

VALLEY CLEAN ENERGY ALLIANCE

Staff Report - Item 14

TO: Board of Directors

FROM: Mitch Sears, Interim General Manager

SUBJECT: Ratification of Waiver of Certain Potential Legal Conflicts under the Legal Professional Ethics Rules for Richards, Watson & Gershon

DATE: September 9, 2021

Recommendation

Ratify the Interim General Manager's execution of the attached waiver of potential legal conflicts for the law firm of Richards, Watson & Gershon.

Background

On June 10, 2021, Valley Clean Energy ("VCE") authorized a legal services agreement with Richards, Watson & Gershon (RWG), and appointed Inder Khalsa as General Counsel. Inder Khalsa represents the City of Davis as City Attorney as well as East Bay Community Energy Authority as General Counsel. Additionally, RWG represents other CCAs as general counsel. Because VCE occasionally enters into contractual transactions with the City of Davis or other CCAs, RWG is requesting informed consent and waiver of any potential conflict of interest in order to comply with the firm's obligations under Rule 1.7 of the State Bar's Rules of Professional Conduct.

Analysis

A client of a law firm may occasionally have an interest that is "adverse" to another client of the same law firm, as defined by the California State Bar's Rules of Professional Conduct for attorneys ("State Bar Rules"). "Adverse" in this context does not necessary mean that there is an actual dispute between the two clients, but also includes clients that are, or may be, on opposite sides of a transaction or matter (such as the negotiation of a contract) as well as opposite sides of litigation or a dispute. When clients are potentially "adverse," the law firm must inform the clients and seek informed consent and a waiver to continue the representation. With informed consent and a waiver, an attorney can represent multiple clients that are technically "adverse" under the State Bar Rules.

RWG represents several public agencies that are potentially "adverse" to VCE under this definition. The requested waiver specifically addresses three other clients of RWG: City of Davis, East Bay Community

Energy (EBCE), and Silicon Valley Clean Energy (SVCE). VCE has occasionally negotiated contracts with the City of Davis, such as for renewable energy infrastructure, and has negotiated cost-sharing and joint representation agreements with EBCE and SVCE. Although the relationships between VCE and these other entities has always been collaborative and in furtherance of their common goals, the State Bar Rules require that RWG inform VCE of the potential conflict and obtain a waiver to continue representing VCE.

If a situation arises in the future where these parties' interests are not well-aligned, RWG may seek additional informed consent and waiver from VCE and its other clients, or VCE may choose to engage different legal counsel, such as from the County Counsel's Office, which continues to provide legal services to VCE. In the unlikely event of a true dispute or litigation to occur between two clients, RWG would not represent either party in that litigation.

Conclusion

Mitch Sears, VCE's Interim General Manager, executed the attached waiver on July 20, 2021, allowing Ms. Khalsa and RWG to represent VCE as well as the City of Davis, EBCE, and SVCE in contractual negotiations where the parties are acting collaboratively. Senior Deputy County Counsel Eric May has provided VCE legal advice on this matter and approved the waiver as to form. For maximum transparency, staff recommends that the Board take action to ratify this waiver.

Attachment: Executed Waiver



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July 16, 2021

VIA ELECTRONIC MAIL

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Eric May, Co-General Counsel and Senior Deputy County
Counsel
County of Yolo, Office of the County Counsel
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Woodland, California 95695

Re: **Attorney Conflict Waiver Regarding City of Davis and CCA Representation**

Dear Mitch and Eric:

As you and the Board of Directors are aware, I represent the City of Davis as City Attorney. I also represent the East Bay Community Energy Authority as General Counsel. In addition, Richards, Watson, and Gershon represents a number of other CCA programs as general counsel, including Silicon Valley Clean Energy Alliance, Pioneer Community Energy, and Clean Energy Alliance. We occasionally provide special counsel services to other CCA programs in California as well.

