

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Family and Juvenile Law Advisory Committee
Hon. Mary Ann Grilli and Hon. Susan D. Huguenor, Co-chairs
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DATE: August 25, 2005

SUBJECT: Juvenile Dependency: Guidelines for Attorneys Representing
Sibling Groups (amend Cal. Rules of Court, rule 1438) (Action
Required)

Issue Statement

Rule 1438 of the California Rules of Court sets forth the guidelines applicable to the appointment of counsel in juvenile dependency proceedings. It requires the court to appoint an attorney to represent the interests of each child who is the subject of a petition under Welfare and Institutions Code section 300, unless it is determined that the child would not benefit from the appointment.¹ When siblings are involved in the same proceeding, the court will frequently appoint a single attorney to represent the interests of each child in the sibling group. However, the court will occasionally have to appoint separate attorneys for some or all of the siblings due to conflicting interests.

Courts and attorneys must balance a multitude of competing concerns, such as protecting each child's interests in the proceedings, fulfilling ethical obligations, expeditiously resolving the proceedings, and effectively using public resources when assessing conflicts of interest within the unique legal context of juvenile dependency. Amending rule 1438 is necessary to provide the courts and attorneys with guidance in assessing the conflicting interests among siblings and determining whether representation by a single attorney is appropriate.

¹ Welf. & Inst. Code, § 317(c); see also Cal. Rules of Court, rules 1412(h)(1)(A) and 1438(b)(1).

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2006, amend rule 1438 of the California Rules of Court, to provide courts and children’s attorneys with guidance in assessing conflicts of interest and determining whether a single attorney should be appointed to represent, or continue to represent, siblings in the same dependency proceeding.

The text of the proposed rule is attached at pages 8–11.

Rationale for Recommendation

In 2000, the Legislature adopted Welfare and Institutions Code section 326.5. This statute directed the Judicial Council to adopt a rule of court, effective July 1, 2001, that identified, among other things, guidelines for the appointment of attorneys in juvenile dependency proceedings. In response, the Judicial Council amended rule 1438 of the California Rules of Court.²

Rule 1438 identifies guidelines for the screening, training, and appointment of attorneys representing parties in juvenile dependency proceedings. Subdivision (b) requires the court to appoint an attorney to represent a child who is the subject of a petition under Welfare and Institutions Code section 300, unless the court determines that the child would not benefit from the appointment. When siblings are involved in the same proceeding, the court will frequently appoint a single attorney to represent the interests of each child in the sibling group.

As recently noted by the California Supreme Court in the case *In re Celine R.*,³ having a single attorney “permit[s] the children to consult with their attorney together rather than separately, which can be quite beneficial in the often intimidating environment of judicial proceedings. Children’s interests are not always adversarial, and they should not always be treated as such.”⁴ However, the court further recognized that, while “the court should not automatically appoint separate counsel for separate children . . . sometimes the interests of siblings are so conflicting that they should have separate counsel.”⁵ Therefore, the court concluded that, when first appointing counsel in a dependency matter, the court should appoint a single attorney to represent all siblings unless there is an actual conflict of interest or a reasonable likelihood that an actual conflict will arise.⁶

² See also Senate Bill 2160 (Stats. 2000, ch. 450).

³ *In re Celine R.* (2003) 31 Cal.4th 45.

⁴ *Id.* at p. 56.

⁵ *Id.* at pp. 55–56.

⁶ *Id.* at p. 58.

After the initial appointment, the court should relieve an attorney from representation of multiple siblings only if an actual conflict arises.⁷

To provide guidance to the court and children's attorneys in assessing whether a conflict of interest exists or is reasonably likely to arise, the proposed amendment of rule 1438 seeks to (1) clearly set forth the conflict of interest standard specifically applicable to juvenile dependency proceedings, as identified by the California Supreme Court in *Celine R.*, (2) identify factors to consider in making determinations as to whether or not conflicts exist, (3) delineate the role of the court and of children's attorneys in analyzing those factors, and (4) identify protocols for the court and children's attorneys to follow once an actual conflict of interest is identified.⁸

This amendment is consistent with the focus of rule 1438 because it establishes principles directly relevant to the appointment of counsel in juvenile dependency proceedings. Representation of multiple siblings is a common practice in dependency proceedings, and these guidelines assist the court and children's attorneys in evaluating conflicting interests among siblings and determining whether representation by a single attorney is appropriate. They are necessary to ensure that children throughout the state receive effective representation of their interests.

The proposed amendment is made under the Judicial Council's authority in Welfare and Institutions Code section 326.5, in which the Legislature directs the council to establish guidelines for the appointment of an attorney in juvenile dependency proceedings. It is consistent with the council's rule-making authority in this area⁹, and it will promote uniform practice and procedure in the evaluation of any conflicts that exist or arise among sibling groups and further the efficiency of court administration by improving case management and decreasing procedural delays in juvenile courts.

Alternative Actions Considered

The committee considered using the California Standards of Judicial Administration to set forth principles regarding conflicts rather than the California Rules of Court, but after considering the mandate in Welfare and Institutions Code

⁷ *Ibid.*

⁸ The committee originally recommended adoption of a new rule addressing this issue—proposed rule 1438.5. After the public comment period, the committee concluded that the guidelines should be contained within rule 1438 rather than as a separate companion rule, given that the focus of the proposal is to clarify and expand on guidelines for the appointment of counsel in juvenile dependency proceedings.

⁹ See *Sara M. v Superior Court* 2005 WL 1863450 (Cal.) [Council has authority to adopt guidelines that are not inconsistent with statute and that promote uniform practice and procedure for those participating in the juvenile court system.]

section 326.5 and the recent trend away from creating new standards, the committee determined that amending rule 1438 was more appropriate. The committee also considered taking no action regarding the sibling conflict issue; however, given the council's mandate to adopt appropriate guidelines to assist attorneys with practice and procedure in juvenile court, the committee believes this proposal is appropriate and necessary.

Comments From Interested Parties

The invitation to comment on the proposal was circulated as proposed rule 1438.5¹⁰ from April 21 through June 20, 2005, to the standard mailing list for family and juvenile law proposals, as well as the regular rules and forms mailing list. This distribution includes judges, court administrators, attorneys, social workers, probation officers, mediators, and other family and juvenile law professionals, such as family court services' directors, managers, supervisors, and staff. In addition, the proposal was sent to members of the Dependency Representation Administration Funding and Training (DRAFT) Pilot Program Implementation Committee and was specifically circulated to attorneys in DRAFT-participating court systems.¹¹ As noted above, the committee later concluded that the guidelines should be contained within rule 1438 rather than as a separate companion rule, given that the focus of the proposal is to clarify and expand on guidelines for the appointment of attorneys in dependency proceedings.

The comments are summarized in the attached chart at pages 12–39. There were a total of 13 commentators. Seven agreed with the proposal, 3 agreed if modifications were made, and 3 did not agree. The following issues received the most significant comments.

