

**American Bar Association  
CPR Policy Implementation Committee**

**Variations of the ABA Model Rules of Professional Conduct**

**Rule 1.7**

**Conflict of Interest: Current Clients**

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

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

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

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[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).

[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.

[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].

[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).

#### **Identifying Conflicts of Interest: Directly Adverse**

[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 matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

#### **Identifying Conflicts of Interest: Material Limitation**

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the

client.

### **Lawyer's Responsibilities to Former Clients and Other Third Persons**

[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.

### **Personal Interest Conflicts**

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[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.

[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).

### **Interest of Person Paying for a Lawyer's Service**

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client 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.

### **Prohibited Representations**

[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.

[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).

[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 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

	<p>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><b>Informed Consent</b></p> <p>[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).</p> <p>[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><b>Consent Confirmed in Writing</b></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</p>
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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.

### **Revoking Consent**

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation 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.

### **Consent to Future Conflict**

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and

is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

### **Conflicts in Litigation**

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as 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.

[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.

[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.

### **Nonlitigation Conflicts**

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

[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.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or

arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

### **Special Considerations in Common Representation**

[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 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.

[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.

[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.

[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).

[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.

### **Organizational Clients**

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

	<p>other client.</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 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>Variations from ABA Model Rule are noted. Based on reports of state committees reviewing recent changes to the model rules. For information on individual state committee reports, see <a href="http://www.abanet.org/cpr/jclr/home.html">http://www.abanet.org/cpr/jclr/home.html</a>.</p>
<p><u>AL</u> Effective 2/19/09</p>	<p>Deletes clause, "Except as provided by paragraph (b);" adds "of that client" after "representation;" replaces "involves...exists if" with, "will be directly adverse to another client, unless"</p> <p>(a)(1) is comparable to MR, but with significantly different wording: "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and"</p> <p>Adds as (a)(2): each client consents after consultation</p> <p>Adds as (b):</p> <p><i>(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:</i></p> <p><i>(1) the lawyer reasonably believes the representation will not be adversely affected; and</i></p> <p><i>(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.</i></p> <p>Does not adopt MR Comments, except for [23]</p> <p>Adds new sections:</p>

***Loyalty to a Client***

*Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The 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 parties and issues involved and to determine whether there are actual or potential conflicts of interest.*

*If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.*

*As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.*

*Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict 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. Consideration should be given to whether the client wishes to accommodate the other interest involved.*

***Lawyer's Interests***

*The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters*

*that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. 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 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 interest.*

First paragraph of “Conflicts in Litigation” is similar to Comment [23], but changes language: changes reference in first sentence to Paragraph (a); deletes “the same” and clause, “regardless...consent;” deletes “On the other hand;” adds “impermissible” before “conflict may exist;” deletes “in civil litigation;” adds “risk of adverse effects is minimal and” before “the requirements;” adds to end: “Compare Rule 2.2 involving intermediation between clients;” does not adopt [24] and [25];

Adds two paragraphs to “Conflicts in Litigation” section:

*Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.*

*A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.*

Adds sections:

***Interest of Person Paying for a Lawyer's Service***

*A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance*

*agreement, and the insurer provides special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.*

***Other Conflict Situations***

*Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect 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 actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.*

*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 of interest among them.*

*Conflict questions may also 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 arise. 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. The lawyer should make clear the relationship to the parties involved.*

