

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.—
Amended June 17, 2009, eff. Sept. 1, 2009.

Comment

General Principles

[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, marriage or civil union, 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, spouse or civil

union partner, 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] These rules do not expressly prohibit a lawyer from engaging in a sexual relationship with a client, but such relationships could give rise to a variety of violations of specific provisions of the rules. See Rule 1.8, Comment [17].

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 of interest.

[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).

Informed Consent

[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).

[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.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

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 other client.

[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.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.7 is replaced by Model Rule 1.7 as completely revised by the ABA in 2002 to eliminate confusion created by the form and language of the original rule.

The Supreme Court addressed issues under former V.R.P.C. 1.7 in *Deptula v. Kane*, 2008 WL 4906905 (Vt.) (unpub. entry order, Nov. 5, 2008) (trial court correctly ruled that expert evidence was necessary to establish plaintiff's legal malpractice claims, which included alleged violation of V.R.P.C. 1.7), and *Smedberg v. Detlef's Custodial Service, Inc.*, 2007VT99, 182 Vt. 349, 940 A.2d 674 (argument "unpersuasive" that plaintiff's lawyer's prior representation of employer would have been a conflict under V.R.P.C. 1.7(b) if plaintiff were a real party in interest in claim against workers' compensation carrier after settlement of plaintiff's claim).

The ABA Reporter's Explanation is as follows:

TEXT:

1. Change caption to "Conflict of Interest: Current Clients"

Rule 1.7 does not purport to define or regulate all types of conflicts but rather only those that arise with respect to current clients. The proposed change will more accurately reflect the limited scope of this Rule. No change in substance is intended.

2. Create single paragraph defining “conflict of interest”

The relationship between [former] paragraphs (a) (directly adverse conflicts) and (b) (material limitation conflicts) is not well understood. Lawyers frequently become confused attempting to determine what constitutes a “directly adverse” conflict when it may not matter because, even when not “directly adverse,” the representation may still involve a conflict under paragraph (b)’s “material limitation” standard.

In addition, [former] paragraph (a) is conceptually confusing since, in most “directly adverse” conflicts, common representation is likely to affect both the relationship with the current client and the representation of the new client. For example, when the lawyer seeks to represent a new client suing an existing client represented by the lawyer in an unrelated matter, [former] paragraph (a) looks to the effect of the new representation on the existing client, while paragraph (b) applies to the effect of the existing relationship on the representation of the new client. Thus, most cases involving directly adverse conflicts need to be analyzed under both paragraphs (a) and (b). There appears to be no reason why both conflicts cannot be analyzed under a single paragraph that defines and prohibits the representation unless informed consent is properly obtained

Under the proposed new structure, paragraph (a) sets forth the basic prohibition against representation involving currently conflicting interests, including the definition of a conflict of interest. Conflict of interest is defined to include both directly adverse conflicts and material limitation conflicts.

Unlike [former] paragraph (b), in which a conflict exists if the representation “may be” materially limited by the lawyer’s interests or duties to others, proposed paragraph (a)(2) limits conflicts to situations in which there is “a significant risk” that the representation will be so limited. This proposed change is not substantive but rather reflects how [former] paragraph (b) is presently interpreted by courts and ethics committees.

Proposed paragraph (a)(2) specifically identifies “former clients” as nonclients to whom the lawyer may owe duties, as distinct from “other persons” to whom the lawyer may owe duties, such as those arising from the lawyer’s role as fiduciary or corporate director. These changes are proposed to make it easier for lawyers to recognize these conflicts when they arise.

The introductory phrases in both paragraphs (a) and (b) are designed to clarify the relationship between the two paragraphs.

The purpose of these proposed changes is to clarify the text and to better educate lawyers regarding the complex subject of conflict of interest. No change in substance is intended.

3. Create single paragraph on consent ability and informed consent

The proposed Rule makes clear that in certain situations a conflict may not be waived by the client. That is, the representation may not go forward even with the client’s consent. Unlike the [former] Rule, the proposed Rule contains a single standard of consentability and informed consent, applicable both to directly adverse and material-limitation conflicts. This standard is set forth in a separate paragraph, both to reflect the separate steps required in analyzing conflicts (i.e., first identify potentially impermissible conflicts, then determine if the representation is permissible with the client’s consent) and to highlight the fact that not all conflicts are consentable.