Factors to be considered in conflicts analysis

As distributed for public comment, the proposal enumerated eight factors that, “do not, standing alone, demonstrate an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise.”¹² This list was included in the “appointment of counsel” subdivision in the circulated proposal. Four of the 13 commentators felt that this subdivision was inappropriate or should be deleted in its entirety because the items lacked legal authority, lacked factual accuracy, and/or improperly limited the trial court's discretion. The list has since been moved and is now included in rule 1438(c)(1)(C) and (c)(2)(B).

¹⁰ See Attachment A.

¹¹ The DRAFT pilot program is aimed at implementing uniform caseload and practice standards for court-appointed dependency counsel in participating trial courts. The 10 volunteer trial courts participating in the program are the superior courts of Imperial, Los Angeles, Marin, Mendocino, San Diego, San Joaquin, San Luis Obispo, Santa Barbara, Santa Cruz, and Stanislaus counties.

¹² See subdivision (a)(3) of Attachment A.

Legal Authority

Two commentators asserted that there is no direct legal authority for the factors identified. The commentators are, with one exception, correct on this point. The only factor directly stated in case law is that a theoretical or abstract conflict of interest among siblings does not constitute a conflict of interest. (See *Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423, 1429.) However, the committee believes that identification of each factor is necessary to provide much-needed guidance to the court and children’s attorneys in assessing conflicts of interest that exist or arise among siblings. Further, even though most of these factors are not specifically identified in statutory or case law, they are not inconsistent with the legal authority in this area, and they promote “uniformity in practice and procedure” and provide “guidance to judges, referees, attorneys, probation officers, and others participating in the juvenile court.”¹³ Therefore, it is within the Judicial Council’s purview to include these factors as proposed amendments.

Factual Accuracy

Four commentators asserted that the factors identified as not indicative of a conflict, standing alone, may in fact demonstrate a conflict depending upon the facts of the case. They requested elimination of this portion of the proposal so as not to mislead trial courts and children’s attorneys by suggesting that representation of multiple siblings is appropriate when it in fact may not be. The committee recognizes that factual scenarios in juvenile dependency proceedings are capable of limitless permutations and that any one of the factors identified in the rule as circulated for comment may, depending on the facts of a particular case, constitute an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise. However, the committee still believes that the identification of factors assists the court and children’s attorneys in assessing whether or not a conflict of interest exists. Therefore, rather than eliminating the list in its entirety, the committee proposes adding the word “necessarily” in the introductory sentence to account for the possibility that any of the factors identified may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances (see subdivisions (c)(1)(C) and (c)(2)(B)). In addition, language has been added to the advisory committee comment to clarify that the attorney must use his or her best judgment in analyzing whether, under the particular facts of the case, it is necessary to decline appointment or request withdrawal from appointment due to a purported conflict of interest.

The committee further recommends eliminating subdivision (a)(3)(D), which was included in the circulated proposal,¹⁴ as a factor to consider. Subdivision (a)(3)(D) stated that it would not constitute a conflict of interest if “[t]he siblings have

¹³ Cal. Rules of Court, rule 1400(b).

¹⁴ See Attachment A.

differing positions about material issues, but at least one of these positions lacks legal or factual foundation.” The committee believes this provision may encourage potential violations of legal and ethical responsibilities by suggesting that an attorney may reconcile differing material positions among siblings.

Trial Court Discretion

One commentator asserted that identifying factors that are not indicative of a conflict of interest restricts the trial court’s ability to exercise discretion in weighing all factors that may be relevant in determining whether the interests of siblings conflict such that the appointment of independent counsel is necessary. The committee does not agree that rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) improperly narrows the trial court’s ability to exercise discretion in determining whether it must or should appoint independent counsel for multiple children. However, the committee recognizes that, by saying that “[t]he court may appoint a single attorney to represent a group of siblings under any of the following circumstances . . .”, the provision may be misinterpreted as limiting judicial discretion. Therefore, the committee recommends eliminating the reference to the court in the introductory sentence. The committee has also added language to clarify that the court has the duty and authority to inquire as to the general nature of an asserted conflict (subject to privilege) and to determine whether a conflict actually exists. (See amended rule 1438(c)(2)(E) and the advisory committee comment.)

Duty of loyalty

Two commentators asserted that the proposal fails to consider an attorney’s duty of loyalty toward a client. The committee does not believe that the proposed rule amendment compromises the duty of loyalty. The text provides specific guidance as to when the attorney should decline appointment or seek to withdraw due to conflicting interests among some or all of the siblings. To further clarify that this amendment does not compromise the attorney’s ongoing duty of loyalty, the committee proposes adding subdivision (c)(2)(A) to emphasize that the attorney must continually “evaluate the interests of each sibling and assess whether there is an actual conflict of interest.” Further, the committee proposes the addition of subdivision (c)(2)(D), which states that, if the attorney believes that an actual conflict is present, he or she must “take any action necessary to ensure that the siblings’ interests are not prejudiced,” including notifying the court of the existence of an actual conflict of interest and requesting to withdraw from representation of some or all of the siblings.

Finally, an attorney’s duty of loyalty is further emphasized in subdivision (c)(2)(F)(iii), which states that an attorney may continue to represent one or more siblings after a conflict of interest arises only if continued representation “would not otherwise prejudice the other sibling or siblings.”

Other Rule Modifications

In addition to incorporating the proposal into rule 1438, the committee, on its own review, recommends the following modifications to improve the structure and clarity of the proposed amendment.

First, the committee proposes reorganizing the factors listed in subdivision (c)(1)(C) (former proposed rule 1438.5(a)(3)) to increase the text's cohesiveness.

Second, the committee recommends identifying circumstances that are not necessarily indicative of a conflict of interest in both subdivision (c)(1)(C) and (c)(2)(B) to clarify that such circumstances may arise before appointment or during representation. These lists include many of the same factors, but subdivision (c)(2)(B)(vi)–(vii)—which concern the materiality of conflicting desires or accounts of events expressed by siblings—are only included in the “Withdrawal from appointment or continued representation” section because it is not typically clear at initial appointment whether or how either of these factors will affect representation.

Third, the committee recommends adding language to emphasize the attorney's role in assessing conflicts of interest, including an ongoing duty to evaluate the interests of the siblings involved and to take any steps necessary to prevent the siblings' interests from being prejudiced. These additions are included in subdivisions (c)(2)(A) and (c)(2)(D) as well as the advisory committee comment. The committee, after reviewing comments submitted by the public, concluded that it was necessary to clarify the attorney's role in evaluating conflicts to ensure that an ongoing assessment was made and that the siblings received effective representation of their interests.

Fourth, the committee proposes language to clarify that the court has a duty to inquire into any conflicts noted by children's attorneys (subject to privilege) and is vested with the authority to determine both whether an actual conflict of interest exists and whether an attorney must be relieved from representation of some or all of the siblings. These additions are found in subdivision (c)(2)(E) and the advisory committee comment and were included after a commentator suggested clarifying the role of the court in evaluating conflict determinations made by counsel.

