations, the employment of a single counsel might have benefits of convenience, economy or strategy, but paragraph (b) requires the lawyer to make disclosure to, and to obtain informed written consent from, each client whenever the lawyer knows or reasonably should know it is reasonably possible that the lawyer's performance of the lawyer's duties to one of the joint clients will or does interfere with the lawyer's full performance of duties owed to another of the joint clients."</p> <p>Commission substantially revised the Comment but retained it as a reminder that a lawyer's interest in investment vehicles, of which mutual funds are only one example, could have an effect on a lawyer's representation of a client and in some situations should be disclosed to the client.</p>
5	Lodise, Margaret	D	the Trust and Estates Section]		Requiring disqualification without tying it to the possession of confidential information relevant to the new matter will severely impact estate planners who may do planning for a client and place their firms into a conflict position merely by representation of the individual without access to any information	Rule 1.7 does not address the topic of disqualification, which is a matter within the control of the courts. Rule 1.7 in both the Model Rule and proposed versions recognizes the primacy of the duty of loyalty owed to current clients. The key to the expressed concerns is determined by whether a representation is directly adverse to another current

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					<p>which is in any way confidential or material to the new representation.</p> <p>Prior version of rule contained a comment relating to the situation of reciprocal will for a husband and wife or of representation in an antenuptial agreement as situations where a potential conflict might exist. This should be returned to the comments.</p>	<p>client.</p> <p>The Commission agreed and revised Comment [10] to add the suggested language.</p>
4	Los Angeles County Bar Association (Toby J. Rothschild)	M		(a)	Delete references in 1.7(a) to the "matter." This makes (b) unnecessary.	The Commission disagrees with this reading of the Rule and did not make the requested revision. Paragraph (a) and (b) are distinct, and the suggested revision to paragraph (a) would not accomplish what was suggested. Paragraph (a) addresses the conflict involved in a representation that is adverse to a lawyer's current client. Paragraph (b) addresses the conflict involved in representing multiple clients in a single matter.
				(c)	<p>Amend (c) to read: "A lawyer shall not accept the representation of a client if that client has a dispute with another of the lawyer's clients, unless the lawyer's representation of each client concerns matters other than those which are the subject of the dispute.</p> <p>Delete Comments [5], [6], and [7].</p>	<p>The Commission does not believe the suggested language would work as written and did not make the requested revision.</p> <p>The Commission believes these three paragraphs provide important explanation of what work would be "directly adverse" to another client, and it did not make the requested revision.</p>

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

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					<p>Utilize the Model Rule standard of “confirmed in writing” rather than the proposed “informed written consent”.</p> <p>Expressed concern that Comment [23] buries a potential conflict that could exist among related attorneys but made no specific recommendation</p> <p>Move section on prohibited representations (Comments [27] and [28]) closer to the beginning of the comments.</p> <p>Third sentence of Comment [33] is contradictory and ambiguous and should be deleted.</p>	<p>The Commission believes this change would dilute important client protection and did not make this consent.</p> <p>Commission did not see any problem and made no change</p> <p>Commission considered three alternative placements of these two paragraphs but concluded that none of them would materially change the availability of the Comment and made no change.</p> <p>Commission did not make the requested revision.</p>
3	McGowan, David	M		(a)	<p>Delete references in 1.7(a) to the “matter,” which makes 1.7(c) unnecessary because then (a) becomes a flat prohibition on all concurrent representation of directly adverse interests, including the types specified in (c).</p> <p>Add a section 1.7(e), which would provide a detailed safe harbor provision for advanced conflict waivers, including what steps a lawyer must take to ensure informed consent. Then</p>	<p>Prof. McGowan is correct, but the Commission favors retaining paragraph (c) to underline the risks involved in representing a current client’s adversary even in a matter unrelated to the lawyer’s representation of the first client. Also, removing the “matter” modifier in paragraph (a) would interfere with the distinction between proposed paragraphs (a) and (b), as is explained in Comment [4].</p> <p>The Commission engaged with lawyers several times at its public sessions on the topic of a client’s advance consent to a representation despite a potential for a future conflict of interest, received</p>

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

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					change Comment [29] to reflect the evidentiary presumptions relating to section (e). Delete current Comment [33]	several written suggestions during the initial drafting stage, and received several written comments during the formal public comment process. The thoughts shared with the Commission covered a wide range of views extending from a desire to expand existing case law so as to make the process easier to two commenters who objected to advance consents on principle despite their facilitating a client's choice of counsel and being permitted by existing case law. The Commission recognized that removing Comment [33] would cause confusion because Model Rule [22] does cover the topic of advance consent, and it determined that the correct resolution is to acknowledge that advance consents can be obtained but to underline the limitations involved in the process. The Commission decided not to make Prof. McGowan's interesting suggestion to include in the Rule rather than the Comment presumptions about the effectiveness of advance consents, in part because it is not convinced that presumptions should be in a Rule.
6	Morrison & Foerster (Douglas Hendricks)	A			Support Comment [33] regarding advance waivers of conflicts of interest. Advanced waivers are used regularly in modern law practice and permit access to counsel of choice for clients.	No response necessary.
12	OCTC				Suggests the inclusion of a definition of potential and actual conflicts of interest.	This is addressed in proposed Comments [12] and [13].

