

Rule 1.7: Conflict of Interest: Current Clients

1. Current Kentucky Rule with Official Comments:

SCR 3.130(1.7) Conflict of interest: general rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Supreme Court Commentary

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship

exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope (sic).

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

[3] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

[4] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in

related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

[5] The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[6] Paragraph (a) prohibits representation of opposing partisan (sic) litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

[7] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept

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

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

Interest of Person Paying for a Lawyer's Service

[9] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

[10] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will

arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[11] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[12] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[13] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

[14] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See *Scope* (sic).

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(1.7) Conflict of interest: ~~general rule~~ current clients

~~(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:~~

~~(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and~~

~~(2) Each client consents after consultation.~~

~~(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:~~

~~(1) The lawyer reasonably believes the representation will not be adversely affected; and~~

~~(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.~~

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

(1) the representation of one client will be directly adverse to another client; or

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

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one

client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

Supreme Court Commentary Comment

Loyalty to a Client General Principles

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

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[1] [3] An impermissible A conflict of interest may exist before representation is undertaken, in which event the representation should must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). The 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 parties persons and issues involved and to determine whether there are actual or potential conflicts of interest. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a

lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

~~[1]~~ [4] If such a conflict arises after representation has been undertaken, the lawyer should ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Rule 2.2(e) Comments [5] and [29]. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

~~[2]~~ [6] As a general proposition, loyalty Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Paragraph (a) expresses that general Rule. Thus, absent consent, a lawyer ordinarily may not act as an advocate in one matter against a person the lawyer represents in some other matter, even if it is when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse

representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally 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. ~~Paragraph (a) applies only when the representation of one client would be directly adverse to the other.~~

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

Identifying Conflicts of Interest: Material Limitation

~~[3] [8] Loyalty to a client is also impaired when~~ Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer cannot lawyer's ability to consider, recommend or carry out an appropriate course of action for the client because will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. ~~Paragraph (b) addresses such situations. A possible conflict~~ The mere possibility of subsequent harm does not itself preclude the representation require disclosure and consent. The critical questions are the likelihood that a ~~conflict~~ difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose

courses of action that reasonably should be pursued on behalf of the client. ~~Consideration should be given to whether the client wishes to accommodate the other interest involved.~~

Lawyer's Interests Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

~~[5]~~ [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family

relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

~~[9] [13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.~~

Consultation and Consent Prohibited Representations

~~[4] [14] A client Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, some conflicts are~~

~~nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client is involved, the question of conflict consentability must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.~~

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

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

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

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

impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[6] [23] Paragraph ~~(a)~~ (b)(3) prohibits representation of opposing parties in the

~~same litigation, regardless of the clients' consent. Simultaneous~~ On the other hand, ~~simultaneous~~ representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph ~~(b)~~ (a)(2). ~~An impermissible A~~ conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if ~~the risk of adverse effect is minimal and~~ the requirements of paragraph (b) are met. ~~Compare Rule 2.2 involving intermediation between clients.~~

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

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

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals

at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Other Conflict Situations Nonlitigation Conflicts

~~[10]~~ [26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation sometimes may be difficult to assess. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for adverse-effect material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual-conflict disagreements will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree. See Comment [8].

[12] [27] ~~Conflict~~ For example, conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. ~~The~~ In order to comply with conflict of interest Rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[11] [28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to

be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing Rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the

lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

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

[13] [35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters

discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

~~Conflict Charged by an Opposing Party~~

~~[14] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.~~

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The proposed Rule is entitled "Current Clients" and creates a single set of standards for dealing with all "concurrent conflicts of interest." Concurrent conflicts include representations that are "directly adverse" and those that may be "materially limited" by other duties, but the new Rule eliminates the need to determine which category the conflict falls. The proposed Rule provides for consent (waiver) in most conflicts if the lawyer reasonably believes he or she can provide "competent and diligent representation." The most significant change is the requirement that each client must give informed consent to the conflict of interest and the consent must be confirmed in writing. This may involve a writing by the client, but it also permits the lawyer merely to confirm an oral understanding with the client. (Proposed KRPC Rule 1.0 Terminology defines "confirmed in writing," "informed consent" and "writing.") The proposed Rule recognizes two non-consentable conflicts – those that involve the assertion of a claim by one client against another in litigation and those that are prohibited by law.

(2) There have been extensive amendments and additions to the Comments. These changes and additional Comments provide a framework for conflicts analysis, address

special problems in litigation and non-litigation settings, and deal with questions of common representation and organizational clients. Several proposed Comments explain “informed consent” and “confirmed in writing” requirement. Comments [18]-[21]. In addition, the proposed Comments address the use of prospective waivers. Comment [22]. Rule 2.2 Intermediary is eliminated in the MR and is recommended for elimination in the KRPC with the understanding that when a lawyer serves in that role, the lawyer’s conduct is subject to Rule 1.7. With that in mind, most of the Comments from Rule 2.2 have been moved to Rule 1.7 and placed under the heading of common representation. Comments [29]-[33].