Implementation Requirements and Costs

The proposed rule should not result in any additional costs and may result in cost savings by avoiding appointment of separate counsel in situations where declaring conflicts is unnecessary or inappropriate.

Attachments

Rule 1438 of the California Rules of Court is amended, effective January 1, 2006 to read:

1 **Rule 1438. Attorneys for parties (§§ 317, 317.6)**

2 (a)–(b) ***

3
4 **(c) [Conflict of interest guidelines for attorneys representing siblings]**

5
6 (1) [Appointment]

7
8 (A) The court may appoint a single attorney to represent a
9 group of siblings involved in the same dependency
10 proceeding.

11
12 (B) An attorney must decline to represent one or more
13 siblings in a dependency proceeding, and the court
14 must appoint a separate attorney to represent the
15 sibling or siblings, if, at the outset of the proceedings:

16
17 (i) An actual conflict of interest exists among those
18 siblings; or

19
20 (ii) Circumstances specific to the case present a
21 reasonable likelihood that an actual conflict of
22 interest will arise among those siblings.

23
24 (C) The following circumstances, standing alone, do not
25 necessarily demonstrate an actual conflict of interest or
26 a reasonable likelihood that an actual conflict of
27 interest will arise:

28
29 (i) The siblings are of different ages;

30
31 (ii) The siblings have different parents;

32
33 (iii) There is a purely theoretical or abstract conflict of
34 interest among the siblings;

35
36 (iv) Some of the siblings appear more likely than
37 others to be adoptable; or
38

1 (i) Notifying the juvenile court of the existence of
2 an actual conflict of interest among some or all
3 of the siblings; and

4
5 (ii) Requesting to withdraw from representation of
6 some or all of the siblings.

7
8 (E) If the court determines that an actual conflict of
9 interest exists, the court must relieve an attorney from
10 representation of some or all of the siblings.

11
12 (F) After an actual conflict of interest arises, the attorney
13 may continue to represent one or more siblings whose
14 interests do not conflict only if:

15
16 (i) The attorney has successfully withdrawn from
17 the representation of all siblings whose interests
18 conflict with those of the sibling or siblings the
19 attorney continues to represent;

20
21 (ii) The attorney has exchanged no confidential
22 information with any sibling whose interests
23 conflict with those of the sibling or siblings the
24 attorney continues to represent; and

25
26 (iii) Continued representation of one or more
27 siblings would not otherwise prejudice the other
28 sibling or siblings.

29
30 **Advisory Committee Comment**

31 The court should initially appoint a single attorney to represent all siblings in a
32 dependency matter unless there is an actual conflict of interest or a reasonable likelihood that an
33 actual conflict of interest will arise. (*In re Celine R.* (2003) 31 Cal.4th 45, 58.) After the initial
34 appointment, the court should relieve an attorney from representation of multiple siblings only if
35 an actual conflict of interest arises. (*Ibid.*) Attorneys have a duty to use their best judgment in
36 analyzing whether, under the particular facts of the case, it is necessary to decline appointment or
37 request withdrawal from appointment due to a purported conflict of interest.

38 Nothing in this rule is intended to expand the permissible scope of any judicial inquiry
39 into an attorney's reasons for declining to represent one or more siblings or requesting to
40 withdraw from representation of one or more siblings, due to an actual or reasonably likely
41 conflict of interest. (See Cal. Bar Rules, Prof. Conduct R 3-310, subd. (C).) While the court has
42 the duty and authority to inquire as to the general nature of an asserted conflict of interest, it
43 cannot require an attorney to disclose any privileged communication, even if such information
44 forms the basis of the alleged conflict. (*In re James S.* (1991) 227 Cal.App.3d 930, 934; *Aceves v.*
45 *Superior Court* (1996) 51 Cal.App.4th 584, 592–593.)

1
2 ~~(e)~~(d)
3
4 ~~(d)~~(e)
5
6 ~~(e)~~(f)
7
8 ~~(f)~~(g)

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Juvenile Dependency: Guidelines for Attorneys Representing Sibling Groups
(amend Cal. Rules of Court, rule 1438)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Ms. Elaine Alexander Executive Director Appellate Defenders, Inc. San Diego	AM	Y	<p>1. Subdivisions (a)(1), (a)(2), and (b) (now rule 1438 (c)(1)(A)–(B), (c)(2)(C), (c)(2)(D)(ii), (c)(2)(E)–(F)). We support the adoption of these sections. They implement the standards of <i>Celine R.</i> and will be helpful to the trial court and counsel.</p> <p>2. Subdivision (a)(3) (now rule 1438(c)(1)((C) and (c)(2)(B)). We recommend this section be deleted. It is misguided, not only in the particulars, but in theory—that is, in assuming it is even possible to identify conflict situations in advance of a specific fact situation with any specificity since that question often involves subtle factors unique to the family and siblings’ interpersonal relations, the personalities of the various clients, the differences among their positions and possibility of harmonizing them, etc. Setting out guidelines that often might be over-inclusive in one application and under-inclusive in another is unwise and invites appellate reversals.</p> <p>2. Subdivision (a)(3) (now rule 1438(c)(1)(C) and (c)(2)(B)). Each part of section (a)(3) would incorrectly characterize, as presumptive non-conflicts, a number of situations where that presumption should not be applied. Such presumptions could potentially mislead trial courts into concluding representation of multiple siblings is appropriate when in fact it is</p>	<p>1. No response required.</p> <p>2. The factors identified in new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) are necessary to provide guidance to the court and children’s attorneys in assessing conflicts of interest. The word “necessarily” has been added to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances.</p> <p>2. Agree in part. The list will remain, but the word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict</p>

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				<p>not. They might encourage counsel not to contest multiple representation when they should and/or not to disclose facts that would demonstrate the existence of an actual conflict. Instead, the rule should encourage the court and counsel to exercise reasoned judgment on a case-by-case basis, as the Supreme Court required in <i>Celine R.</i>.</p> <p>3. Subdivision (a)(3) (now rule 1438(c)1)(C) and (c)(2)(B)). This could put counsel in untenable ethical positions, implicitly permitting courts to require counsel to accept or continue appointments that violate their professional obligations.</p>	<p>of interest under certain circumstances. In addition, language has been added to clarify that an attorney must use his or her best judgment in analyzing whether a conflict exists and take any action necessary to ensure siblings’ interests are not prejudiced, including notifying the juvenile court if a conflict exists.</p> <p>3. The factors identified in new rule 1438(c)1)(C) (formerly proposed rule 1438.5(a)(3)) are only intended to provide guidance to the court and children’s attorneys in assessing conflicts of interest—they are not intended to limit an attorney’s discretion to decline or withdraw from appointment if necessary to avoid a violation of professional obligations. They are also not intended to provide courts with the authority to require counsel to accept or continue representation. To avoid misinterpretation of this subdivision’s meaning, the reference to the court has been eliminated. In addition, language has been added to the Advisory Committee Comment to clarify the</p>