We do not believe there is any conflict of interest in RWG providing legal services to each of these entities. Nonetheless, due to the potential for a conflict of interest among or between these parties, RWG is providing this conflict waiver letter for consideration by Valley Clean Energy as well as seeking waivers from the City of Davis, SVCE, and EBCE. These parties occasionally negotiate and enter into contracts with each other and RWG may be asked to represent two or more parties in negotiating an agreement. In addition, the two entities have cooperatively shared personnel and it is possible that conflicts could arise with respect to employment or personnel issues. Finally, RWG will continue to represent other CCAs as General or Special Counsel, and we may seek future waivers if those entities engage in contractual transactions with VCE.

We apologize for the length and formality of this letter, but we seek to provide a full disclosure of relevant identifiable issues.

Rule 1.7 of California Rules of Professional Conduct

Rule 1.7 (Conflict of Interest: Current Clients) is set forth at Exhibit 1 for your convenience. Rule 1.7(a) of the California Rules of Professional Conduct states that “[a] lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.” Further, under Section 1.7(b), “[a] lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client or a third person, or by the lawyer’s own interests.” Rule 1.7(d) states that the representation under Rule 1.7 is permitted only if there is compliance with 1.7(a) -1.7(c) and if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law; and
- (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.

The Comments to Rule 1.7 state that 1.7(a) and 1.7(b) “apply to all types of legal representations, including the concurrent representation of multiple parties . . . in a single transaction or in some other common enterprise . . .”

Summary of Conflict Issues

In connection with requesting your informed written consent, we are obligated to inform you of “the relevant circumstances” and of “the material risks, including any actual and reasonably foreseeable adverse consequences” of RWG’s representation of (i) the City of Davis as City Attorney, and (ii) other CCA programs in California.

City of Davis

The City of Davis is a member agency of Valley Clean Energy Alliance, which is a joint powers authority. Davis residents are customers of VCE. In itself, representation of a Joint Powers Authority and one of its member agencies does not create a conflict of interest or require a conflict waiver. A conflict waiver is required, however, where a lawyer represents two parties who negotiate and enter into contracts with each other. The City of Davis and VCE have entered into contracts in the past, and will likely do so in the future. Furthermore, the two agencies

have cooperatively shared staff. Accordingly, under Rule 1.7(a), it is necessary for RWG to obtain the informed written consent of Davis and VCE to allow RWG to continue this representation.

RWG reasonably believes it can provide competent and diligent representation to VCE. At the same time, RWG reasonably believes that it can continue to provide competent and diligent representation to the City of Davis. That said, it is possible that a dispute could arise between the entities with respect to a contract between the parties or an employment matter.

Other CCA Program Representation

RWG represents a number of CCA programs as general counsel or special counsel, but this waiver request is specific to East Bay Community Energy and Silicon Valley Clean Energy, which have contracted with VCE in the past and are likely to do so in the future.

California CCAs work together frequently to promote regulatory and legislative changes that benefit CCAs. CCAs have also entered into contracts with each other with respect to joint representation, information sharing and confidentiality, cost-sharing, and to create new joint powers authorities.

RWG reasonably believes it can provide competent and diligent representation to VCE, and that it can continue to provide competent and diligent representation to SVCE, EBCE, and other CCA programs. That said, it is possible that a dispute between two CCAs we represent could arise, due to a contract dispute, differing positions on legal issues, or competition for customers.

Analysis

At first impression, VCE, the City of Davis, and other CCAs generally act collaboratively and towards shared goals when engaging in transactions, and VCE's relationship with these entities is not what one ordinarily would think of as "adverse." However, in any transaction, VCE may have different concerns and interests than the other parties.

Our representation of VCE is not prohibited by law and does not involve the assertion of any claim in litigation or other proceeding before a tribunal. (Rule 1.7(d)(2)&(3)). Further, RWG's representation of VCE will not be materially limited by RWG's continued representation of the City of Davis or other CCA programs. We will represent VCE zealously on CCA matters. We have absolutely no reason to believe that our objectivity or representation of VCE will be compromised in any way by RWG's representation of the City of Davis or other CCAs.

In evaluating the "material risks and any actual and reasonably foreseeable adverse consequences" to the requested consent, we believe VCE should consider two issues that concern potential indirect consequences.