*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.*

***Conflict Charged by an Opposing Party***

*Resolving questions of conflict of interest is primarily the*

	<p><i>responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.</i></p>
<p><a href="#">AK</a> Effective 4/15/09</p>	<p>Adds (c): <i>A lawyer shall act with reasonable diligence in determining whether a conflict of interest, as described in paragraphs (a) and (b) of this rule, or Rules 1.8, 1.9 and 1.10 exists.</i></p> <p>Adds (d): <i>For purposes of this rule, the term “client” does not include unidentified members of a class in a class action or identified members of a class when individual recovery is expected to be de minimis.</i></p> <p>[1] Changes reference at end of last sentence to Rule 9.1(g) and (c); Does not adopt MR [12]; [12] and [13] are the same as MR [13] and [14]; [14] is similar to MR [15] but first sentence is replaced with: “Waiver 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;” [15] is the same as MR [16] [16] is similar to MR [17] but references Rule 9.1(r) instead of Rule 1.0(m). Does not adopt MR [17] [17] is similar to MR [18] but replaces “See Rule 1.0(e) (informed consent)” with “See Rule 9.1(g) (informed consent)” [18] is MR [19] [19] is similar to MR [20] but replaces “See Rule 1.0(b). See also Rule 1.0(n)” with “See Rule 9.1(c). See also Rule 9.1(s);” Replaces second reference to Rule 1.0(b) with reference to Rule 9.1(c). [20] is MR [21] [21] through [23] are the same as MR [22] through [24] [24] is similar to MR [25], but adds to end: “However, normal conflict rules apply when the lawyer litigates facts or claims specific to an individual class member.” [25] through [32] are the same as MR [26] thgouh [33] [33] is similar to MR [34], but adds, after “See Rule 1.13(a),” “and 1.13(f) (the definition of constituent)” [34] is MR [35].</p>
<p><a href="#">AZ</a> Effective 12/1/03</p>	<p>Same as MR, but moved (b)(4) up into introductory paragraph of (b)</p>

<p><a href="#">AR</a> Effective 5/1/05</p>	<p>Same as MR</p>
<p><a href="#">CA</a> Effective 9/1/09</p>	<p>Does not adopt MR. Equivalent Rule: <b><i>Rule 3-310 Avoiding the Representation of Adverse Interests</i></b> (A) <i>For purposes of this rule:</i>  <ul style="list-style-type: none"> <li>(1) <i>"Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;</i></li> <li>(2) <i>"Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;</i></li> <li>(3) <i>"Written" means any writing as defined in Evidence Code section 250.</i></li> </ul> (B) <i>A member shall not accept or continue representation of a client without providing written disclosure to the client where:</i>  <ul style="list-style-type: none"> <li>(1) <i>The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or</i></li> <li>(2) <i>The member knows or reasonably should know that:</i> <ul style="list-style-type: none"> <li>(a) <i>the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and</i></li> <li>(b) <i>the previous relationship would substantially affect the member's representation; or</i></li> </ul> </li> <li>(3) <i>The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or</i></li> <li>(4) <i>The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.</i></li> </ul> (C) <i>A member shall not, without the informed written consent of each client:</i>  <ul style="list-style-type: none"> <li>(1) <i>Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or</i></li> <li>(2) <i>Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or</i></li> <li>(3) <i>Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.</i></li> </ul> (D) <i>A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.</i>  (E) <i>A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the</i></p>

	<p><i>member has obtained confidential information material to the employment.</i></p> <p><i>(F) A member shall not accept compensation for representing a client from one other than the client unless:</i></p> <p style="padding-left: 40px;"><i>(1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and</i></p> <p style="padding-left: 40px;"><i>(2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and</i></p> <p style="padding-left: 40px;"><i>(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:</i></p> <p style="padding-left: 80px;"><i>(a) such nondisclosure is otherwise authorized by law; or</i></p> <p style="padding-left: 80px;"><i>(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.</i></p>
<p><a href="#">CO</a> Effective 1/1/08</p>	<p>Same as MR</p>
<p><a href="#">CT</a> Effective 1/1/07</p>	<p>(b)(3): replaces “a tribunal” with “any tribunal”</p>
<p><a href="#">DE</a> Effective 7/1/03</p>	<p>Same as MR</p>
<p><a href="#">District of Columbia</a> Effective 2/1/07</p>	<p>Conflicts of Interest: General</p> <p><i>(a) A lawyer shall not advance two or more adverse positions in the same matter.</i></p> <p><i>(b) Similar to MR (a) but deletes “if the representation...exists if” and adds: “with respect to a matter if”</i></p> <ul style="list-style-type: none"> <li>○ <i>(1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;</i></li> <li>○ <i>(2) Similar to MR (a)(1) but changes wording: Such representation will be or is likely to be adversely affected by representation of another client;</i></li> <li>○ <i>(3) Representation of another client will be or is likely to be adversely affected by such representation;</i></li> <li>○ <i>(4) The lawyer’s professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer’s responsibilities to or interests in a third party or the lawyer’s own financial, business, property, or personal interests.</i></li> </ul> <p><i>(c) Similar to MR (b) but deletes clause, “Notwithstanding...paragraph (a)” and inserts between “client” and “if:” with respect to a matter in the circumstances described in paragraph (b) above if”</i></p> <ul style="list-style-type: none"> <li>○ <i>(1) Similar to MR (b)(4) but adds “potentially” before</i></li> </ul>