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				<p>4. Subdivision (a)(3)(A) (now rule 1438(c)(1)(C)(iii) and (c)(2)(B)(iii)). This is not meaningful terminology since many conflicts are theoretical or abstract in one sense—they concern the way counsel “might” act or refrain from acting under given conditions.</p> <p>5. Subdivision (a)(3)(B) (now rule 1438(c)(2)(B)(vi)). While insignificant disparities in children’s wishes may not create an actual conflict, genuinely conflicting desires on fundamental issues could readily constitute an actual conflict, requiring counsel to argue both for and against a given result in a single case. One client or another (or all) almost inevitably will be shortchanged.</p>	<p>roles of the court and children’s attorneys in dealing with any conflicts that may exist or arise.</p> <p>4. This terminology is taken directly from <i>Celine R</i>. It emphasizes that there is a distinction between actual or reasonably likely conflicts and those that are merely theoretical in nature, and it will remain as one of the factors in new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)).</p> <p>5. Agree. The word “necessarily” has been added to new rule 1438(c)(2)(B) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances. In addition, language has been added to highlight the importance of weighing the materiality of any conflicting desires expressed when assessing whether a conflict exists.</p> <p>*Note: This subdivision is no longer included in the</p>

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(amend Cal. Rules of Court, rule 1438)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>6. Subdivision (a)(3)(C) (now rule 1438(c)(2)(B)(vii)). While merely trivial differences may not create an actual conflict, significant discrepancies, even on trivial matters not central to the legal dispute, can affect the children’s credibility and the overall “flavor” of the case and ultimately tilt the outcome.</p>	<p>“Appointment of counsel” section because it was determined that the materiality of any conflicting desires or objectives expressed by the siblings is often not evident at the time of appointment. Instead, this provision is included in the “Withdrawal from appointment or continued representation” section as new rule 1438(c)(2)(B)(vi). A list of conflicts factors now appears in two sections to clarify that such factors may arise before appointment and/or during representation.</p> <p>6. Agree. The word “necessarily” has been added to new rule 1438(c)(2)(B) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances. In addition, the language has been modified to clarify that the materiality of any contradictory accounts of events must be considered</p> <p>*Note: This subdivision is no longer included in the “Appointment of counsel” section</p>

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				<p>7. Subdivision (a)(3)(D). This provision practically invites trial courts to prejudge legal and factual matters and decide cases without giving a true advocate a chance to consider, develop, and present a credible approach for the side presumably “lacking foundation.” It also suggests that counsel can be forced to abandon their clients’ interests in having their position represented, merely for the sake of avoiding separate appointments.</p> <p>8. Subdivision (a)(3)(E) (now rule 1438(c)(1)(v) and (c)(2)(B)(v)). While this factor does not always constitute an actual conflict, it might, such as when advocacy for one child’s best</p>	<p>because it was determined that the materiality of any contradictory accounts of events expressed by the siblings is often not evident at the time of appointment. Instead, this provision is included in the “Withdrawal from appointment or continued representation” section as new rule 1438(c)(2)(B)(vii). A list of conflicts factors now appears in two sections to clarify that such factors may arise before appointment and/or during representation.</p> <p>7. Agree. Subdivision (a)(3)(D) has been eliminated from the list of factors to consider in evaluating whether or not a conflict of interest is present.</p> <p>8. Agree in part. The list will remain, but the word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the</p>

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				<p>interests is for termination of parental rights and advocacy for another’s best interests is against termination of parental rights. As with other factors listed in subdivision (a)(3), trial courts and counsel can more reliably discern what is or is not a conflict without guidelines tilting the analysis.</p> <p>9. Subdivision (a)(3)(F) (now rule 1438(c)(1)(C)(i) and (c)(2)(B)(i)). Age differences often do not themselves create a conflict, but they can. They also usually play a major role in key matters such as adoptability and the weight to be given to a child’s preferences. The rule should not invite the court or counsel to discount this factor.</p> <p>10. Subdivision (a)(3)(G) (now rule 1438(c)(1)(C)(iv) and (c)(2)(B)(iv)). Adoptability is often a dispositive factor in permanent plan and other proceedings. Another, sometimes conflicting consideration is the interest of one or more of the children in maintaining sibling relationships. The resolution of such competing factors should be left to the good judgment of the trial court and trial counsel.</p>	<p>possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances.</p> <p>9. Agree. The list will remain, but the word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances.</p> <p>10. Agree. The list will remain, but the word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances. Language has also been added to clarify that attorneys must use their best judgment in analyzing whether a conflict may be</p>

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				11. Subdivision (a)(3)(H). The character and behavior of each individual parent is absolutely critical to jurisdictional, dispositional, and virtually every other decision made in the dependency process. The rules should not suggest that parental identify is presumptively immaterial.	present under the facts of the case (see Advisory Committee Comment). 11. Agree. The word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances.
2.	Ms. Grace Andres Program Manager Superior Court of California, County of Solano Fairfield	A	N	<i>No specific comment</i>	No response required.
3.	Hon. Charles Campbell Juvenile Dependency Judge Superior Court of California, County of Ventura Ventura	A	N	<i>No specific comment</i>	No response required.
4.	Ms. Carole Greeley Bay Area Dependency Chapter of California Appellate Defense Counsel (CADC) Fairfield	N	Y	We do not think that this rule should be approved. The Supreme Court has ruled on this issue in <i>Celine R</i> . It did not ask the Judicial Council to address the issue. The Legislature has not asked the Judicial Council to address the issue. There is no showing that the local courts are looking for state regulation on this issue.	The proposed amendments to rule 1438 are made pursuant to the Judicial Council’s authority in section 326.5 of the Welfare and Institutions Code, in which the Legislature directs the council to establish guidelines for the

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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				This should be considered on a case-by-case basis.	appointment of an attorney in juvenile dependency proceedings. The proposed amendments set forth conflict of interest guidelines to assist the court and children’s attorneys in determining whether appointment of a single attorney is appropriate and to ensure protection of each child’s interest. The principles identified are also consistent with evaluating conflicts on a case-by-case basis.
5.	Mr. Michael Kresser Executive Director Sixth District Appellate Program Writing on behalf four of the five Apellate Projects serving the Courts of Appeal Santa Clara	N	Y	1. Subdivision (a)(3) (now rule 1438(c)(1)(C) and (c)(2)(B)). The proposed rule restricts and imposes limitations on the trial court’s ability to exercise its discretion and give appropriate weight to all relevant factors in determining whether multiple siblings can be represented by a single attorney or whether their interests conflict such that each minor (or groups of minors) requires independent counsel to articulate their best interests.	1. The proposed amendments in new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) do not narrow the trial court’s ability to exercise its discretion and weigh any factors relevant to determining whether a single attorney can represent a group of siblings. They are merely intended to provide guidance to the court and children’s attorneys in assessing any conflicting interests. However, to avoid any possible misinterpretation, there is no longer a reference to the court in the introductory sentence of this section. In addition, language has been added to clarify that the court has the duty and authority to inquire

