Supreme Court Case No. S232946

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP,

Plaintiff and Respondent,

v.

J-M MANUFACTURING CO., INC.,

Defendant and Appellant.

Court of Appeal, Second Appellate District, Division Four
Case No. B256314

Los Angeles Superior Court
Case No. YC067332
Honorable Stuart Rice, Judge

J-M MANUFACTURING COMPANY, INC.'S SUPPLEMENTAL BRIEF ON NEW AUTHORITY

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Pursuant to California Rules of Court, rule 8.520(d)(1), J-M hereby addresses the same recent modifications of the California Rules of Professional Conduct discussed by Sheppard Mullin in, and included in the exhibit to, its supplemental brief filed on May 18, 2018.

A. Rule 1.7 Comment 9 Applies To "Future," Hypothetical Conflicts—Not Existing Conflicts.

The recently-adopted Rule 1.7, which addresses "Conflicts of Interest," confirms that rules applicable to advance waivers of hypothetical, future conflicts do not apply to existing conflicts. Thus, Comment 9 explains that its discussion of "advance consent" and client sophistication is applicable to a client's consent "to a *future* conflict in compliance with applicable case law" and discusses the need for an explanation to the client of "the *types of future representations* that *might* arise." (Sheppard Supp. Br., Ex. A at p. 25, italics added.)

The new rules do not alter California's well-established requirement that attorneys must disclose the existence of and material information about an existing conflict to allow a prospective client to evaluate whether to engage the attorney. For instance, Rule 1.7 requires "informed consent" and "disclosure of the conflicting relationship to the client" when a conflict exists. (*Id.* at pp. 21-22 [Rule 1.7(a), (c)(1)].) Likewise, under the new rules, "informed consent" is defined as requiring that "the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks" (*id.* at p. 3 [Rule. 1.0.1(e)])—the opposite of Sheppard Mullin's approach in this case of

providing a written waiver that says only that a conflict "may" or may not exist, while verbally telling J-M's general counsel that no conflict exists.

B. Even As To Hypothetical Future Conflicts, The New Rule Is More Circumscribed Than The Out-Of-State Authorities Sheppard Mullin Relies On.

As J-M previously argued, even as to hypothetical future conflicts, California Rule 1.7 "'*rejects* the ABA's decision to recognize generalized, open-ended advance waivers for sophisticated clients.'" (J-M's Answer Brief at p. 34.) Contrary to Sheppard Mullin's assertions (Sheppard Mullin Supp. Br. p. 3.), that is true of both the recently-adopted version and its immediately-prior draft.

The ABA Model Rule expressly leaves an opening for "general and open-ended" advance waivers, saying that such waivers "*ordinarily* will be ineffective," but that "such consent is more likely to be effective" in the case of sophisticated clients. (ABA Model Rules of Prof. Conduct, rule 1.7, com. 22; italics added.) No comparable language appears in California Rule 1.7 comment 9. Had California wanted to incorporate from the ABA Model Rules this normative concept about the potential validity of sophisticated clients' consent to *general, open-ended waivers*, it easily could and would have done so.

Indeed, the history of the new California rule demonstrates that this departure was deliberate. The Bar began revising the rules in 2000. In 2010, the Board of Governors adopted a version similar to the ABA's, under which "even a general and open-ended advance consent" is sometimes permissible, depending on client sophistication and other factors. (Proposed Rule of Prof. Conduct, Rule 1.7, com. 22, adopted by Board of Governors on July 24, 2010 and Sept. 22, 2010, available at p. 24 of

http://www.calbar.ca.gov/Portals/0/documents/ethics/CRRPC/RRC%20Final%20Docs/Proposed%20Rules%20of%20Professional%20Conduct%20v.24%20(7-21-14).pdf.)[1] But the Bar stripped this language from subsequent versions of proposed Rule 1.7. In fact, in April 2016, the authors of Rule 1.7 highlighted the deletion of the reference to "general and open-ended" waivers by providing a redline of the proposed California version to the ABA Model Rule. (Exhibit 2 at "Redline Comparison of the Proposed Rule to ABA Model Rule" at p. 8 previously available at http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment %20X/RRC2%20-%201.7%20[3-310]%20-%20Rule%20-%20DFT3%20(04-01-16)%20w-ES.pdf].)[2]