Under the [former] Rule, consentability turns on a determination that the conflict will “not adversely affect the representation.” The difficulty with this standard is that in order to determine that a conflict exists in the first place, the lawyer must have already determined that the lawyer’s duties or interests are likely to “materially limit” the representation. There is a difference between “material limitation” and “adverse affect on” the representation, but the difference is subtle. As a result, lawyers are understandably confused regarding the circumstances under which consent may be sought.

Paragraph (b) breaks down consentability into three components. The first and most common is modeled after the [former] Rule, in which the goal is to protect clients in situations where the representation is likely to be inadequate. The proposal is to replace the phrase “adverse effect on the representation” with an explicit statement of what that phrase was intended to mean, i.e., that it is unlikely that the lawyer will be able to provide “competent and diligent representation to each affected client.” The terms “competent” and “diligent” are already defined and are generally well understood, thus providing a relatively clear standard that lawyers can apply in making the determination whether to go ahead and seek the client’s consent. The term “reasonably” makes clear that, as under the [former] Rule, the consent ability standard is an objective one.

Paragraphs (b)(2) and (b)(3) articulate situations in which courts and ethics committees have found certain conflicts to be nonconsentable, not only because they may be harmful to clients, but also because there are other interests, for example, the interests of courts, that need to be protected. Paragraph (b)(2) refers to representation “prohibited by law,” that is, law other than the Rules of Professional Conduct. (For example, substantive law in some jurisdictions provides that the same lawyer may not represent more than one defendant in a capital case or both the buyer and seller in a real estate transaction.)

Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in adequate development of each client’s position when the clients are aligned directly against each other in the same litigation. Thus, these conflicts are nonconsentable even if the lawyer reasonably believed that the representation would be competent and diligent. It has been suggested that there may be similar institutional interests in separate representation in contexts outside litigation. Since it is not possible to describe such situations in language that preserves this paragraph’s bright-line test, the Commission believes that these other situations can be adequately addressed under paragraphs (b)(1) and (b)(2).

Finally, paragraph (b)(4) substitutes “informed consent” of the client for “consent after consultation.” It was felt that “consultation” did not adequately convey the requirement that the client receive full disclosure of the nature and implications of a lawyer’s conflict of interest. The term “informed consent” was chosen because it already has a fairly well-accepted meaning in other contexts. That term, which is used throughout the Rules in place of “consent after consultation,” is defined in Rule 1.0(e). In each Rule where the term is used, there will be a cross-reference in the Comment to the definition in Rule 1.0(e), as well as language in the Comment providing specialized guidance.

The purpose of these proposed changes is to clarify the text and better educate lawyers regarding the complex subject of conflict of interest. No change in substance is intended.

4. New requirement that informed consent be “confirmed in writing”

The Commission was urged to require some form of writing, for the benefit of both the lawyer and the client. Some states have done so, and experience indicates that the requirement is not overly burdensome or impractical.

Under the Commission’s proposal, it is not necessary that the client’s agreement be obtained in a writing signed by the client. Rather, the term “confirmed in writing” is defined by proposed Rule 1.0(b) to denote informed consent that is either given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. A writing is required in all instances, but the Comment allows for flexibility when there is not time to memorialize the consent before proceeding with the representation. See Comment [20].

COMMENT:

Conflict of interest doctrine is complicated, and the Commission believes that lawyers are in need of additional guidance. Therefore, the Commission is recommending substantial changes to the Comment to Rule 1.7. The changes are designed to clarify basic conflicts doctrine and to address a number of recurring situations. The proposed organization provides an introduction (Comments [1] through [5]), a general roadmap to conflicts analysis (Comments [6] through [22]) and finally an elaboration of conflicts involving litigation (Comments [23] through [25]), nonlitigation (Comments [26] through [28]), common representation (Comments [29] through [33]) and organizational clients (Comments [34] and [35]).

General Principles

Caption. The caption has been changed to better reflect the subject of the following Comments.