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				<p>2. Subdivision (a)(3) (now rule 1438(c)(1)(C) and (c)(2)(B)). The proposed rule is outside the purview of the Judicial Council and the California Rules of Court because it narrows and limits the exercise of trial court discretion whereas Welfare and Institutions Code (WIC) section 317, subdivision (c), the underlying statute, does not. The Judicial Council has the authority to “adopt rules for court-administration, practice and procedure, not inconsistent with statute.” (Cal. Const., art. VI, §6.) WIC § 317(c) explicitly instructs the trial court to appoint counsel without a conflict. Subdivision (a)(3) “elaborates” on and limits how a trial court may exercise its discretion when determining whether one attorney can legally represent more than one child in a dependency proceeding by positing “fact scenarios” that do not create a conflict of interest. In those situations described in the rule, the trial court would seem to have no discretion to find a conflict and thus, to appoint separate counsel. In the past, the appellate courts have invalidated court rules adopted by the Judicial</p>	<p>as to the general nature of an asserted conflict (subject to privilege) and to determine whether a conflict actually exists (see new rule 1438(c)(2)(E) and the Advisory Committee Comment).</p> <p>2. The proposed amendments to rule 1438 are made pursuant to the Judicial Council’s authority in section 326.5 of the Welfare and Institutions Code, in which the Legislature directs the council to establish guidelines for the appointment of an attorney in juvenile dependency proceedings. The list of factors identified in new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) set forth conflict of interest guidelines to assist the court and children’s attorneys in evaluating conflicts and determining whether appointment of a single attorney is appropriate. To clarify that the factors included may constitute a conflict under certain circumstances and that the court and attorney should exercise discretion in every case, the word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly</p>

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				<p>Council where the rule has restricted a trial court’s discretion when no similar restriction existed in the underlying statute. The trial court has the discretion to determine when to appoint separate counsel of multiple minors based on the applicable law and facts of each case.</p> <p>3. Subdivision (a)(3) (now rule 1438(c)(1)(C) and (c)(2)(B)). There is no authority for subdivision (a)(3)(A)-(G) of the proposed rule. <i>Celine R.</i> never stated that these factors—alone or in combination—are legally insufficient to mandate that the trial court appoint separate counsel.</p> <p>4. Subdivision (a)(3) (now rule 1438(c)(1)(C) and (c)(2)(B)). The proposed rule, if enacted, would likely restrict and limit the effect of section 317 of the Welfare and Institutions Code by causing trial counsel to err on the side of not</p>	<p>proposed rule 1438.5(a)(3)). In addition, language has been added to clarify that the court has the duty and authority to inquire as to the general nature of an asserted conflict (subject to privilege) and to determine whether a conflict actually exists (see new rule 1438(c)(2)(E) and the Advisory Committee Comment).</p> <p>3. While there is no direct legal authority for the specific factors identified in new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)), the identification of such factors is not inconsistent with legal authority in this area. In addition, these factors provide guidance to the court and children’s attorneys in assessing conflicts of interest that exist or arise among siblings and determining whether appointment of a single attorney is appropriate.</p> <p>4. The word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these</p>

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				<p>drawing situations to the trial court’s attention when counsel might have a legitimate question as to whether a conflict exists between siblings. Factual situations that may give rise to a conflict of interest can only be brought to the attention of the court by counsel. If counsel is dissuaded from bringing such issues to the attention of the trial court, section 317 would be further diluted because any exercise of trial discretion would not be made with full and complete information.</p> <p>5. The proposed rule, if enacted, would spawn litigation at both the trial and appellate levels regarding what factors constitute a potential or actual conflict of interest when counsel is appointed to represent more than one party (see WIC § 317.5) in cases in which the court must determine who will be the legal parents of multiple siblings.</p> <p>6. Even if the proposed rule is not taken by trial courts as a mandate as to what they <i>must</i> do, they will likely use it as a guide as to what they</p>	<p>factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances. In addition, language has been added to clarify that if an attorney believes a conflict exists, he or she must take any action necessary to ensure that the siblings’ interests are not prejudiced, including notifying the juvenile court of the conflict. Thereafter, if the court determines a conflict exists, the court must relieve the attorney from representation. (See subdivisions (c)(2)(D)–(E) and Advisory Committee Comment.)</p> <p>5. The word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances.</p> <p>6. The proposed amendments are not inconsistent with the current</p>

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				<p><i>should</i> do. It attempts to educate trial judges in the exercise of their discretion in a way not intended under the statutory scheme and will negatively impact trial counsel by affecting their understanding of their own ethical responsibilities.</p> <p>7. We also agree with and support the additional reasons for eliminating subdivision (a)(3) as stated by Elaine Alexander, Executive Director of Appellate Defenders, Inc.</p>	<p>statutory scheme. Rather, they complement current statutory and case law in this area by providing guidance to the court and children’s attorneys in assessing conflicts of interest and determining whether appointment of a single attorney is appropriate.</p> <p>7. No response required.</p>
6.	Ms. Miriam Krinsky Executive Director Children's Law Center of Los Angeles Monterey Park	A	Y	<p>1. The Children’s Law Center is pleased to see that efforts are being made to provide guidance to lawyers and to the bench regarding conflict analysis and representation of multiple siblings in dependency matters. In recent years, the representation of sibling clients in dependency matters has created confusion; this rule will help provide needed guidance—consistent with existing case law—in regard to this critical issue.</p> <p>2. Although the California Supreme Court addressed many of these issues and explicitly recognized the value to children that can flow from the multiple representation of sibling clients in dependency cases, this well-crafted rule provides further clarification about how best to answer difficult questions that can arise in the context of the multiple representation of</p>	<p>1. No response required.</p> <p>2. No response required.</p>

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				<p>sibling clients. In particular, the proposed rule will help ensure that multiple representation of siblings can continue, wherever appropriate, while providing effective procedures for dealing with conflicts that may arise between and among siblings. It is only through the development of clear and concise standards, such as those included in this proposed rule, that counsel for dependency children will be able to provide the most effective representation for their clients.</p> <p>3. We think the rule could be improved by adding clarification regarding the role of the court in evaluating conflict determinations made by counsel. Such clarification would avoid dependency courts from construing the rule to either entitle or require them to make inquiries into confidential attorney-client communications when assessing conflict determinations. While courts have an affirmative duty to assess conflicts, courts are prohibited from inquiring into confidential communications between the attorney and client; it would be helpful if this rule specifically recognized this fact. We therefore suggest that the following language be added to the Advisory Committee Comment:</p> <p>“Nothing in this rule is intended to encourage or expand the permissible scope of any judicial</p>	<p>3. Agree. Language has been added to the Advisory Committee Comment to clarify the role of the court in evaluating conflict determinations made by counsel, including that courts are prohibited from inquiring into confidential communications between the attorney and client.</p>