The version of the comment that California ultimately adopted did *not* reintroduce the ABA's conditional "blessing" of general, open-ended waivers. Instead, in a far less controversial move, the adopted version merely acknowledged that the validity of an advance waiver turns on the "comprehensive[ness of] the explanation of [a] the types of future representations that might arise and [b] the actual and reasonably foreseeable adverse consequences," and that client sophistication is relevant in determining the second of these considerations. The use of general, open-ended waivers—something that the ABA Model Rule explicitly contemplates—remains a concept considered and rejected in California.

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[1] To assist the Court, we attach a copy of the September 22, 2010 proposed California Rule 1.7 and its comments as Exhibit 1.

[2] The Bar's document provided as Exhibit 2 includes both a redline comparison of the proposed rule to current rule 3-310 followed by a redline comparison of proposed Rule 1.7 to the ABA Model Rule 1.7. Both of those redlines follow a clean version and executive summary of the rule. This document was located on the Bar's website at the above web address at the time J-M filed its Answer Brief on the Merits. The web address no longer appears to be working.

C. The Case Is Governed By Existing Law—Not The Newly Adopted Rule, Which Becomes Effective In November 2018.

Even if Sheppard Mullin's interpretation of California Rule 1.7 were correct, that would not alter the outcome of this case.

To begin with, the rule does not become effective until November 1, 2018. (Sheppard Supp. Br., Ex. A at p. 6.) A rule that is not effective until the future necessarily is not retroactive and cannot possibly control the permissibility of Sheppard Mullin's actions in 2010. That is consistent with the general rule that a statutory or regulatory amendment is *not* retroactive, especially where it changes the standards governing past conduct. (E.g. *USS-POSCO Industries v. Case* (2016) 244 Cal.App.4th 197, 217, citing *Elsner v. Uveges* (2004) 34 Cal.4th 915, 937.) What matters is the Rules of Professional Conduct in effect in 2010, when Sheppard Mullin engaged in the unethical conduct. What's more, if Rule 1.7 really does introduce the type of dramatic new concepts that Sheppard Mullin asserts, that only underscores that a different result flows from the prior law that is applicable here.

Dated: May 23, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached **SUPPLEMENTAL BRIEF** is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, signature block and this certificate, it contains **977 words.**

DATED: May 23, 2018

/s/ Jeffrey E. Raskin

Jeffrey E. Raskin

EXHIBIT 1

connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the protected information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[23] Paragraph (b) permits but does not require the disclosure of information protected by Business and Professions Code section 6068(e) to accomplish the purposes specified in paragraphs (b)(2) through (b)(5).

Acting Competently to Preserve Confidentiality

[24] A lawyer must act competently to safeguard information protected by Business and Professions Code section 6068(e) against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3.

[25] When transmitting a communication that includes information protected by Business and Professions Code section 6068(e), the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[26] The duty of confidentiality continues after the lawyer-client relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Government Lawyers

[27] This Rule applies to lawyers representing governmental organizations. See Rule 1.13, Comment [15].

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 written consent.

Comment

General Principles

[1] Undivided loyalty and independent professional 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. See Comments [6]-[7], [8], [9], [10]-[12]. This Rule and the other conflict rules (1.8.1 through 1.8.11, 1.9, 1.10, 1.11, 1.18) seek to protect a lawyer's ability to carry out the lawyer's basic fiduciary duties to each client. In addition to the duty of undivided loyalty and the duty to exercise independent professional judgment, the conflict rules are also concerned with (1) the duty to maintain confidential client information; (2) the duty to disclose to the client all material information and significant developments; and (3) the duty to represent the client competently and diligently within the bounds of the law. See Rule 1.2(a) regarding the allocation of authority between lawyer and client. For specific rules regarding certain concurrent conflicts of interest, see Rules 1.8.1 through 1.8.11. 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 "informed written consent," see Rule 1.0.1(e) and (e-1), and Comments [6] and [7] to that Rule.