First, VCE should consider the issue of whether our representation of these other entities could affect our zealous representation of VCE or cause VCE to question our loyalty or performance, including our review of any contracts or arrangements between VCE and other public agencies we represent. When an attorney represents multiple parties, there is the theoretical possibility that the attorney may not vigorously represent each client, or may have his or her independence or judgment compromised in some way. An effective attorney-client relationship requires the client to have confidence in its counsel's loyalty and objectivity. As noted above, we do not see any significant potential for such adverse consequences at this time.

Second, VCE should consider whether it would be adversely affected by any negative perception as a result of our simultaneous representation of the City of Davis and other CCA programs. It is fairly common for firms of our size with specialized expertise to represent actually or potentially adverse clients with their mutual consent. In reviewing our request for consent, we suggest the VCE consider whether it concurs with our view regarding the unlikely chance of adverse public perception from our representation of multiple public agency clients.

In the very unlikely event that litigation resulted with either the City of Davis or other CCA programs, we would feel obligated to not represent any of the parties in such litigation.

By executing this letter, VCE acknowledges that it has obtained independent advice of counsel with respect to the waiver of the potential conflicts described above.

Waiver

If, after considering the foregoing, VCE agrees to waive any conflict of interest arising from: (i) RWG's representation of VCE, as General Counsel; (ii) RWG's simultaneous representation of the City of Davis, as City Attorney; and (iii) RWG's representation of other CCA programs, specifically EBCE and SVCE, on transactions between the parties, and any legal issues that may arise in the future not adverse to VCE, please sign below and return a copy of this letter. If additional issues or potential conflicts come up between VCE and other parties that RWG represents, I may seek additional waivers in the future.

This waiver can be withdrawn at any time. If circumstances arise where you feel that RWG should not represent VCE, I can assist you in ensuring VCE receives adequate legal advice on that issue or matter, whether from the Yolo County Counsel's Office or another law firm.

Very truly yours,



Inder Khalsa

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AGREEMENT TO TERMS OF LEGAL SERVICES ENGAGEMENT AND CONSENT AND WAIVER

I have read, understand and acknowledge the disclosures and description of potential adverse consequences set forth in the letter of Richards, Watson & Gershon dated July 16, 2021 (“Consent Request Letter”). Valley Clean Energy Alliance (“VCE”, based upon the Consent Request Letter, consents to, and waives any conflict or potential conflict arising from, the simultaneous representation by Richards, Watson & Gershon (“RWG”) of VCE as well as (i) the City of Davis, as City Attorney, and (ii) East Bay Community Energy Authority and Silicon Valley Clean Energy Alliance as General Counsel on transactions between the parties and any legal issues that may arise in the future not adverse to VCE in RWG’s representation of these parties.

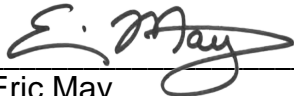
Date: July 20, 2021

Valley Clean Energy Alliance

By: 

Mitch Sears

Title: Interim General Manager

By: 

Eric May

Title: Co-General Counsel



The State Bar of California

Rule 1.7 Conflict of Interest: Current Clients (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (a) A lawyer shall not, without informed written consent* from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.
- (c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:
 - (1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
 - (2) the lawyer knows* or reasonably should know* that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm,* or has an intimate personal relationship with the lawyer.
- (d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:
 - (1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law; and
 - (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.
- (e) For purposes of this rule, "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,* or a discrete and identifiable class of persons.*

Comment

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits

undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. (See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].) A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person* in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm.* 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. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[3] 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 paragraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply with respect to the relationship between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[4] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) 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, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be

able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially by the resolution of the matter.

[5] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[6] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals* at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the 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' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[7] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this rule. (See, e.g., Bus. & Prof. Code, § 6068, subd. (e)(1) and rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this rule is likewise precluded.

[8] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr.

185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[9] This rule does not preclude an informed written consent* to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably* understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably* foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably* understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d). A lawyer who obtains from a client an advance consent that complies with this rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. (See rule 1.8.8.)

[10] A material change in circumstances relevant to application of this rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more 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 clients from whose representation the lawyer has withdrawn. (See rule 1.9(c).)