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				inquiry into an attorney’s reasons for declining to represent or declaring a conflict of interest as to one or more siblings. While a court has the duty and authority to make inquiries regarding a conflict of interest, a court cannot require an attorney to disclose confidential information even if the confidential information may form the basis of a conflict. [citations.]”	
7.	Supreior Court of California, County of Los Angeles	A	Y	<i>No specific comment</i>	No response required.
8.	Mr. Stephen Love Executive Officer Superior Court of California, County of San Diego San Diego	A	N	<i>No specific comment</i>	No response required.
9.	Ms. Erin O'Donohue Staff Attorney Legal Services for Children San Francisco	A	N	Although we often see conflicts arise in situations such as proposed rule 1438.5 (a)(3), subsections (B), (E), and (G), we agree that it is usually beneficial to have a single attorney representing siblings from the outset.	The word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances.
10.	Professor William Patton Professor Whittier Law School Costa Mesa	N	N	1. The proposed rule violates the separation of powers doctrine. Neither the Legislature, nor the Judicial Council, can pass rules of professional conduct inconsistent with dictates by the California Supreme Court. The California Supreme Court has not approved any rules of	1. The proposed amendments to rule 1438 are made pursuant to the Judicial Council’s authority in section 326.5 of the Welfare and Institutions Code, in which the Legislature directs the council to

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				<p>professional conduct regarding California lawyers which treat child clients differently than adult clients. The identical duties of loyalty, confidentiality, zealousness, and competence apply to adult and to child clients. Yet, the proposed rule permits attorneys to provide child clients a substantially different form of representation than that mandated by the Rules of Professional Conduct and the California Supreme Court. It further opposes case law requiring that a client expressly waive a conflict of interest since nowhere in the proposed rule is there a requirement that the child make a knowing and intelligent waiver of a conflict of interest.</p> <p>2. Subdivision (a)(3) (now rule 1438(c)(1)(C) and (c)(2)(B)). Many of the examples listed are, in fact, under some circumstances sufficient evidence of a conflict of interest requiring the attorney to conflict off the case. By stating</p>	<p>establish guidelines for the appointment of an attorney in juvenile dependency proceedings. The list of factors identified in new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) are intended to assist the court and children’s attorneys in evaluating conflicts and determining whether appointment of a single attorney is appropriate. They are not inconsistent with current statutory or case law. The California Supreme Court, in the case <i>In re Celine R.</i> (2003) 31 Cal.4th 45 concluded that, to reconcile competing concepts in Welfare and Institutions Code section 317(c) and rule 3-310 of the Rules of Professional Conduct, a slightly modified conflicts standard applies to juvenile dependency proceedings in the multiple representation of siblings. (See <i>Celine R.</i> at pp. 57-58.)</p> <p>2. Agree. The word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these</p>

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				<p>categorically that these factual scenarios are factually insufficient by themselves to trigger a conflict, children’s attorneys will be less likely to raise the conflicts issue and judges confronted by these hypothetical conflicts will be less likely to declare the conflicts sufficient to require the appointment of new counsel for abused children. *Note: The commentator included several detailed hypotheticals of how the examples described in subsections (B), (D), and (E), may, standing alone, constitute an actual conflict of interest. Those hypotheticals are not included in this comment chart.</p> <p>3. Subdivision (a)(3) (now rule 1438(c)(1)(C) and (c)(2)(B)). The language of this section is misleading. I think the drafters of the proposed rule actually meant to say the following:</p> <p>“These are examples which may or may not under the specific facts of each case rise to the level of a conflict of interest. None of these examples raises a presumption that a conflict of interest exists. The attorney must analyze all the evidence in the case to determine whether an actual conflict exists or whether a conflict is reasonably likely to arise during the</p>	<p>factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances. In addition, language has been added to clarify that if an attorney believes a conflict exists, he or she must take any action necessary to ensure that the siblings’ interests are not prejudiced, including notifying the juvenile court of the conflict. Thereafter, if the court determines a conflict exists, the court must relieve the attorney from representation. (See subdivisions (c)(2)(D)–(E) and Advisory Committee Comment.)</p> <p>3. Agree in part. The language of new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) has been revised to avoid any possible misinterpretations. The word “necessarily” has been added to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances. In addition, the reference to the court has been eliminated.</p>

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				<p>representation of multiple siblings.”</p> <p>4. Subdivision (b)(1) (now rule 1438 (c)(2)(C), (c)(2)(D)(ii), and (c)(2)(E)). The cases of <i>Celine R.</i> and <i>Carroll v. Superior Court (Carroll)</i> (2002) 101 Cal.App.4th 1423 do not support the statement that, once an actual conflict arises, the attorney has the discretion to decide whether to withdraw from the representation of some or all of the siblings. <i>Carroll</i> stated that “the attorney must be relieved from any of the minors.” (emphasis added.) In <i>Celine R.</i>, the Court stated that “the court will have to relieve counsel from multiple representation if, but only if, an actual conflict arises.” (emphasis added.) At the very least, the proposed rule should indicate that there is some ambiguity over the appropriate remedy, and that attorneys must determine whether the Rules of Professional Responsibility or <i>Celine R.</i> require withdrawal from representation of either “some” or “all” of the siblings.</p> <p>5. Subdivision (b)(2) (now rule 1438(c)(2)(F)). This section misstates the California Rules of Professional Conduct and the California Supreme Court common law in its overbroad statement that presupposes that as long as an attorney’s dual representation does not use confidential data obtained by one client against another client, and as long as the joint</p>	<p>4. It is not inconsistent with rule 3-310(C), <i>Celine R.</i>, or <i>Carroll</i> to conclude that an attorney may request to withdraw from some or all of the siblings. Language has been added to clarify that it is within the discretion of the court, upon being notified of a conflict, to determine whether an attorney should be relieved from representation. (See (c)(2)(E)–(F).)</p> <p>5. New rule 1438(c)(2)(F) (formerly rule 1438(b)(2)) is consistent with current statutory and case law. Further, several provisions included in the proposed amendments work to ensure that that the attorney does not violate any ethical obligations</p>

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				<p>representation will not “prejudice” the other clients, the attorney may proceed with the representation of multiple siblings. In determining whether a conflict of interest exists, it is important to determine whether continued representation will violate the duty of loyalty in addition to the duty of confidentiality. The duty of loyalty is not tested by whether confidential information will be used or by whether the client will actually be prejudiced by dual representation. The duty of loyalty concerns the very nature of the attorney/client relationship and also focuses on the mindset of the client, not just the substantive and procedural effects of dual representation. Moreover, if the duty of loyalty is violated, the attorney must withdraw from the case unless the client gives a knowing and intelligent waiver of those ethical duties. Subdivision (b)(2) therefore violates established case law and Rule 3-310(C)(1) & (2) of the California Rules of Professional Conduct allowing an attorney to continue representation when there is an actual conflict of interest (under the circumstances listed) without requiring a knowing, intelligent waiver of the duty of loyalty from the siblings.</p> <p>6. Subdivision (b)(2) (now rule 1438(c)(2)(F)). It is not clear that an attorney can continue to represent some of the siblings once an actual conflict of interest arises.</p>	<p>owed to the client. New language clarifies that the attorney must continually evaluate the interests of each sibling and assess whether an actual conflict of interest exists, and, if the attorney believes a conflict is present, take any action necessary to ensure that the siblings’ interests are not prejudiced (See (c)(2)(A), (c)(2)(D), and Advisory Committee Comment).</p> <p>6. This section is consistent with current case law in this area.</p>