	<p>“affected,” changes “gives” to “provides,” deletes “confirmed in writing” and adds: “to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and”</p> <ul style="list-style-type: none"> <li>o (2) Identical to MR (b)(1)</li> </ul> <p>Adds: <i>(d) If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).</i></p>
<p><a href="#">FL</a> Effective 5/22/06</p>	<p>(a) only includes the first part of the introductory phrase in MR (a): Except as provided in subdivision (b), a lawyer shall not represent a client if:</p> <p>(a)(2) replaces “significant” with “substantial”</p> <p>(b): does not use “concurrent”</p> <p>(b)(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and</p> <p>adds (c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.</p> <p>adds (d) Lawyers Related by Blood or Marriage. 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.</p> <p>Adds (e) Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty 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. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.</p>
<p><a href="#">ID</a> Effective 7/1/04</p>	<p>Adds to end of (a)(2): or by the personal interests of the lawyer, including family and domestic relationships.</p>
<p><a href="#">IL</a> Effective 1/1/2010</p>	<p>(b)(4) Deletes “confirmed in writing” at the end of the paragraph.</p>
<p><a href="#">IN</a> Effective 1/1/05</p>	<p>Same as MR</p>
<p><a href="#">IA</a> Effective 7/1/05</p>	<p>Adds (c) <b>In no event shall a lawyer represent both parties in dissolution of marriage proceedings.</b></p>
<p><a href="#">KS</a></p>	<p>(a)(2): replaces “significant” with “substantial”</p>

Effective 7/1/07	
<a href="#">KY</a> Effective 7/15/09	(b)(4): adds to end “The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.”
<a href="#">LA</a> Effective 3/1/04	Same as MR
<a href="#">ME</a> Effective 8/1/09	(a)(1): Adds clause to end: “even if representation would not occur in the same matter or in substantially related matters” (b)(1): replaces “will” with “would” (b)(2) same as MR (b)(4) MR (b)(2) or (3) are moved to new Paragraph (c): (c) <i>Under no circumstances may a lawyer represent a client if:</i> <b>(1) the representation is prohibited by law; (almost identical to MR (b)(2) but deletes “not”)</b> <b>(2) the representation involves 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. (almost identical to MR (b)(3) but changes “does not involve” to “involves”</b>
<a href="#">MD</a> Effective 7/1/05	Did not change title (a) and (b): deletes the word “concurrent”
<a href="#">MI</a> (as proposed July 2004)	(b)(3): deletes “litigation or other”
<a href="#">MN</a> Effective 10/1/05	Same as MR
<a href="#">MS</a> Effective 11/3/05	Changes title to: “Conflict of Interest: General Rule” (a) Changes wording: deletes clause, “Except as provided in paragraph (b);” deletes “involves a concurrent conflict...exists if” and replaces with: “of that client will be directly adverse to another client, unless the lawyer reasonably believes” (1) Similar to MR (b)(1) but deletes “of one client,” replaces “be directly adverse to another client” with “not adversely affect the relationship with the other client” (2) Similar to MR (b)(4) but changes wording to: “each client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the adverse representation and the advantages and risks involved.” (b) <i>A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the lawyer reasonably believes:</i> <b>(1) the representation will not be adversely affected; and</b>

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	<i>(2) the client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the representation and the advantage and risks involved.</i>
<a href="#">MO</a> Effective 7/1/07	Same as MR
<a href="#">MT</a> Effective 4/1/04	Same as MR
<a href="#">NE</a> Effective 9/1/05	Same as MR
<a href="#">NV</a> Effective 5/1/06	Same as MR
<a href="#">NH</a> Effective 1/1/08	Same as MR
<a href="#">NJ</a> Effective 1/1/04	Did not change rule title (b): MR (b)(4) is placed first as (b)(1) and the following language is added at the end: “after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;”
<a href="#">NM</a> Effective 11/2/09	(a) Adds title: “Representation involving concurrent conflict of interest.” (b) Adds title: “Permissible representation when concurrent conflict exists.”
<a href="#">NY</a> Effective 4/1/09	<i>(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.</i> (b) Identical to MR (b)
<a href="#">NC</a> Effective 3/1/03	(a)(2): “may” replaces “will”
<a href="#">ND</a> Effective 8/1/06	<b>CONFLICT OF INTEREST: GENERAL RULE</b> (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.