[1] Comment [1] retains and modifies the first sentence of [former] Comment [1] but is otherwise new. It states the rationale for the basic prohibition of representation involving conflicts of interest-to avoid compromising loyalty and independent judgment. It then adds cross-references to Rules 1.8 and 1.9.

[2] This entirely new Comment outlines a fourstep process for recognizing and resolving conflict-of-interest problems.

[3] This Comment incorporates much of the remainder of [former] Comment [1]. Changes in the first sentence reflect the dual requirements of paragraphs (a) and (b) that the lawyer recognize a conflict and decline representation unless the requirements of paragraph (b) have been met. The Comment adds a cross-reference to the Rule 5.1 Comment, which states the requirement that lawyers with managerial authority within a law firm make reasonable efforts to establish internal systems for determining conflicts of interest. The last sentence is identical to the last sentence in [former] Comment [2].

[4] This Comment incorporates much of [former] Comment [2]. Changes are designed to more clearly state the requirements of the Rule where a conflict arises after a representation has commenced and, in addition, to indicate the type of analysis required to determine whether a lawyer must withdraw

from representing one of several clients represented concurrently by the lawyer or, in some cases, from representing all of them.

[5] This new Comment addresses the problem of conflicts that arise after a representation has commenced as a result of unforeseeable developments, such as a merger or acquisition by a corporate client. In the disqualification context, courts have often recognized that it is unreasonable to require the lawyer to withdraw from representing both clients and have permitted the lawyer to withdraw from one of the two representations in order to avoid the conflict (something that is ordinarily not permitted under the so-called “hot potato” doctrine). The Comment specifies that the lawyer may be permitted to withdraw from one of the representations in order to avoid the conflict. The Comment requires the lawyer to comply with Rule 1.16, including seeking court approval where necessary. The Comment further reminds lawyers that they continue to owe the now former client the duty to keep confidential any information gained during the course of the representation.

Identifying Conflicts of Interest: Directly Adverse

Caption. The caption has been added to better reflect the following Comments.

[6] This Comment incorporates much of [former] Comment [3]. It addresses the conflicts defined in paragraph (a)(1), i.e., “directly adverse” conflicts. It provides the rationale for the Rule, addresses the question of whether the Rule applies when a lawyer will have to cross-examine a present client and explains how “directly adverse” conflicts also pose “material limitation” conflicts with respect to the lawyer’s existing client.

[7] This new Comment explains how directly adverse conflicts may arise in some transactional matters.

Identifying Conflicts of Interest: Material Limitation

Caption. The caption has been added to better reflect the following Comment.

[8] This Comment incorporates much of [former] Comment [4]. It addresses the conflicts defined in paragraph (a)(2), i.e., “material limitation” conflicts. The changes are designed to clarify the relationship between paragraphs (a)(1) and (a)(2) and to address the question of how likely the risk of harm must be before a conflict of interest is determined to exist.

Lawyer’s Responsibilities to Former Clients and Other Third Persons

Caption. The caption has been modified to better reflect the subject of the Comment.

[9] This new Comment explains the variety of ways conflicts arise other than from duties to existing or prospective clients, including a specification of some of the ways in which a lawyer’s duties to third persons may interfere with the representation of present clients. It specifies that such third persons include former clients and provides a cross-reference to Rule 1.9. This Comment should help clarify that when there is a conflict between a prospective client and a former client, the representation may be undertaken only if the requirements of both Rules 1.7 and 1.9 are met.

Personal Interest Conflicts

Caption. The caption has been added to better reflect the following Comments.

[10] This Comment addresses conflicts arising from a lawyer’s self-interest and retains most of [former] Comment [6]. The sentence regarding fees has been deleted on the ground that conflicts between lawyers and prospective clients regarding fee arrangements are typically addressed not by “conflict of interest” rules but rather by Rule 1.5, which regulates fees directly. The third sentence is intended to incorporate ABA Formal Opinion 96-400, which addresses a lawyer negotiating for employment with opposing counsel, which might lead to a lawyer switching to the law firm opposing the lawyer’s client in the middle of a representation. The last two sentences add cross-references to Rules 1.8 and 1.10.