(3) The ABA Reporter’s Explanation of Changes to MR 1.7 expresses the Committee’s view. It is adopted by the Committee for purposes of explaining in detail recommended changes and is quoted below.

- ABA Reporter's Explanation of Changes -- Model Rule 1.7

TEXT:

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

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

2. Create single paragraph defining "conflict of interest"

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

In addition, present paragraph (a) is conceptually confusing since, in most "directly adverse" conflicts, common representation is likely to affect both the relationship with the current client and the representation of the new client. For example, when the lawyer seeks to represent a new client suing an existing client represented by the lawyer in an unrelated matter, current paragraph (a) looks to the effect of the new representation on

the existing client, while paragraph (b) applies to the effect of the existing relationship on the representation of the new client. Thus, most cases involving directly adverse conflicts need to be analyzed under both paragraphs (a) and (b). There appears to be no reason why both conflicts cannot be analyzed under a single paragraph that defines and prohibits the representation unless informed consent is properly obtained.

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

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

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

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

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

3. Create single paragraph on consentability and informed consent

The proposed Rule makes clear that in certain situations a conflict may not be waived by the client. That is, the representation may not go forward even with the client's consent. Unlike the current Rule, the proposed Rule contains a single standard of consentability and informed consent, applicable both to directly adverse and material limitation conflicts. This standard is set forth in a separate paragraph, both to reflect the separate steps required in

analyzing conflicts (i.e., first identify potentially impermissible conflicts, then determine if the representation is permissible with the client's consent) and to highlight the fact that not all conflicts are consentable.

Under the current Rule, consentability turns on a determination that the conflict will "not adversely affect the representation." The difficulty with this standard is that in order to determine that a conflict exists in the first place, the lawyer must have already determined that the lawyer's duties or interests are likely to "materially limit" the representation. There is a difference between "material limitation" and "adverse affect on" the representation, but the difference is subtle. As a result, lawyers are understandably confused regarding the circumstances under which consent may be sought. Paragraph (b) breaks down consentability into three components. The first and most common is modeled after the current Rule, in which the goal is to protect clients in situations where the representation is likely to be inadequate. The proposal is to replace the phrase "adverse effect on the representation" with an explicit statement of what that phrase was intended to mean, i.e., that it is unlikely that the lawyer will be able to provide "competent and diligent representation to each affected client." The terms "competent" and "diligent" are already defined and are generally well understood, thus providing a relatively clear standard that lawyers can apply in making the determination whether to go ahead and seek the client's consent. The term "reasonably" makes clear that, as under the current Rule, the consentability standard is an objective one.

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

Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in adequate development of each client's position when the clients are aligned directly against each other in the same litigation. Thus, these conflicts are nonconsentable

even if the lawyer reasonably believed that the representation would be competent and diligent. It has been suggested that there may be similar institutional interests in separate representation in contexts outside litigation. Since it is not possible to describe such situations in language that preserves this paragraph's bright line text, the Commission believes that these other situations can be adequately addressed under paragraphs (b)(1) and (b)(2).

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

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

4. New requirement that informed consent be "confirmed in writing"

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

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

COMMENT:

Conflict of interest doctrine is complicated, and the Commission believes that lawyers are

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

General Principles

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

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

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

[3] This Comment incorporates much of the remainder of current Comment [1]. Changes in the first sentence reflect the dual requirements of paragraphs (a) and (b) that the lawyer recognize a conflict and decline representation unless the requirements of paragraph (b) have been met. The Comment adds a cross reference to the Rule 5.1 Comment, which states the requirement that lawyers with managerial authority within a law firm make reasonable efforts to establish internal systems for determining conflicts of interest. The last sentence is identical to the last sentence in current Comment [2]. *(Ed. Note: This is Comment [1] in current KRPC 1.7.*

[4] This Comment incorporates much of current Comment [2] *(Ed. Note: This is Comment [1] in current KRPC 1.7.)*. Changes are designed to more clearly state the requirements of the Rule where a conflict arises after a representation has commenced and, in addition, to indicate the type of analysis required to determine whether a lawyer must withdraw from representing one of several clients represented concurrently by the

lawyer or, in some cases, from representing all of them.

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

Identifying Conflicts of Interest: Directly Adverse

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

[6] This Comment incorporates much of current Comment [3] (*Ed. Note: This is Comment [2] in current KRPC 1.7.*). It addresses the conflicts defined in paragraph (a)(1), i.e., "directly adverse" conflicts. It provides the rationale for the Rule, addresses the question of whether the Rule applies when a lawyer will have to cross examine a present client and explains how "directly adverse" conflicts also pose "material limitation" conflicts with respect to the lawyer's existing client.