**Rule 1.7 Conflicts of Interests: Current Clients.
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				(d)	<p>The meaning of “directly adverse” will create multiple problems. The only suggestive alternative is to strike the word “directly”.</p> <p>Disagrees with the description of a lawyer’s cross-examination of his or her own client as “directly” adverse except in particular circumstances and would remove the second sentence of Comment [6].</p> <p>Would make paragraph (d) subject to a standard of “informed written consent” rather than only “disclosure”.</p>	<p>This term is central to the Model Rule and the proposed Rule, and there is no available alternative. Striking the word “directly” would create discipline where none would be warranted, such as those discussed in Comment [7].</p> <p>The Commission disagrees because any cross-examination of one’s own client is a violation of the lawyer’s duty of undivided loyalty.</p> <p>The proposed standard of “disclosure” without “written consent” goes beyond the requirements of the Model Rule and provides sufficient client protection. The argument against this change is that the purpose of requiring written disclosure primarily is a matter of trust. By requiring disclosure, a client’s trust is protected by informing the client of what a client reasonably can be expected to believe the lawyer would disclose. The client then can make an informed decision about whether to hire the lawyer and, if so, how to supervise the lawyer’s work.</p>
7	Orange County Bar Association (Trudy Levindofske)	D		(c)	<p>The heading for paragraph (c) is confusing.</p> <p>The terms “direct adversity,” “client’s adversary,” and “indirect adversity” are not</p>	<p>The Commission agreed and changed the title accordingly.</p> <p>This and the other comments on the “direct adversity” issue made no helpful redrafting</p>

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				(a) – (d)	<p>adequately defined.</p> <p>Draft rule deviates from the Model Rule, making it difficult for attorneys to find guidance on interpretation.</p> <p>Rule should explain or define the distinctions between the same matter and different matter contexts that are fundamental to subparagraphs (a), (b), and (c).</p> <p>Criticized the word “full” in the fourth sentence of Comment [10].</p> <p>With regard to advance waivers addressed in Comments [14] and [33], concern about adequacy of disclosure where the relevant factual circumstances have not yet developed.</p> <p>Suggestion in Comment [33] that screening might be appropriate has yet to be endorsed</p>	<p>suggestions. Because the distinctions inherently are fact driven, the Commission does not believe that an all-purpose definition is possible, and it only made a small clarifying change in Comment [6].</p> <p>The Model Rule has been adopted in different forms in different jurisdictions; California has a rich body of case law interpreting rules that are much the same as the proposed Rule.</p> <p>Neither the Model Rule nor the proposed Rule make an attempt to define “matter”, and that term is not included among the Model Rule 1.0 definitions. However, Alaska, D.C., New York, North Dakota, and Oregon have defined the term in their version of Rule 1.0. The Commission will consider this possibility.</p> <p>The Commission agreed and removed the word.</p> <p>The Commission agrees that the adequacy of disclosure is a key element and believes that is stated in the Comment.</p> <p>Comment [33] refers only to ethics screens instituted with client consent, which clearly are</p>

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					<p>by CA courts.</p> <p>Suggestion in Comment [33] that the relative sophistication of the client may be factor is troubling because it requires a lawyer to assess the client's intellect and experience before knowing whether or not a particular disclosure will violate an ethical rule.</p> <p>Requests deletion of Comment [34] because, although it believes the Comment is accurate, the topic of class actions is too complex to cover in a Comment paragraph</p>	<p>permitted.</p> <p>Client sophistication is a proper and accepted consideration in determining the effectiveness of an advance consent. See, e.g., <i>Visa U.S.A., Inc. v. First Data Corp.</i>, 241 F.Supp.2d 1100.</p> <p>Comment [34] does not attempt to cover all class action issues and could not, but the Commission believes that [34] provides important guidance of some fundamental conflicts issues that arise in class action representations.</p>
9	Sall, Robert K.	D			<p>Troubled by Comment [33] endorsement of advance waivers as they are rarely sufficient to disclose either the circumstance or the foreseeable adverse consequences. At a minimum, sentence in Comment [33] that suggests an open ended general waiver may be sufficient should be deleted. Focus on sophisticated clients versus unsophisticated clients is not appropriate.</p> <p>Concepts of "direct" and "indirect" adversity are ill-defined (no corrective drafting suggested). Also, Comment [5] statement that there is no single definition for what constitutes a direct conflict is not helpful and</p>	<p>There was perhaps no portion of the Commission's work on Rule 1.7 that led to greater public involvement and comment than the topic of advance consent to future conflicts of interest. After careful consideration of the public comment, both pro and con, the Commission made no change in Comment [33].</p> <p>The concept of "direct adversity" is fundamental to application of Rule 1.7 both in the Model Rule and the proposed versions. The Commission carefully reviewed the Model Rule explanation and compared</p>