[11] This new Comment addresses conflicts arising from a lawyer’s family relationships, a topic that was previously addressed in Rule 1.8(i). (For a discussion of the reasons why the Commission is proposing to delete Rule 1.8(i) and address a lawyer’s family relationships in the Rule 1.7 Comment, see the Reporter’s Explanation on Rule 1.8.) This Comment explains how conflicts arise under Rule 1.7(b) when lawyers representing different clients are closely related. The cross-reference to Rule 1.10 reminds lawyers that these personal interest conflicts ordinarily will not be imputed to members of the disqualified lawyer’s firm.

[12] Vermont Comment [12] differs from the Model Rules Comment, which referred to Model Rule 1.8(j) prohibiting lawyers from engaging in sexual relationships with clients, which has not been adopted in the Vermont Rules. Interest of Person Paying for a Lawyer’s Service

[13] This Comment modifies [former] Comment [10] by eliminating the specific illustrations and explaining the relationship between Rules 1.7 and 1.8(f). The Commission is recommending a specific reference in Rule 1.8(f), Comment [12], to compliance with the requirements of Rule 1.7 when third-party

payment involves a conflict of interest. The examples involving insurance defense and corporate constituents have been deleted on the grounds that these examples involve a number of complex questions that cannot adequately be addressed in this Comment.

Prohibited Representations

Caption. The caption has been changed in order to highlight and then focus on the fact that there are some representations that are prohibited, even with the informed consent of the client.

[14] This Comment modifies [former] Comment [5] in order to more clearly articulate the fact that some conflicts are nonconsentable, meaning that the lawyer may not undertake the representation even with the client's informed consent.

[15] This new Comment addresses the standard by which consent ability is determined under paragraph (b)(1), i.e., when the concern is for the client's own protection.

[16] This new Comment describes the standard by which consentability is determined under paragraph (b)(2), i.e., when the representation is prohibited by applicable law, and provides some examples.

[17] This new Comment describes the standard by which consentability is determined under paragraph (b)(3), i.e., when the clients are aligned directly against each other in the same litigation, and explains that the rationale is to protect institutional interests in vigorous development of each client's position.

Informed Consent

Caption. The caption has been changed to reflect the substantive change in the text from "consent after consultation" to "informed consent."

[18] This new Comment explains what is required to meet the requirement that the lawyer obtain the client's informed consent and provides cross-references both to Rule 1.0(e) and to the more detailed paragraphs of this Comment on the implications of common representation.

[19] This new Comment addresses circumstances when it may be impossible to make the disclosures required to obtain consent.

Consent Confirmed in Writing

Caption. The caption has been added to set off the new Comment.

[20] This new Comment addresses the new requirement under paragraph (b)(4) that the informed consent of the client be confirmed in writing. It states that it is not necessary in all instances that the writing be obtained or provided at the time the client gives informed consent. If it is not feasible to do so because of the exigencies of the circumstances, then the lawyer may confirm the consent in writing within a reasonable time thereafter.

Revoking Consent

Caption. The caption has been added to set off the new Comment.

[21] This new Comment explains that, while a client may always revoke consent and terminate the lawyer's representation of the client, whether or not the revocation will preclude the lawyer from continuing to represent other clients will depend on the circumstances, including the nature of the conflict.

Consent to a Future Conflict

[22] This new Comment addresses a question that has arisen frequently in practice, i.e., the effectiveness of consent to future conflicts. The Comment states that whether such consent is effective is determined by the test of paragraph (b), specifically whether the conflict is consentable and whether the client has given truly informed consent.

Conflicts in Litigation

[23] This Comment maintains [former] Comment [7] with only a few modifications reflecting textual changes. The Commission recommends deleting [former] Comment [8] because the material here is now addressed in Comment [6].

The Commission recommends deleting [former] Comment [9] because the material here is now addressed in Comment [24].

[24] This new Comment replaces [former] Comment [9] on "positional conflicts." It focuses primarily, not on whether such conflicts are consentable, but rather on the more important and troubling question of whether the clients need to be consulted. The [former] Comment has been uniformly criticized for making too much of the distinction between trial and appellate courts. This Comment uses an analysis similar to that used for other conflicts, i.e., whether there is a significant risk that the lawyer's duties in one representation are likely to materially limit the lawyer's duties in the other representation. It must be kept in mind, however, that it may be difficult to detect some positional conflicts. Moreover, there is a

need to avoid giving clients too much veto power over what types of representation a lawyer or law firm may handle.