[2] Resolution of a conflict of interest under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine the scope of each relevant representation of a client or proposed representation of a client; (3) determine whether a conflict of interest exists; (4) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether lawyer has the ability to obtain the client's consent to the conflict; and (5) if so, consult with the clients affected under paragraph (a) and obtain their informed written consent. 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 written 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. Whether a lawyer-client relationship exists or, having once been established, is continuing, is beyond the scope of these Rules.

[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 written 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 a client who becomes a 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 Comment [29].

[5] [RESERVED]

Paragraph (a)(1): Identifying Conflicts of Interest: Directly Adverse

[6] The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the lawyer-client 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. Thus, a directly adverse conflict arises, for example, when a lawyer accepts representation of a client that is directly adverse to another client the lawyer currently represents in another matter. See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537]. Similarly, a directly adverse conflict under

paragraph (a)(1) occurs when a lawyer, while representing a client, accepts in another matter the representation of a person or organization who, in the first matter, is directly adverse to the lawyer's client. Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. Other instances that ordinarily would not constitute direct adversity include: (1) a representation adverse to a non-client where another client of the lawyer is interested in the financial welfare or the profitability of the non-client, as might occur, for example, if a client is the landlord of, or a lender to, the non-client; (2) working for an outcome in litigation that would establish precedent economically harmful to another current client who is not a party to the litigation; (3) representing two clients who have a dispute with one another if the lawyer's work for each client concerns matters other than the dispute; (4) representing clients having antagonistic positions on the same legal question that has arisen in different cases, unless doing so would interfere with the lawyer's ability to represent either client competently, as might occur, *e.g.*, if the lawyer were advocating inconsistent positions in front of the same tribunal. See Comments [14]-[17A].

[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 written consent of each client. Paragraph (a)(1) applies even if the parties to the transaction have a common interest or contemplate working cooperatively toward a common goal.

[7A] If a lawyer proposes to represent two or more parties on the same side of a negotiation or lawsuit, the situation is analyzed under paragraph (a)(2), not paragraph (a)(1). See Comments [29]-[33].

Paragraph (a)(2): Identifying Conflicts of Interest: Material Limitation

[7B] Conflicts of interest that create a significant risk that a lawyer's representation of one or more clients will be materially limited as provided in paragraph (a)(2) can arise from: (1) duties owed a former client or a third person (see Comment [9]); (2) a lawyer's personal interests (see Comments [10]-[12]); or (3) a lawyer's joint representation of two or more clients in the same matter (see Comments [29]-[33]).

[8] Even where there is no direct adversity, 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 two or more clients in the same matter, such as 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 other clients. The conflict in effect forecloses alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent. The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of actions that reasonably should be pursued on behalf of each client. See Comments [29]-[33]. Depending on the circumstances, various relationships a lawyer has may likewise create a significant risk that the lawyer's representation will be materially limited, for example, where (1) the lawyer has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; (2) the lawyer knows or reasonably should know that: (i) the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter, and (ii) the previous relationship would substantially affect the lawyer's representation; (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity and the lawyer knows or reasonably should know that either the relationship or the person or entity would be affected substantially by resolution of the matter; (4) a lawyer or law firm

representing a party or witness in the matter has a lawyer-client relationship with the lawyer, the lawyer's law firm, or another lawyer in the lawyer's law firm; and (5) a lawyer representing a party or witness in the matter is a spouse, parent or sibling of the lawyer, or has an intimate personal relationship with the lawyer or with another lawyer in the lawyer's law firm.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] A lawyer's duties of undivided loyalty and independence of professional judgment 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. See, e.g., *William H. Raley Co, Inc. v. Superior Court* (1983) 149 Cal.App.3d 1042 [197 Cal.Rptr. 232].

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on the 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 the client detached advice. A lawyer's legal, business, professional or financial interest in the subject matter of the representation might also give rise to a conflict under paragraph (a)(2), where, for example, (1) the lawyer is a party to a contract being litigated; (2) the lawyer represents a client in litigation with a corporation in which the lawyer is a shareholder; or (3) the lawyer represents a landlord in lease negotiations with a professional organization of which the lawyer is a member. 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 Rules 1.8.1 through 1.8.11 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 3.7 concerning a lawyer as witness and Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, or when there is an intimate personal relationship between the lawyers, 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 who is related to another lawyer, e.g., as parent, child, sibling or spouse, or who is in an intimate personal relationship with another lawyer, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed written consent. The prohibition on representation arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the lawyer-client relationship. See Rule 1.8.10.