[11] For special rules governing membership in a legal service organization, see rule 6.3; and for work in conjunction with certain limited legal services programs, see rule 6.5.

**NEW RULE OF PROFESSIONAL CONDUCT 1.7
(Former Rule 3-310(B), (C))
Conflict of Interest: Current Client**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations: Model Rules 1.7 (Current Client Conflicts); 1.8(f) (third party payments); 1.8(g) (aggregate settlements); and 1.9 (Duties To Former Clients).

The result of the Commission’s evaluation is a two-fold recommendation for implementing:

- (1) the Model Rules’ framework of having separate rules that regulate different conflicts situations: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and
- (2) proposed Rule 1.7 (conflicts of interest: current clients), which regulates conflicts situations that are currently regulated under rule 3-310(B) and (C). Proposed rule 1.7 largely tracks the ABA approach to current client conflicts of stating general rules regarding “direct adversity” conflicts between clients of a lawyer (addressed incompletely in current rule 3-310(C)(2) and (C)(3)) and “material limitation” conflicts (e.g., a joint representation conflict), which are currently addressed in current rule 3-310(C)(1) and 3-310(B).

Proposed rule 1.7 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization..

1. **Recommendation of the ABA Model Rule Conflicts Framework**. The rationale underlying the Commission’s recommendation of the ABA’s multiple-rule approach is its conclusion that such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules.¹

¹ Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client]).

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers

2. **Recommendation of the ABA approach of proposed Rule 1.7.** The recommended approach tracks the ABA Model Rule, which generally describes two kinds of conflict situations relating to current clients: (1) those involving direct adversity, (MR 1.7(a)(1)), and (2) those involving a significant risk that a lawyer's representation of current clients will be materially limited by the lawyer's responsibilities to another client or third person, or by the lawyer's personal interests. (MR 1.7(a)(2)).

There are a number of reasons for the Commission's recommendation. *First*, the proposed rule will facilitate compliance with enforcement of the current client conflicts rule provisions by incorporating more clearly-stated general conflicts principles, (see paragraph (a) and introductory clause to paragraph (b)), while providing specific examples in the comments to the rules. *Second*, the approach will also increase client protection by including the generally-stated conflicts principles that are subject to regulation under the rule, rather than limiting the rule's application to several discrete situations as in current rule 3-310(B) and (C). *Third*, by incorporating the generally-stated principles in Model Rule 1.7(a)(1) and (2) into paragraphs (a) and (b), the proposed rule will help promote a national standard in conflicts of interest. *Fourth*, by incorporating the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts into proposed paragraph (d), the proposed rule will move this important concept into the black letter rather than relegate it to two separate Discussion paragraphs in the current rule (see rule 3-310, Discussion paragraphs 2 and 10).

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed Rule 1.7 incorporates the concept of direct adversity of interests of two current clients. This carries forward the concept in current rule 3-310(C)(2) and (3), and Model Rule 1.7(a)(1).

Paragraph (b) incorporates the concept of material limitations on a lawyer's representation of a client because of duties owed another current or former client, or because a relationship with a client or other person. The paragraph borrows the language of Model Rule 1.7(a)(2) in carrying forward the concepts found in current rule 3-310(B) and (C)(1).

Paragraph (c) carries forward the concepts in current rules 3-310(B)(1) and 3-320. Similar to paragraph (b), this paragraph is concerned with limitations on the lawyer's ability to represent a client because of the lawyer's duties to or relationships with other persons. These situation is not included in paragraph (b) because the Commission believes that the standard in current rule 3-310(B) – the lawyer must only provide written disclosure to the client of the relationship – should be carried forward, rather than applying paragraph (b)'s "informed written consent"

and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees). The Commission is currently studying those rules.

standard.² This separate paragraph recognizes that there are certain instances when the duties owed to or relationships with other persons do not create a “significant risk” of a material limitation on the representation so as to require the heightened informed written consent standard, but nevertheless warrants the reduced “written disclosure” standard currently found in rule 3-310(B).