	<p><b>(b)</b> A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.</p> <p><b>(c)</b> A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:</p> <ul style="list-style-type: none"> <li>(1) the lawyer reasonably believes the representation will not be adversely affected; and</li> <li>(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.</li> </ul> <p><b>(d)</b> Except as required or permitted by Rule 1.6, a lawyer shall not use information relating to representation of a client to the disadvantage of a client unless a client who would be disadvantaged consents after consultation.</p>
<p><a href="#">OH</a> Effective 2/1/07</p>	<p><b>(a)</b> A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following apply:</p> <ul style="list-style-type: none"> <li>(1) the representation of that client will be directly adverse to another current client;</li> <li>(2) there is a significant risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.</li> </ul> <p><b>(b)</b> A lawyer shall not accept or continue the representation of a client if a conflict of interest is created pursuant to division (a) of this rule, unless all of the following apply:</p> <ul style="list-style-type: none"> <li>(1) the lawyer will be able to provide competent, diligent, and loyal representation to each affected client;</li> <li>(2) each affected client gives informed consent, confirmed in writing;</li> <li>(3) the representation is not precluded by division (c) of this rule.</li> </ul> <p><b>(c)</b> Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:</p> <ul style="list-style-type: none"> <li>(1) the representation is prohibited by law;</li> <li>(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.</li> </ul>
<p><a href="#">OK</a> Effective 1/1/08</p>	<p>Same as MR</p>
<p><a href="#">OR</a> Effective 12/1/06</p>	<p>Uses "current" in place of "concurrent" throughout</p> <p>Adds as (a)(3): <i>the lawyer is related to another lawyer as parent, child, sibling, spouse or domestic partner in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter</i></p> <p>Inserts as (b)(3): <i>the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose</i></p>

	<i>on behalf of another client; and</i>
<a href="#">PA</a> Effective 7/1/06	Does not include "confirmed in writing" in (b)(4)
<a href="#">RI</a> Effective 4/15/07	Same as MR
<a href="#">SC</a> Effective 10/1/05	Same as MR
<a href="#">SD</a> Effective 1/1/04	(b)(4): "same matter" replaces "other proceeding"
<a href="#">TN</a> Effective 3/1/03	<p><i>(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:</i></p> <p style="padding-left: 40px;"><i>(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and</i></p> <p style="padding-left: 40px;"><i>(2) each client consents in writing after consultation.</i></p> <p><i>(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:</i></p> <p style="padding-left: 40px;"><i>(1) the lawyer reasonably believes the representation will not be adversely affected; and</i></p> <p style="padding-left: 40px;"><i>(2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.</i></p> <p><i>(c) A lawyer shall not represent more than one client in the same criminal case, unless</i></p> <p style="padding-left: 40px;"><i>(1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and</i></p> <p style="padding-left: 40px;"><i>(2) each client consents in writing after consultation concerning the implications of the common representation, along with the advantages and risks involved.</i></p>
<a href="#">UT</a> Effective 11/1/05	Same as MR
<a href="#">VT</a> Effective 9/1/09	Same as MR
<a href="#">VA</a> Effective 1/1/04	(b): adds at end "each affected client consents after consultation, and" (b)(4): the consent from the client is memorialized in writing
<a href="#">WA</a> Effective	Adds to end of (b)(4): (following authorization from the other client to make any required disclosures)

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9/1/06	
<a href="#">WI</a> Effective 7/1/07	(b)(4): adds “signed by the client” to end
<a href="#">WY</a> Effective 7/1/06	(b)(4), before proceeding with the representation, each affected client makes an informed decision to waive the conflict, in writing signed by the client

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