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 gives informed written consent and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8.6. 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 payor 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 lawyer has the ability to obtain the client's consent to the representation and, if so, whether the client has adequate information about the material risks of the representation. See Comments [14]-[17A].

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), in some situations a lawyer 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 consent must be resolved as to each client.

[15] A lawyer's ability to obtain consent is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed written 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.

[16] Paragraph (b)(2) describes conflicts to which a client cannot consent because the representation is prohibited by applicable law. For example, certain representations by a former government lawyer are also prohibited, despite the informed consent of the former client. See, e.g., Business and Professions Code section 6131.

[17] Paragraph (b)(3) describes conflicts for which client consent cannot be obtained because of the interests of the legal system 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. See, e.g., *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [107 Cal.Rptr. 185] (the lawyer of a family-owned business organization should not represent one owner against the other in a marital dissolution action); *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 898 [142 Cal.Rptr. 509] (a lawyer may not represent parties at hearing or trial when those parties' interests in the matter are in actual conflict). Although paragraph (b)(3) 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 1.0.1(m)), such representation may be precluded by paragraph (b)(1).

[17A] Under paragraph (b)(4), a lawyer must obtain the informed written consent of each affected client before accepting or continuing a representation that is prohibited under paragraph (a). If the lawyer cannot make the disclosure requisite to obtaining informed written consent, (see Rules 1.0.1(e) and 1.0.1(e-1)), without violating the lawyer's duty of confidentiality, then the lawyer may not accept or continue the representation for which the disclosure would be required. See Rule 1.6 and Business and Professions Code section 6068(e). A lawyer might also be prevented from making a required disclosure because of a duty of confidentiality to former, current or potential clients, because of other fiduciary relationships such as service on a board of directors, or because of contractual or court-ordered restrictions. In addition, effective client consent cannot be obtained when the person who grants consent lacks capacity or authority. See Civil Code section 38; and see Rule 1.14 regarding clients with diminished capacity.

Disclosure and Informed Written Consent

[18] Informed written consent requires that the lawyer communicate in writing to each affected client the relevant circumstances and the actual and reasonably foreseeable adverse consequences of the conflict on the client's interests and the lawyer's representation and that the client thereafter gives his or her consent in writing. See Rules 1.0.1(e) (informed consent) and 1.0.1(e-1) (informed written consent) and Comments [6] and [7] to that Rule. 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 joint representation, including possible effects on loyalty, confidentiality and the lawyer-client privilege and the advantages and risks involved. See Comment [30] (effect of joint representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. See Comments [14]-[17A].

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client in writing. See Rule 1.0.1(n) (writing includes electronic transmission). The requirement of a written disclosure, (see Comment [18]), 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.

Duration of Consent

[20A] A disclosure and an informed written consent are sufficient for purposes of this Rule only for so long as the relevant facts and circumstances remain unchanged. With any material change, the lawyer may not continue the representation without making a new written disclosure to each affected client and obtaining a new written consent.

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 of that client 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, whether material detriment to the other clients or the lawyer would result, and the lawyer's confidentiality obligations to the client revoking consent.