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11.	Mr. William Rentz Senior Deputy County Counsel Monterey County Salinas	AM	N	<p>1. While the proposed rule seems to be consistent with <i>Celine R.</i>, it makes no attempt to define what would constitute a conflict requiring an attorney to withdraw or preventing an attorney from being appointed to represent multiple siblings. Incorporating a definition would be helpful.</p> <p>2. I think the standard for defining the existence of a conflict might differ depending upon the age of the child and his or her ability to assist an attorney with the case. When children are too young to assist, the attorney has to assess what will be in their best interests. In such cases, I would say that there is a conflict that requires the attorney to withdraw only (1) if the best interests of one child conflict with the best interests of another child in such a way that the best interests of one child cannot be served without impairing the ability to serve the best interests of the other child, or (2) if the attorney concluded that he or she is unable to fairly assess the best interests of the children because of conflicts between what might be in the best interests of the children. When the children are older, the attorney should represent what the child wants, unless there is a good reason not to.</p> <p>3. Subdivision (a)(3)(B) (now rule 1438(c)(2)(B)(vi). If older children are involved</p>	<p>1. Only scenarios that do not constitute a conflict of interest were addressed because it was believed to be too difficult to affirmatively account for the many different scenarios in which a conflict of interest could arise in juvenile dependency proceedings.</p> <p>2. No response required.</p> <p>3. Agree. The word “necessarily”</p>

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				and they express conflicting desires or objectives, a conflict could result.	<p>has been added to new rule 1438(c)(2)(B) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances. In addition, language has been added to highlight the importance of weighing the materiality of any conflicting desires expressed when assessing whether a conflict exists.</p> <p>*Note: This subdivision is no longer included in the “Appointment of counsel” section because it was determined that the materiality of any conflicting desires or objectives expressed by the siblings is often not evident at the time of appointment. Instead, this provision is included in the “Withdrawal from appointment or continued representation” section as new rule 1438(c)(2)(B)(vi). A list of conflicts factors now appears in two sections to clarify that such factors may arise before appointment and/or during representation.</p>

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				<p>4. Subdivision (a)(3)(D). If older children are involved and they have differing positions about material issues, the attorney may have a duty to withdraw regardless of whether there appears to be no legal or factual basis of one side.</p> <p>5. I would suggest that the rule be structured so that there is a separate subsection that defines the circumstances that do not constitute an actual conflict and another section that defines the circumstances that do constitute an actual conflict. To do this, I would suggest making subdivision (a)(3) its own separate subsection—perhaps subdivision (c). Then subdivision (d) could define what constitutes an actual conflict, either by means of a general definition or by means of a series of examples.</p> <p>6. Note: This commentator also submitted a brief he wrote for a case involving an asserted conflict of interest among a sibling group. While the brief did not respond to the proposed rule directly, it contained an analysis of the <i>Celine R.</i> decision and conflicts principles as applied to the representation of multiple siblings in juvenile dependency proceedings.</p>	<p>4. Agree. Subdivision (a)(3)(D) has been eliminated from the list of factors to consider in evaluating whether or not a conflict of interest is present.</p> <p>5. The Committee has opted not to define what constitutes a conflict because it was deemed to difficult to affirmatively account for the many different scenarios in which a conflict of interest could arise in juvenile dependency proceedings.</p> <p>6. No response required.</p>
12.	Ms. Christina Riehl Acting President Los Angeles Affiliate of the National Association of Counsel for Children Monterey Park	AM	Y	1. Subdivision (a)(3) (now rule 1438(c)(1)(C) and (c)(2)(B)). We recommend that this section be deleted in its entirety. Although the proposed rule was crafted in an effort to “elaborate” on the standard set forth in <i>Celine R.</i> , the proposed	1. The proposed amendments to rule 1438 (formerly proposed rule 1438.5) are made pursuant to the Judicial Council’s authority in section 326.5 of the Welfare and

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				<p>rule, in fact, goes beyond the holding by creating a list of circumstances that purportedly do not give rise to conflicts at the time of appointment. Subdivision (a)(3) conflicts with existing Rules of Professional Conduct—which require that an attorney may not accept a case in which there is an actual or potential conflict and may not continue to represent a client if an actual conflict develops. Rule 3-310 does not include examples of situations that are not conflicts because it is not possible to do so absent the facts peculiar to each case.</p>	<p>Institutions Code, in which the Legislature directs the council to establish guidelines for the appointment of an attorney in juvenile dependency proceedings. While the list of factors in new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) are not specifically identified in current statutory or case law, they are not inconsistent with any legal authority in this area. They are merely intended to assist the court and children’s attorneys in determining whether appointment of a single attorney is appropriate and to ensure protection of each child’s interest. In addition, the California Supreme Court, in the case <i>In re Celine R.</i> (2003) 31 Cal.4th 45 concluded that, to reconcile competing concepts in Welfare and Institutions Code section 317(c) and rule 3-310 of the Rules of Professional Conduct, a slightly modified conflicts standard applies to juvenile dependency proceedings in the multiple representation of siblings. (See <i>Celine R.</i> at pp. 57-58.)</p>

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				<p>2. Subdivision (a)(3) (now rule 1438(c)(1)(C) and (c)(2)(B)). The circumstances in subdivision (a)(3) never stand alone. The facts in each case must be included in any conflict analysis, either before or after accepting appointment. The more egregious of the circumstances are (B), (C), and (D), but even with these three circumstances deleted, the proposed rule is flawed as long as any portion of subdivision (a)(3) remains.</p> <p>3. Subdivision (a)(3)(B) (now rule 1438(c)(2)(B)(vi)). This provision is in conflict with the Rules of Professional Conduct, exceeds the direction provided by the Supreme Court in <i>Celine R.</i>, and places the attorney representing a sibling group in the position of violating the attorney’s Duty of Loyalty by directing the acceptance of one client’s position over the conflicting position of another client. Differing desires and objectives among siblings may well give rise to a conflict and the failure to declare such not only may result in reversals that prolong a child’s attainment of permanency, but it may also lead to claims of ineffective</p>	<p>2. Agree in part. The factors identified in new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) should not be deleted because they provide guidance to the court and children’s counsel in assessing conflicts of interest. However, the word “necessarily” has been added to new rule 1438(c)(1)(C) (formerly proposed rule 1438.5(a)(3)) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances.</p> <p>3. Agree in part. The word “necessarily” has been added to new rule 1438(c)(2)(B) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances. In addition, language has been added to highlight the importance of weighing the materiality of any conflicting desires expressed when assessing whether a conflict exists. Finally, language has been added to</p>