Paragraph (d) incorporates the provisions in Model Rule 1.7(b)(1) – (3) concerning unconsentable conflicts. The concept is currently found in two separate Discussion paragraphs of current rule 3-310 (paragraphs 2 and 10).

Unlike the Model Rule with 35 comments, there are only 12 comments to proposed Rule 1.7, all of which provide interpretative guidance or clarify how the proposed rule, which is intended to govern a broad array of complex conflicts situations, should be applied. Comment [1] explains “direct adversity” of legal interests and importantly distinguishes clients with economically adverse interests. Comment [2] provides a definition of “matter,” a concept central to the rule’s application. Comment [3] carries forward the concept in current rule 3-310, Discussion ¶.7, and explains the rule’s application to joint client representations. Comment [4] carries forward current Discussion ¶.9, which the Supreme Court approved in 2002 after extensive debate among various stakeholders in the insurance industry. Comment [5] explains how paragraph (b) should be applied by providing several discrete examples. Comment [6] explains how paragraph (c) should be applied by comparison to paragraph (b). Comment [7] explains when adverse positions clients have taken on a legal issue may require a lawyer to obtain the clients’ informed written consent. Comment [8] crucially explains that a lawyer’s duty of confidentiality may preclude the lawyer from providing a disclosure sufficient to ensure the client’s consent is informed. Comment [9] carries forward the substance of current Discussion ¶¶.2 and 10 concerning unconsentable conflicts and provides citations to several cases that have addressed the issue. Comment [10] is new and provides interpretative guidance regarding paragraphs (a) and (b) regarding the extent to which they might apply to advance consents to future conflicts of interest. Comment [11] notes that a second consent may be required should the circumstances under which a consent was originally obtained change. Comment [12] provides cross-references to proposed Rules 6.3 and 6.5, both of which permit otherwise conflicted representations or provide exceptions for imputation under certain conditions.

1st Round 90-day Public Comment Period

Following consideration of public comment, the Commission made several changes to both the text and comment of proposed Rule 1.7.

Text. In paragraphs (a) and (b), the Commission added the phrase “in compliance with paragraph (d)” to clarify that a lawyer must not only obtain the client’s informed written consent but must also comply with the requirements in paragraph (d).

In paragraph (b), the Commission deleted the examples that had been provided in the public comment draft except for former subparagraph (b)(1), which has been moved to paragraph (c) as subparagraph (c)(1). The version issued for 90-day public comment represented a

² The Commission determined that current rule 3-320’s requirement of merely “informing” the client of the relationship with the other party’s lawyer was not sufficiently rigorous to enhance public protection.

“hybrid” approach that involved merging the “checklist approach”³ of regulating conflicts involving current clients in current rule 3-310(B) and (C) with the ABA Model Rule’s approach, which generally describes two kinds of conflict situations relating to current clients: (1) those involving direct adversity, (MR 1.7(a)(1)), and (2) those involving a significant risk that a lawyer’s representation of current clients will be materially limited by the lawyer’s responsibilities to another client or third person, or by the lawyer’s personal interests. (MR 1.7(a)(2)). After consideration of public comment, including a lengthy letter submitted by the State Bar Committee on Professional Responsibility and Conduct, the Commission no longer favored this hybrid approach and revised the rule to be a variation of the Model Rule 1.7.

The Commission added new paragraph (c), with a new introductory clause. Paragraph (c) carries forward subparagraph (b)(1) of the public comment draft as subparagraph (c)(1) and paragraph (c) of the public comment draft as subparagraph (c)(1). Similar to paragraphs (a) and (b), paragraph (c) provides that not only must the lawyer give written disclosure to the client of the relationships in paragraphs (c)(1) and (2), but must also comply with the requirements in paragraph (d).

Comment. In Comment [2], which addresses the issue of positional conflicts, the first sentence has been deleted and the second sentence has been moved to new Comment [7], which contains a fuller discussion of positional conflicts.

The Commission has added new Comment [2], which explains what is meant by the term “matter.” This comment is also cross-referenced in the Comment to both Rule 1.9 (Duties to Former Clients) and Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officials and Employees).