[25] This new Comment addresses the application of paragraph (a)(1) to lawyers involved in class-action lawsuits.

Nonlitigation Conflicts

Caption. The caption has been changed to reflect the emphasis in these Comments on nonlitigation conflicts.

[26] This Comment maintains [former] Comment [11] with a few modifications designed to clarify the application of conflict-of-interest doctrine to nonlitigation situations.

[27] This Comment maintains [former] Comment [13] with a few stylistic changes.

[28] This Comment maintains [former] Comment [12] with an expanded discussion of nonconsentability in the context of transactional representation. The expanded discussion is taken from the Comment to [former] Rule 2.2.

Special Considerations in Common Representation

These Comments are taken primarily from the Comment to [former] Rule 2.2, which the Commission is recommending be deleted on the grounds that the relationship between Rules 2.2 and 1.7 is confusing, the role of lawyer as “intermediary” has not been well understood and the Rule has not proved helpful in clarifying conflict-of-interest doctrine for lawyers. (See [Reporter’s Notes] regarding proposed deletion of Rule 2.2.) The Commission believes that situations intended to be encompassed within Rule 2.2 can be adequately dealt with under Rule 1.7 and its Comment.

Caption. The caption has been added to set off the new Comments.

[29] This new Comment combines Comments [4] and [7] to [former] Rule 2.2. “Intermediation” has been changed to “common representation.” In addition, in keeping with the general standard of Rule 1.7(b)(1), the Comment states that common representation is improper, not only when impartiality “cannot” be maintained, but also when it is “unlikely” that the lawyer can do so. The Comment also makes clear that a lawyer may be required to withdraw from the representation entirely, depending upon the outcome of the analysis described in Comment [4].

[30] This Comment and Comment [31] are a modified version of Comment [6] to [former] Rule 2.2. The discussions of evidentiary privilege and the rule of confidentiality have been separated. This Comment addresses the privilege.

[31] This Comment is a modified version of the portion of Comment [6] to [former] Rule 2.2 that addresses the effect of the obligation of confidentiality on common representation. Unlike [former] Comment [6], this Comment gives more explicit guidance to lawyers, emphasizing that they should discuss confidentiality at the outset of the representation and that in most cases the common representation will be proper only if the clients have agreed that the lawyer will not maintain confidences between them.

[32] This Comment combines and substantially modifies Comments [8] and [9] to [former] Rule 2.2 and addresses the requirement of informed consent. It specifies that, when seeking to establish or adjust a relationship between clients, the lawyer must explain how such a role differs from the partisan role expected in other circumstances. It further requires the lawyer to explain the implications of the changed role on the client’s responsibility for making decisions.

[33] This new Comment is a slightly modified version of Comment [10] to [former] Rule 2.2. The changes are stylistic.

Organizational Clients

Caption. The caption has been added to set off the new Comments.

[34] This new Comment addresses the application of paragraph (a) to situations involving corporate or other organizational affiliates. The language is largely drawn from the conclusions of ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 95-390, although the Commission believes that there will be more situations in which the lawyer will be prohibited from undertaking representation than may have been reflected in that opinion.

[35] This Comment maintains [former] Comment [14] with modifications designed to reflect that, when problems arise with a lawyer-director, the lawyer may either resign as director or cease acting as the corporation’s lawyer, and to advise the lawyer of the possible consequences of discussing matters at board meetings while the lawyer is present in the capacity of director. The Commission proposes to delete [former] Comment [15] and the associated caption because it addresses questions outside the disciplinary context.

ANNOTATIONS

1. Conflict of Interest. Attorney who concealed the continuation of her romantic relationship with the husband of a client of the firm that she worked for, which was a clear conflict of interest, acted deceitfully and her conduct reflected adversely on her fitness to practice law. *In re Strouse*, 2011 VT 77, 190 Vt. ___, 34 A.3d 329.