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				assistance of counsel.	<p>clarify that attorneys must use their best judgment in analyzing whether a conflict may be present under the facts of the case and to emphasize that the attorney has an ongoing duty to evaluate the interests of each sibling, assess whether a conflict is present, and take any action necessary to ensure that the siblings' interests are not prejudiced. (See (c)(2)(A), (c)(2)(D), and the Advisory Committee Comment.)</p> <p>*Note: The substance of former (a)(3)(B) is no longer included in the "Appointment of counsel" section because the materiality of any conflicting desires expressed by the siblings is often not evident at the time of appointment. However, the Committee has included this provision in the "Withdrawal from appointment or continued representation" section as new rule 1438(c)(2)(B)(vi). A similar list of factors now appears in two sections to clarify that such factors may arise before appointment and/or during representation.</p>

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				<p>4. Subdivision (a)(3)(C) (now rule 1438(c)(2)(B)(vii)). It is not possible for an experienced dependency attorney to ascertain that a conflict does not exist and should not be declared in this situation. Moreover, the advocate for a group of siblings should not approach the representation seeking to reconcile siblings' differing or contradictory accounts of events. The materiality of the differing or contradictory accounts of events is often not clear at the time of appointment, and the rule would result in unnecessary replacement of counsel and delay or reversal of the proceedings. The risk posed by this rule is unacceptable when weighed against such harm.</p>	<p>4. Agree in part. The word "necessarily" has been added to new rule 1438(c)(2)(B) to account for the possibility that any one of these factors may in fact constitute an actual or reasonably likely conflict of interest under certain circumstances. In addition, the reference to the reconciliation of sibling's positions has been eliminated. Finally, language has been added to clarify that attorneys must use their best judgment in analyzing whether a conflict may be present under the facts of the case and to emphasize that the attorney has an ongoing duty to evaluate the interests of each sibling, assess whether a conflict is present, and take any action necessary to ensure that the siblings' interests are not prejudiced. (See (c)(2)(A), (c)(2)(D), and the Advisory Committee Comment.)</p> <p>*Note: The substance of former (a)(3)(C) is no longer included in the "Appointment of counsel" section of the proposed amendments because the materiality of any contradictory accounts of</p>

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(amend Cal. Rules of Court, rule 1438)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>5. Subdivision (a)(3)(D). This provision requires the advocate for a group of siblings to choose one sibling client’s position over that of another with regard to a material issue in the proceeding. The rationale that “at least one of the positions lacks legal or factual foundation” not only violates the duty of loyalty, it invites a violation of the ethical and legal responsibility of the attorney to actively seek to advance the client’s position by conducting an independent investigation of the facts and circumstances as required by Welfare and Institutions Code, section 317, subdivision (e). The full extent of the legal and factual foundations of a client’s position is many times not clear at the time of a detention hearing when counsel is appointed. If</p>	<p>events expressed by the siblings is often not evident at the time of appointment. However, the Committee has included this provision in the “Withdrawal from appointment or continued representation” section as new rule 1438(c)(2)(B)(vii). A similar list of conflicts factors is now included in two sections to clarify that such factors may arise before appointment and/or during representation.</p> <p>5. Agree. Subdivision (a)(3)(D) has been eliminated from the list of factors to consider in evaluating whether or not a conflict of interest is present.</p>

SPR05-32

Juvenile Dependency: Guidelines for Attorneys Representing Sibling Groups
(amend Cal. Rules of Court, rule 1438)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				enacted, this provision would result in the unnecessary replacement of counsel at a later time and a delay or reversal of the proceedings. The risk posed by this rule is unacceptable when weighted against such harm.	
13.	Mr. Dean Zipser President Orange County Bar Association Irvine	A	Y	<i>No specific comment</i>	No response required.

ATTACHMENT A: INITIAL PROPOSAL

Rule 1438.5. Conflict of interest guidelines for court-appointed counsel for children in juvenile dependency proceedings

(a) [Appointment of counsel]

(1) A single attorney may represent a group of siblings involved in the same dependency proceeding.

(2) An attorney must decline to represent a group of siblings, and the court must appoint a separate attorney to represent one or more of the siblings, if, at the outset of the proceedings:

(A) An actual conflict of interest exists among those siblings; or

(B) Circumstances specific to the case present a reasonable likelihood that an actual conflict of interest will arise among those siblings.

(3) The court may appoint a single attorney to represent a group of siblings under any of the following circumstances, which do not, standing alone, demonstrate an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise:

(A) There is a purely theoretical or abstract conflict of interest among the siblings;

(B) The siblings express conflicting desires or objectives;

(C) The siblings give different or contradictory accounts of the events, but the issues involved are not material and/or the sibling's positions can be reconciled;

(D) The siblings have differing positions about material issues, but at least one of these positions lacks legal or factual foundation;

(E) The siblings have different permanent plans;

(F) The siblings are of different ages;

(G) Some of the siblings are more likely than others to be adoptable; or

(H) The siblings have different parents.

1
2 **(b) [Withdrawal from appointment or continued representation]**
3

4 (1) An attorney must request to withdraw from the representation of some or
5 all of the siblings, and the court should relieve counsel from
6 representation, if an actual conflict of interest arises during counsel’s
7 representation of the siblings. A reasonable likelihood of an actual
8 conflict does not necessitate withdrawal.
9

10 (2) After an actual conflict of interest arises, the attorney may continue to
11 represent siblings whose interests do not conflict only if:
12

13 (A) The attorney has successfully withdrawn from the representation of
14 all siblings whose interests conflict with those of the siblings the
15 attorney continues to represent;
16

17 (B) The attorney has exchanged no confidential information with any
18 sibling(s) whose interests conflict with those of the sibling(s) the
19 attorney continues to represent; and
20

21 (C) Continued representation of one or more siblings would not
22 otherwise prejudice the other sibling or siblings.
23

24
25 **Advisory Committee Comment**

26
27 Representation of multiple siblings in a dependency case is both permitted and encouraged. In *In*
28 *re Celine R.* (2003) 31 Cal.4th 45, the California Supreme Court concluded that the juvenile court may
29 appoint a single attorney to represent multiple siblings in a dependency case unless, at the time of the
30 appointment, an actual conflict of interest exists among the siblings or it appears from circumstances
31 specific to the case that an actual conflict is reasonably likely to arise. This rule is intended to elaborate on
32 the *Celine R.* standard by (1) providing examples of circumstances in which an actual conflict of interest
33 is not present or “reasonably likely” to arise, and (2) explaining the circumstances under which an
34 attorney may continue representation despite the existence of an actual conflict of interest among some of
35 the siblings.