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					should be deleted.	it to the proposed discussion, and as a result it did not make the requested revision.
10	San Diego County Bar Association (Heather L. Rosing)	M			Delete Comment [34] regarding class representation because it should be addressed in a separate rule on class representation. Delete 4th sentence from end of Comment [33] regarding advance consent because it does not accurately state the status of current law.	The Commission did not undertake to create a new class action rule (there being no such Model Rule) and instead retained Comment [34] as a helpful explanation of some of the key conflicts issues that can arise in a class action representation. The 4 th sentence describes potentially important client protection, and the Commission did not make the requested revision.
8	Zitrin, Richard, and California Legal Ethics Educators	D		(a)	1.7(a) as drafted would allow lawyers to be adverse to their own clients (if a lawyer represents A in A v. B, the lawyer may undertake representation of B in B v. X without consent, even though B is directly adverse to the lawyer's client A). No jurisdiction in the US allows a lawyer to be directly adverse to that individual's own client and CA should not move in that direction.	This comment is based on a misreading of the paragraph. It overlooks that, when a lawyer represents multiple clients in a single matter, the lawyer is governed by proposed paragraph (b). This is explained in proposed Comment [4]. The Commission did not make the requested change.
				(a)	1.7(a) should be amended to remove the three phrases concerning "matters" and what remains is a simple statement of the duty of loyalty.	A statement that lawyers should be loyal to their clients would not be workable as a disciplinary standard, would provide no guidance to lawyers or to disciplinary authority, and therefore would provide no client protection.
				(c)	1.7(c) is an amended restatement of 3-310(C)(3) that is considerably narrower than	The Commission disagrees with this reading of paragraph (c), which it believes is correct and clear,

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				(b)(1) and (2)	<p>the current rule because it removes the language that now read “whose interest in the ... matter is adverse,” adds the word “direct” to the word adverse, and puts the “matters” in chronological order, thus narrowing the rule’s application.</p> <p>The language in 1.7(b)(1) and (2) could be combined by saying “potentially or actually conflict”.</p>	<p>and it did not make the requested change.</p> <p>The Commission believes it is valuable to have the potential and actual conflicts stated separately to underline, as discussed in Comment [14], that the lawyer must obtain a new informed written consent if the basis for an earlier consent has changed. The Commission did not make the requested revision.</p>
				(d)	<p>Commission’s position on advance waivers is untenable and must be removed. Comment [33] inappropriately allows clients to consent to blanket advance waivers of conflict even where adequate disclosure cannot possibly be met. Comment [33] states that “use of an adequate ethics screen” is a factor in determining the adequacy of a waiver but screening is very limited under CA case law and the Commission appears to be legislating. Consulting independent counsel does not overcome the problem of inadequate disclosure.</p> <p>1.7(d) does not protect clients by requiring only written disclosure without written consent. Perhaps include a “materiality”</p>	<p>There was perhaps no portion of the Commission’s work on Rule 1.7 that led to greater public involvement and comment than the topic of advance consent to future conflicts of interest. After careful consideration of the public comment, both pro and con, the Commission made no change in Comment [33].</p> <p>This observation is correct, but the Commission decided that “disclosure” without “written consent”,</p>

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				(d)(4)	<p>standard that is used to set forth what 1.7(d) situations require consent.</p> <p>Inadequate parallel language in (d)(3) and (d)(4) because word "personal" is left out of (d)(4).</p> <p>(d)(3) refers to a conflict that arises when the lawyer's friends or associates are "affected substantially" but language should include the client being affected substantially.</p>	<p>which goes beyond the requirements of the Model Rule, provides sufficient client protection. The argument against this change is that the purpose of requiring written disclosure primarily is a matter of trust. By requiring disclosure, the lawyer is obligated to reveal what a client reasonably can think a lawyer can be expected to disclose. This permits the client to make an informed decision about whether to hire the lawyer and, if so, how to supervise the lawyer's work.</p> <p>Commission did not make the requested revision. Paragraphs (d)(1)-(3) involve relationships with people, so "personal" is pertinent, but (d)(4) involves only a lawyer's interest in the subject matter of the representation, which is not a "personal" relationship.</p> <p>Commission did not make the requested revision. All of paragraph (d) presumes the client will be affected. Adding the requested modifier to (d)(3) would suggest an incorrect limitation on the other subparagraphs of (d).</p>

Rule 1.7: Conflicts and Interests: Current Clients

STATE VARIATIONS

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

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

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

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

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

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

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

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

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

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

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

(1) consultation with the lawyer,

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

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

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

(1) is prohibited by law or these rules;