Consent to Future Conflict

[22] Lawyers may ask clients to give advance consent to conflicts that might arise in the future, but a client's consent must be "informed" to comply with this Rule. A lawyer would have a conflict of interest in accepting or continuing a representation under a consent that does not comply with this Rule. Determining whether a client's advance consent is "informed," and thus complies with this Rule, is a fact-specific inquiry that will depend first on the factors discussed in Comments [18]-[20] (informed written consent). However, an advance consent can comply with this Rule even where the lawyer cannot provide all the information and explanation Comments [18]-[20] ordinarily requires. A lawyer's disclosure to a client must include: (i) a disclosure to the extent known of facts and reasonably foreseeable consequences; and (ii) an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve future facts and circumstances that to a degree cannot be known when the consent is requested. The lawyer also must disclose to the client whether the consent permits the lawyer to be adverse to the client on any matter in the future, whether the consent permits the lawyer to be adverse to the client in the current or in future litigation, and whether there will be any limits on the scope of the consent. Whether an advance consent complies with this Rule ordinarily also can depend on factors such as the following: (1) the comprehensiveness of the lawyer's explanation of the types of future conflicts that might arise and of the actual and reasonably foreseeable adverse consequences to the client; (2) the client's degree of experience as a user of the legal services, including experience with the type of legal services involved in the current representation; (3) whether the client has consented to the use of an adequate ethics screen and whether the screen was timely and effectively instituted and fully maintained; (4) whether before giving consent the client either was represented by an independent lawyer of the client's choice, or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice; (5) whether the consent is limited to future conflicts unrelated to the subject of the representation; and (6) the client's ability to understand the nature and extent of the advance consent. A client's ability to understand the nature and extent of the advance consent might depend on factors such as the client's education, language skills, and the client's familiarity with the particular type of conflict that is the subject of the consent. An advance consent normally will not comply with this Rule if it is so general and open-ended that it would be unlikely that the client understood the potential adverse consequences of granting consent. However, depending upon the extent to which the other enumerated factors set forth above are present, even a general and open-ended advance consent can be in compliance when: the consent was given by an experienced user of the type of legal services involved; and the client was independently represented regarding the consent or was advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and was given a reasonable opportunity to seek that advice. In any case, advance consent will not be in compliance in the circumstances described in Comments [14]-[17A] (prohibited representations). See Rule 1.0.1(e) (informed consent) and 1.0.1 (e-1) (informed written consent). A lawyer who obtains from a client an advance consent that complies with this Rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. See Rule 1.8.8.

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 co-plaintiffs or co-defendants, 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, joint representation of persons having similar interests in civil litigation is permitted if the requirements of paragraph (b) are satisfied.

[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 informed 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 written consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters to the extent permitted by Rule 1.16.

[24A] If permission from a tribunal to terminate a representation is denied, the lawyer is obligated to continue the representation notwithstanding the provisions of this Rule. See Rule 1.16(c).

[25] This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed member of a plaintiff or a defendant class is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not typically need to get the consent of an unnamed class member before representing a client who is adverse to that 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. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.

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 that are prohibited by paragraph (a)(1), see Comment [7]. Relevant factors in determining whether there is significant risk for material limitation as provided in paragraph (a)(2) 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.

[28] [RESERVED]

Special Considerations in Joint Representation

[29] When a lawyer represents multiple clients in a single matter, the lawyer's duties to one of the clients can interfere with the performance of the lawyer's duties to the other clients. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the joint 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 joint representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake joint representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by joint representation is not likely. Other relevant factors include 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.

[29A] Examples of conflicts that arise under paragraph (a)(2) from representing multiple clients in the same matter and that will likely preclude a lawyer from accepting or continuing a joint representation unless the lawyer complies with paragraph (b) include the following situations: (1) the lawyer receives conflicting instructions from the clients and the lawyer cannot follow one client's instructions without violating another client's instruction; (2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer is obligated to advise each client about how to advance that client's position relative to the other's position; (4) the clients have inconsistent expectations of confidentiality because one client expects the lawyer to keep secret information that is material to the matter; (5) the lawyer has a preexisting relationship with one client that affects the lawyer's independent professional judgment on behalf of the other client(s); (6) the clients make inconsistent demands for the original file.

[30] A particularly important factor in determining the appropriateness of joint representation is the effect on lawyer-client confidentiality and the lawyer-client privilege. With regard to the lawyer-client privilege, although each client's communications with the lawyer are protected as to third persons, as between jointly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation results between the joint clients, the privilege will not protect any such communications. See Evidence Code sections 952 and 962. In addition, because of the lawyer's obligations under Rule 1.4, the lawyer must inform each jointly represented client in writing of that fact and also that the client should normally expect that his or her communications with the lawyer will be shared with other jointly-represented clients. See also Comments [18]-[20].

[31] [RESERVED]

[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 joint 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 joint representation has the right to the lawyer's undivided loyalty 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 who is also a member of its board of directors (or a lawyer for another type of organization who has corresponding fiduciary duties to it) should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in