In Comment [4], the Commission added a reference to paragraph (b), which also corresponds to current rule 3-310(C)(3).

In Comment [5], the Commission added the clause “or relationships, whether legal, business, financial, professional, or personal” to clarify the scope of paragraph (b). The last sentence of Comment [5] was also added for the same reason.

New Comment [6] has been added to clarify the scope and application of new paragraph (c). Public comment suggested that the public comment version of paragraphs (b) and (c) as drafted created confusion because their coverage might overlap in some situations.

New Comment [7] contains a fuller discussion of positional conflicts. See Comment [2], above.

In Comment [10] (Comment [8] in public comment draft), the Commission added a new third sentence (“The experience and sophistication ... consent.”) to identify factors in determining the feasibility of obtaining an advance consent.

³ The “checklist” approach in current rule 3-310(B) and (C) involves the identification of discrete categories of current conflict situations. Unless an alleged conflict fits within one of these discrete categories, the lawyers involved will not be subject to discipline.

2nd Round 45-day Public Comment Period

Following consideration of a second round of public comments, the Commission made changes to both the text and comment of proposed Rule 1.7.

Text. Paragraphs (a), (b) and (c) identify when a conflict of interest may arise and state that a lawyer must obtain a client's informed consent or make written disclosure to a client, depending on the type of conflict. Paragraph (d) identifies circumstances where a conflict of interests cannot be cured by client consent or disclosure. To reinforce the interrelationship of these paragraphs, in paragraph (d) the Commission added the phrase if "the lawyer complies with paragraphs (a), (b), and (c)." Public comments received stated that this was not clear and might lead to confusion about whether consent or disclosure, standing alone, can cure a conflict.

Comment. Comment [1] explains how to apply the concept of "direct adversity" by providing non-exclusive examples. The Commission revised this comment to expressly state that the identified situations are non-exclusive examples of direct adversity conflicts, and to add an additional example that describes the directly adverse conflict that arises when a lawyer is retained to sue a person who is a current client of the lawyer or the lawyer's firm.

In Comment [2], the Commission added language to clarify that a "matter" for purposes of this rule includes a "transaction," an "investigation," a "charge," an "accusation" or an "arrest." Public comments recommended broader language to avoid an overly narrow construction of the rule.

Comment [4] carries forward Discussion paragraph 9 in current rule 3-310, which the Supreme Court of California approved in 2002 after extensive study with participants of various stakeholders in the insurance industry. Discussion paragraph 9 clarifies the extent to which rule 3-310(C)(3) might apply to a lawyer's duties in an insurance defense tripartite relationship. The Commission has revised the comment to refer only to paragraph (a) of the proposed rule which carries forward current rule 3-310(C)(3).

Comment [7] in part carries forward Discussion paragraph 1 in current rule 3-310 which explains that representing inconsistent legal positions in different matters ordinarily does not trigger a conflict of interest. The Commission revised the second sentence of Comment [7] to use a simpler sentence structure and to use the phrase "sufficient, standing alone" to avoid the comment from being potentially overbroad. This clarification was recommended by a public comment.

With these changes, the Board's Committee on Regulation and Discipline authorized an additional 30-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule

The additional 30-day public comment period ended on March 6, 2017 and three written comments were received. The Commission considered these comments at its meeting on March 7, 2017. At this meeting, the Commission also considered two comments that were received after the deadline for the prior 45-day comment period. Following consideration of these comments, the Commission made no changes to the rule and voted to recommend the rule for adoption. Members of the Commission submitted dissents to this rule that can be found following the Report and Recommendation.

The Board adopted proposed rule 1.7 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. The Court deleted Comment [2], and moved the definition of “matter” to the text of the rule as paragraph (e), and renumbered the subsequent Comments. The Supreme Court also deleted “or organization” in Comment [1].

Supreme Court Action (September 26, 2018)

Subsequently, the Board adopted staff recommended “clean-up” revisions to various rules, including this rule. All of these changes were non-substantive and, for example, implemented copy editing corrections to style and punctuation. The Supreme Court approved the “clean-up” revisions operative November 1, 2018 by order dated September 26, 2018.