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

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

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

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

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

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

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

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

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

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

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

Texas: Rule 1.06 provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

**RRC – Rule 3-310 [1.7 to 1.12]
E-mails, etc. – Revised (10/13/2009)**

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August 27, 2009 McCurdy E-mail to Kehr, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead drafter assignments.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. **III.AA. Rule 8.3 Reporting Misconduct [1-500(B)]** (Dec. 2008 Comparison Chart)
Codrafters: Peck, Tuft, Vapnek
Assignment: (1) a chart comparing proposed Rule 8.3 to MR 8.3; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

2. **III.II. Rule 1.7 Conflicts of Interests: Current Clients [3-310]**

(Post Public Comment Draft #12.1 dated 10/21/08)

Codrafters: Melchior, Mohr, Snyder

Assignment: (1) a chart comparing proposed Rule 1.7 to MR 1.7; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.LL. Rule 1.16 Terminating Representation [3-700]** (Post Public Comment Draft #6.1 dated 9/29/08)

Codrafters: Foy, Melchior

Assignment: (1) a chart comparing proposed Rule 1.16 to MR 1.16; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **III.MM. Rule 1.17 Purchase & Sale of a Geographic Area or Substantive Field of a Law Practice [2-300]** (Post Public Comment Merged Rule Draft #1.1 dated 1/6/09 to be revised following the July 2009 meeting)

Codrafters: SAPIRO (co-lead), Martinez, Melchior

Assignment: (1) a chart comparing proposed Rule 1.17 to MR 1.17; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

September 18, 2009 McCurdy E-mail to Drafters (Kehr, Melchior, KEM & Snyder), cc RRC:

Bob & Codrafters (Kurt, Kevin & Dominique):

This message provides the assignment background materials for Rule 1.7 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attachments:

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)
- Public Comment Chart, Draft 1 (9/18/09)
- State Variations (2009)

September 19, 2009 KEM E-mail to Drafters, cc RRC:

I've attached an Introduction template for Rule 1.7 [3-310], in Word. It was inadvertently not included in the attachments sent to you yesterday. Please let me know if you have any questions.

September 20, 2009 KEM E-mail to Drafters, cc RRC:

Please see my cumulative notes, attached.

September 20, 2009 Kehr E-mail to Lee, cc Chair & Staff:

Mimi: I'm not certain that you created the attached comparison chart for this Rule, but if not I imagine that one of you will know who can help me with this.

I don't think the Rule portion of this chart is helpful. There is nothing in the MR that survives in the Commission's proposal. I think that any attempt to mark the MR changes would be misleading by suggesting to the reader that a comparison would be meaningful. The two are so completely different that I don't think this is true. I think the only fair way to do this is to show the MR in the second column entirely lined through in red and then follow it with the entire proposed Rule in blue font.

The Comment generally looks right to me, but there are several paragraphs in which portions are in a third color (green on my screen), sometimes lined out and sometimes not, and in each case in italics. I wonder why that is and, if it is not necessary, whether it can be revised into a consistent font.

September 20, 2009 KEM E-mail to Kehr, cc Chair & Staff:

See revised Rule & Comment comparison chart, attached.

As for the green font language, green is the color that the program we use to create comparisons w/ the Model Rule, ChangePro, uses to indicate that the language was moved to elsewhere in the rule or comment (strikethrough) or was moved from elsewhere in the rule or comment (underline). I've made a notation in the third column by proposed Comments 22 & 23 where the new language comes from.

September 22, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff:

Attached is a revised rule/comment comparison chart for proposed Rule 1.7. See highlighted text on pages 4, 5, and 45. Similar to the Rule 1.6 comparison chart, to indicate that certain language is a direct continuation of current RPC 3-310, the chart has been modified to show the redline to the relevant parts of RPC 3-310. Mimi and I believe this could help clarify that certain key parts of the Commission's proposed rule is firmly based on existing California language. This is just another option for presenting the rule.

September 22, 2009 Kehr E-mail to Difuntorum, cc Drafters, Chair & Staff:

I have a different version of the Rule and Comment comparison chart that Kevin provided to me, I think this past Sunday, on which I've done nothing as I have spent all of my available time on the Introduction and the public comment chart. I will let all of you decide which Rule and Comment comparison chart I should use as I am leaving shortly.

September 22, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff:

The revised version modifies Kevin's draft. If you prefer Kevin's draft then that's fine too as the explanation column can be used to accomplish the goal of indicating that certain language is taken directly from RPC 3-310, but I do think that the RPC 3-310 faithful might be encouraged by seeing the redline of RPC 3-310(B).

September 22, 2009 Kehr E-mail to Difuntorum, cc Drafters, Chair & Staff:

I'd be interested in knowing what others think of emphasizing the continuity with California's current rule. Although I have one allusion to that in what I've done so far on the public comment chart, I am concerned that the Commission might appear to be stubborn. Perhaps that isn't a valid concern in the full context of things, or even in the context of Rule 1.7, but it still troubles me.

September 22, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

I'll jump in on this point. I agree using Randy and Mimi's proposed chart that indicates the continuity w/ California's current rule 3-310(B) [and perhaps also (C)]. I believe there was a public protection rationale, at least as to current 3-310(B) [though I'm on record as not buying it

**RRC – Rule 3-310 [1.7 to 1.12]
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and believe that we should require informed written consent for those kinds of public comment]. I would be less concerned w/ the appearance of stubbornness if we explain that it was a policy decision by the Commission to ensure greater disclosure, the concept being that if only written disclosure is required, lawyers will broadly disclose. I believe that this is the reason why JoElla initially signed off on 3-310(B) and continued to do so with this iteration of the Commission (Randy can correct me on that if I'm wrong). Regardless, given that we've pretty much continued 3-310(B) verbatim in the proposed Rule, in the process rejecting the Model Rule "materially limited" standard, we have to address that fact.

To return to a point I made in the second line, above, should we also do the same for current rule 3-310(C) and proposed Rule 1.7(b)? Again, we've adopted the language nearly verbatim.

September 22, 2009 Lee E-mail to Drafters, cc Chair & Staff:

I took Kevin's suggestion and added a comparison to rule 3-310(C) and Rule 1.7(b) to the chart. Please review.

September 22, 2009 Lee E-mail to Drafters, cc Chair & Staff:

I made a few edits. Please see attached.

September 22, 2009 Melchior E-mail to Drafters, cc Chair & Staff:

Why is adhering to our existing rule bad, as long as we have stated valid reasons?

September 23, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

My only question is one of diplomacy – might an emphasis on our existing rule suggest that the Commission's recommendation is stiff necked? Those involved with the Commission know that its recommendation is the product of repeated and intensive debate of the pros and cons of different possible approaches. I don't want the Commission's effort to be caricatured easily as anything else. Rule 1.6 seems to me to be a different thing b/c of its recent provenance, its having been written at the request of the legislature, and its foundation in statute.

September 27, 2009 Kehr E-mail to Drafters (Melchior & KEM), cc Chair & Staff:

I have attached initial drafts on Rule 1.7 for your review and comments.

Attachments:

- Dashboard, Draft 1 (9/27/09)RLK
- Introduction, Draft 1 (9/27/09)RLK
- Rule & Comment Chart, Draft 1 (9/27/09)RLK
- Public Comment, Draft 1 (9/27/09)RLK

September 28, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

My message to you yesterday transmitting my initial drafts of the Rule 1.7 October meeting materials should have highlighted that my drafts do not highlight the proposal's continuity with the current California rule. I did reconsider this before sending out my drafts, and my conclusion, for the reasons I previously gave, is that it would be wiser to explain the Commission's proposal on its merits rather by appearing to hide behind the current California rule. Rule 1.6 seems to me to be a different kettle of fish in this regard, for reasons I think I previously explained.

September 28, 2009 KEM E-mail to Drafters, cc Chair & Staff:

I've attached revised versions of your materials, all in red-line version and denominated Draft 2 (9/28/09)RLK-KEM - Cf. to DFT1. All are in Word.

Some Comments:

1. Dashboard: I've modified the summary to conform to our style and to include a reference to rule 1.11. I've also added a reference to rule 3-310. Let's face it. If we didn't already have that rule, our proposed Rule 1.7 would not look like it does. Finally, I've referenced a stakeholder in that box (i.e., MoFo).
2. Introduction. Please see my suggested edits. Some points and observations:
 - a. I have eliminated the references to "a majority of the Commission." I know a number of members want that phrase, but I think it is a mistake. The majority is the Commission's position, even if it is a 7-6 vote. The dashboard will tell the tale of the actual vote, but I think that we should simply state the Commission's position as being that of the Commission, not "a majority of the Commission." I believe all everyone on the Commission wants the same thing -- to provide guidance to lawyers to ensure compliance with their duties to their clients. To speak in terms of a majority vs. a minority in so many rules suggests the Commission is Balkanized on the issue of ethics. Yes, there are strong disagreements on some rules, but ultimately I have to believe we're all on the same page.
 - b. I added a paragraph on the advance waiver issue. That seems to have been the most controversial provision and I think we should call it to the attention of BOG and the S.Ct. Alternatively, we could place a reference in the "very controversial" box to the public comment re Comment [33].
3. Rule & Comment Chart. Mostly, I've added cross-references to Explanations or the Introduction. However, please see footnotes 1-3 about numbering a comment [3-A] and having some comments "Reserved" when we've rejected the Model Rule comment nearly in toto.
4. Public Comment Chart. No changes of substance. All I've done is re-sort the commenters alphabetically and change the name of the "Commentator" column.
5. In addition to the materials you sent, I want to insert the following observation I made a while back about proposed paragraph 1.7(d). I have long argued that 3-310(B) [and now 1.7(d)]

should require informed written consent. As explained below, I don't buy the argument given for why just requiring written disclosure strikes the proper balance. The following is taken from my 10/21/08 e-mail to Kehr, cc Melchior & Staff:

4. Comment [21] became more troublesome as I worked on it (see ¶B.40 of Kevin's meeting notes). Paragraph (d)(4) is absolute and involves no standard of materiality. While I agree with Steve Lewis's concern, the kind of softening of the Rule that he has in mind would be at variance with the language of the Rule. My suggestion ignores this under the theory that no one could seriously think that a trivial mutual fund investment should be of any concern. My alternative suggestion is to drop the Comment, but on balance I prefer keeping it. What do you think? **KEM: Keep the comment w/o revision.**

However, my biggest problem with the Rule is 1.7(d). I understand the theory for requiring only disclosure and not informed written consent (disclose a broader swath of information to the client), but I've finally come to conclude it is flawed in practice. I just don't see that lawyers will disclose any more to their clients than they would if informed written consent were required. Moreover, unless a client is required to sign off on something he or she receives from a lawyer, the client is not going to read it very carefully. After all, how many folks (besides the members of the Commission) do you think actually read those rate notices that come with our electric and other utility bills? That in fact may be why we've taken the position that disclosure is sufficient; we're a skewed (i.e., compulsive) distribution of the general public). I would prefer to see a narrower requirement of disclosure, but requiring written client consent. I think lawyers will be more careful about their disclosures, and clients will pay more attention, and therefore be better protected.

Again, please don't hold up circulation of the draft for this or even include my thoughts. I just wanted to preserve this thought for consideration before we send out the Rule for the final public comment.

Well, this is pretty much the final public comment stage. It's not clear that there will even be a final public comment, so I want to raise it one last time.

Finally, thanks for your very hard work on this Rule. I don't entirely agree with Commission's approach that you have ably implemented. I'd prefer the Model Rule approach in 1.7(a)(2) and I'm even OK w/ 1.7(b) (except for the "confirmed in writing"), but only w/ something more akin to our proposed comment. Regardless of my position, I believe the work you have put into this Rule is extraordinarily thoughtful and you should be very satisfied with the result of your countless hours.

Please let me know if you have any questions.

September 29, 2009 Melchior E-mail to Drafters, cc Chair & Staff:

Some redline suggestions -- no big deal.

September 29, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

I have attached a final, unmarked version of the Introduction. It accepts all of the changes you made in my earlier version. My only changes here are a change to the first part of the first sentence b/c of a comment by Kurt, the removal of one reference to “a majority” of the Commission in line with Kevin’s recommendation, and two minor punctuation changes.

The attached Dashboard is Kevin’s revision of my initial draft, with all his changes accepted, but with one spelling error corrected.

The attached public comment chart is Kevin’s revision of my initial draft. B/c Kevin’s draft did not have the changes marked, I could not compare and accept whatever he did. I don’t have the time, energy, or inclination to dig into this and prefer to focus on other matters.

The attached rule comparison chart accepts all of Kevin’s edits, all of which were stylistic and are fine with me. Kevin’s two footnotes about Comment numbering of course are right, but I had thought we were going to hold the renumbering for final editing b/c of all of the other Rules that refer to these Comment paragraphs.

Attachments:

Dashboard, Draft 2 (9/29/09)RLK-KEM
Introduction, Draft 2 (9/29/09)RLK-KEM-KM
Rule & Comment Chart, Draft 2.1 (9/29/09)RLK-KEM-KM
Public Comment Chart, Draft 2 (9/29/09)RLK-KEM

October 5, 2009 Sondheim E-mail to RRC:

There is no dashboard for 1.7.

October 5, 2009 KEM E-mail to RRC:

Here's the most recent dashboard I have for 1.7. I'm pretty sure Bob has signed off on this. It's based on e-mail exchanges the drafters had last week. Bob can confirm . . . or deny.

October 5, 2009 Kehr E-mail to RRC:

I agree. This is the revised version that was completed on 9/29. The final change was to correct a spelling error. I don't see any spelling error in the attachment, so this must be the final corrected version.

October 5, 2009 McCurdy E-mail to RRC:

The Dashboard for Rule 1.7 was inadvertently omitted from the agenda materials. The version that Kevin submitted in his message a moment ago is the draft we have (PDF copy attached).

October 7, 2009 Sapiro E-mail to RRC List:

I have a series of minor drafting suggestions. I also have one substantive concern. They are not criticisms of the excellent work of the drafting committee.

1. In the Introduction, third line from the end of the first page, I would insert a comma after the word “decline.”
2. I agree with the comments in the first full paragraph on page 2 of the Introduction. However, I suggest that the paragraph might be more persuasive if, at the end of it, or in a separate paragraph, we include an explanation of why “informed written consent” is more protective than “informed consent, confirmed in writing.” The fact that the client has to sign off on the written consent after written disclosure may be obvious to us, but a member of the Board who has not studied these rules may not appreciate the difference.
3. While I agree with the last sentence of the explanation of changes for paragraphs (b)(1) and (2), I recommend that we add to the Comment of this rule a statement explicitly to the same effect as that last sentence of the explanation of changes.
4. Maybe Bob or Kevin has spent too much time in England, or I have spent too little. However, I think the word “defence” should be “defense” in the fourth line of the explanation of changes on page 8 of 48.
5. Referring to footnote 2, I agree with Kevin’s recommendation. I won’t repeat this agreement for the other reserved comments.
6. My substantive concern is Comment [24]. It seems to me that, if a lawyer represents a lawyer in the law firm that is on the opposite side of a case, the lawyer ought at least to be required to disclose that fact and probably should get the non-lawyer client’s informed written consent. Current Rule 3-320 requires a lawyer to give written disclosure if the lawyer representing another person is a client of the first lawyer. However, we have deleted that from Rule 1.8.11. The explanation of changes for Rule 1.8.11 refers to Rule 1.7. However, Rule 1.7, Comment [24] denies its applicability to this situation. Thus, we have deleted the problem from the rules entirely. This will represent a change in the law governing lawyers. It will suggest to advocates that this situation does not any longer present a conflict cognizable under our rules. I do not think it should be changed.
7. In addition, proposed Comment [24] refers to Rule 1.8.12. However, Rule 1.8.12 is limited to purchasing property at a foreclosure sale or judicial sale. It provides no authority for the proposition stated in Rule 1.7 Comment [24], and does not address this problem.
8. Either we should add something to Rule 1.7 to deal with the problem of a lawyer who represents another person’s lawyer, or we should add a new rule [1.7.1? or another rule in the 1.8 series?], to make sure that our deletion of this situation from 1.8.11 is not interpreted as a substantive change in the law.
9. At page 33 of 48, at the end of Comment [29A], there is a close bracket. I recommend that it be deleted.
10. Unfortunately, because of the substantive issue I raise above, I must reluctantly vote “no” on this rule. I hope we can address this problem before it goes to the Board.

October 7, 2009 Sondheim E-mail to RRC List:

Since this is not a consent item, the suggestions and concern of Jerry will be discussed at the meeting.

October 8, 2009 Sondheim E-mail to RRC List:

1. Note item 5 at page 190 of the agenda materials. We will discuss the issue Bob raises.
2. On the Dashboard this rule is listed as "Very Controversial" and it is stated that "a substantial minority of the Commission favors the Model Rule approach. See Introduction. However the Introduction simply states "Minority" without any explanation of the minority position. Would a member of the "substantial minority" (I presume you know who you are) please prepare a minority statement by noon on Oct. 14 .

October 10, 2009 KEM E-mail to Tuft, cc Chair & Staff:

I doubt that you'll overlook it, but we left a space for you in the Introduction for Rule 1.7 for a statement of a minority position. We figured you would be the likely person to state that position. If you simply want to draft a statement in Word, we can insert it in the Introduction.

October 10, 2009 Tuft E-mail to KEM, cc Chair & Staff:

Does this mean that we are not going to reconsider this rule under our current mandate?

October 10, 2009 KEM E-mail to Tuft, cc Chair & Staff:

No, there will be a final vote at the meeting. However, in contemplation of that vote, it is best that a minority position be stated. With another rule (I can't recall which at present), the minority position actually became the majority position after further consideration and we simply flipped the positions in the Introduction. So, if you can draft a paragraph that summarizes your concerns with the current rule, that would help advance the debate. Regardless of whether the Commission votes to revisit the rule, it will save us (staff) the time of trying to fashion a minority statement after the fact. We are under the gun to complete the Batch 1, 2 and 3 rules and get them to the week after the meeting, all while we're trying to nail down the agenda for the November 6-7 meeting.

As a guideline, your dissent should not exceed, or at least not greatly exceed, the total lines devoted to the majority position.

To assist you, I've attached the 1.7 E-mail compilation to date, which includes your e-mails and memos in opposition to the Rule. See your communications of 10/26/05, 4/3/06 (and Nancy Moore's and Steve Gillers' e-mails of 4/6/06), your 4/6/06 e-mail to Randy w/ ABA Update Chart; your 5/16/06 Memo (see also 5/22/06 Drafting Team memo that includes a response to this);

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6/5/06 memo; your 8/29/06 e-mail; your 9/16/07 e-mail (advance waivers); your 12/2/07 e-mail (advance waivers); your 8/24/08 memo; your 10/30/08 E-mail (also 10/30/08 Zitrin e-mail).

I can try to help but it may be minimal, as my day job beckons.

October 10, 2009 Tuft E-mail to KEM, cc Chair & Staff:

My day and night job beckons. I will try to have a minority position drafted before the meeting, but I cannot comment on the materials by Noon Monday and accomplish that at the same time. I have included a minority statement in a few rules, like 1.8.3, that point up the serious deficiencies in rule 1.7(d) as applied to the conflicts discussed in the comments to those rules.

October 11, 2009 Kehr E-mail to RRC List:

Jerry and All: In the hope of reducing the time we spend on this at the next meeting, I have gone through Jerry's detailed comments to see which of them we don't need to discuss. I've added paragraph numbers to Jerry's message and will refer to those numbers ---

1. This is stylistic, but I'm ok with doing as Jerry suggests.
2. I'm fine with Jerry's suggestion, but we might consider putting the explanation for why we think "informed written consent" is more client protective than the MR standard in Rule 1.0.1 instead or in addition b/c we use our standard in so many places. Here is my suggestion: "The 'informed written consent' standard protects clients by containing two requirements not found in the Model Rules. These are that California requires that the lawyer's disclosure be made in writing, and that client consent be obtained before the lawyer proceeds with the representation. These requirements have a number of protective consequences, including: (i) the lawyer is forced to analyze the situation in order to make the required written disclosure, which could lead the lawyer to reject or limit a representation a questionable representation, potentially avoiding significant future problems; (ii) the required writing emphasizes to the client the importance of the information and the client's decision; (iii) the written form of the lawyer's advice permits the client to reread and reconsider, and to take the information to others for comment; and (iv) the client is freer to reject the representation if the disclosure is made in advance when the lawyer more easily can be replaced. In addition, the requirements of written disclosure and written client consent provide evidence that the lawyer has fulfilled the applicable duties and could protect the lawyer against improper civil or disciplinary claims."
3. I think Jerry is right that this point is not found in the Comment. I would place this in Comment [29] b/c the point arises in all kinds of conflicts, not just those under paragraph (b): "A lawyer's disclosure remains effective only while the essential facts remain the same and the lawyer's explanation remains valid; the lawyer is required to provide a new disclosure, and to obtain a new written consent where that is required, if the lawyer's disclosure no longer adequately states the facts or explanation."
4. Jerry: I appreciate the favour of your pointing out the spelling error.

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5. We have kept the Comment numbering in place because of the cross-references in several other Rules. The numbering needs to be corrected during final editing.
6. As to Jerry's criticism of Rule 1.8.11 b/c we removed the reference to the lawyer's representation of opposing counsel, I agree with Jerry but think the place to fight that battle is on Rule 1.8.11. As to Jerry's criticism of Rule 1.7(d) b/c it does not require informed written consent, only disclosure, this is something we have debated and voted on repeatedly, and I hope we won't have to do so again.
7. I can't explain this except to suggest that it is a typo. The reference should be to Rule 1.8.11.
8. This seems to repeat item 6. See above.
9. Actually, it appears that the entire paragraph is bracketed, but I can't remember why. Kevin – any thoughts on this?

October 11, 2009 KEM E-mail to Kehr, cc RRC List:

In response to your query at #9, the comment was added to the public comment draft in response to an OCTC request. Here is what the footnote in Draft 12.1 states:

In response to an OCTC comment asking for the inclusion of this language from MR Comment [20], it was decided to add this language as a placeholder so that it can be discussed in the context of the terminology section. See 8/29-30/08 KEM Meeting Notes, III.B., at ¶54.

October 12, 2009 Tuft E-mail to RRC List:

The rush to get done should not eliminate the need to take a fresh look at this rule in light of our restated charge to hew closer to the Model Rule unless there is sound public protection reasons for not doing so. I do not believe we took this approach in crafting this batch 3 rule. Kevin's observations about the inadequacies of rule 1.7(d) are well founded and deserve our attention. There is no sound reason for not requiring client consent for serious conflicts that frequently arise when a lawyer's duties to a third party or the lawyer's own interests pose a significant risk to client loyalty and the lawyer's independent professional judgment. This was the rule in California prior to 1993 and it is the rule in virtually every other jurisdiction. We have seen examples in other rules, including rules 1.8.1, 1.8.3, 1.8.11 and 1.8.12, where 1.7(d) provides inadequate protection.

Currently, the only requirement for informed client consent under rule 1.7 is representing concurrent clients who interests are directly adverse and joint clients. Even the conflict situation described in comment 3A does not require client consent under our version of rule 1.7 This may be the last opportunity we have to fix a glaring deficiency in our conflicts rule.

If the 7-6 majority stands, I will submit a minority position for the Introduction.

October 12, 2009 Martinez E-mail to RRC List:

I agree with Mark that this is a rule we really should reconsider in light of our new mandate. I also see that our paragraphs (a) and (c) seem to overlap and cover the same territory, albeit from the perspective of the "other" client. Paragraph (a) can be read to cover the "thou shalt not represent the client's adversary" concept, which is already addressed in paragraph (c). Lawyers are also going to be confused about the "direct adversity" concept in paragraph (a) and how the clients can be directly adverse in two different matters.

The Introduction states that the rule is drafted with more specificity, yet it doesn't cover all conflict situations, as Mark points out. While the specificity approach of our draft sounds appealing in concept, the proposed rule itself doesn't reach the mark. The ABA approach seems preferable if it comes down to a choice of evils.

October 12, 2009 Ruvolo E-mail to RRC List:

I agree also we should take another look.