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

Identifying Conflicts of Interest: Material Limitation

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

[8] This Comment incorporates much of current Comment [4] (*Ed. Note: This is Comment [3] in current KRPC 1.7.*). It addresses the conflicts defined in paragraph (a)(2), i.e., "material limitation" conflicts. The changes are designed to clarify the relationship between paragraphs (a)(1) and (a)(2) and to address the question of how

likely the risk of harm must be before a conflict of interest is determined to exist.

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

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

Personal Interest Conflicts

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

[10] This Comment addresses conflicts arising from a lawyer's self interest and retains most of current Comment [6] (*Ed. Note: This is Comment [5] in current KRPC 1.7.*). The sentence regarding fees has been deleted on the ground that conflicts between lawyers and prospective clients regarding fee arrangements are typically addressed not by "conflict of interest" Rules but rather by Rule 1.5, which regulates fees directly. The third sentence is intended to incorporate ABA Formal Opinion 96 400, which addresses a lawyer negotiating for employment with opposing counsel, which might lead to a lawyer switching to the law firm opposing the lawyer's client in the middle of a representation. The last two sentences add cross references to Rules 1.8 and 1.10.

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

[12] This new Comment provides a cross reference to Rule 1.8(j), which prohibits lawyers from engaging in sexual relationships with clients in most circumstances.

Interest of Person Paying for a Lawyer's Service

[13] This Comment modifies current Comment [10] by eliminating the specific illustrations and explaining the relationship between Rules 1.7 and 1.8(f) (*Ed. Note: This is Comment [9] in current KRPC 1.7.*). The Commission is recommending a specific reference in Rule 1.8(f), Comment [12], to compliance with the requirements of Rule 1.7 when third party payment involves a conflict of interest. The examples involving insurance defense and corporate constituents have been deleted on the grounds that these examples involve a number of complex questions that cannot adequately be addressed in this Comment.

Prohibited Representations

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

[14] This Comment modifies current Comment [5] (*Ed. Note: This is Comment [4] in current KRPC 1.7.*) in order to more clearly articulate the fact that some conflicts are nonconsentable, meaning that the lawyer may not undertake the representation even with the client's informed consent.

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

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

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

Informed Consent

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

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

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

Consent Confirmed in Writing

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

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

Revoking Consent

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

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

Consent to a Future Conflict

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

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

Conflicts in Litigation

[23] This Comment maintains current Comment [7] (*Ed. Note: This is Comment [6] in current KRPC 1.7.*) with only a few modifications reflecting textual changes.

[8] The Commission recommends deleting current Comment [8] (*Ed. Note: This is Comment [7] in current KRPC 1.7.*) because the material here is now addressed in Comment [6].

[9] The Commission recommends deleting current Comment [9] (*Ed. Note: This is Comment [8] in current KRPC 1.7.*) because the material here is now addressed in Comment [24].

[24] This new Comment replaces current Comment [9] (*Ed. Note: This is Comment [8] in current KRPC 1.7.*) on "positional conflicts." It focuses primarily, not on whether such conflicts are consentable, but rather on the more important and troubling question of whether the clients need to be consulted. The current Comment has been uniformly criticized for making too much of the distinction between trial and appellate courts. This Comment uses an analysis similar to that used for other conflicts, i.e., whether there is a significant risk that the lawyer's duties in one representation are likely to materially limit the lawyer's duties in the other representation. It must be kept in mind, however, that it may be difficult to detect some positional conflicts. Moreover, there is a need to avoid giving clients too much veto power over what types of representation a lawyer or law firm may handle.

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

Nonlitigation Conflicts

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

[26] This Comment maintains current Comment [11] (*Ed. Note: This is Comment [10] in current KRPC 1.7.*) with a few modifications designed to clarify the application of conflict of interest doctrine to nonlitigation situations.

[27] This Comment maintains current Comment [13] (*Ed. Note: This is Comment [12] in*

current KRPC 1.7.) with a few stylistic changes.

[28] This Comment maintains current Comment [12] (*Ed. Note: This is Comment [11] in current KRPC 1.7.)*) with an expanded discussion of nonconsentability in the context of transactional representation. The expanded discussion is taken from the Comment to current Rule 2.2.

Special Considerations in Common Representation

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

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

[29] This new Comment combines Comments [4] and [7] (*Ed. Note: This is Comment [8] in current KRPC 2.2.)*) to current Rule 2.2. "Intermediation" has been changed to "common representation." In addition, in keeping with the general standard of Rule 1.7(b)(1), the Comment states that common representation is improper, not only when impartiality "cannot" be maintained, but also when it is "unlikely" that the lawyer can do so. The Comment also makes clear that a lawyer may be required to withdraw from the representation entirely, depending upon the outcome of the analysis described in Comment [4].

[30] This Comment and Comment [31] are a modified version of Comment [6] (*Ed. Note: This is Comment [7] in current KRPC 2.2.)*) to current Rule 2.2. The discussions of evidentiary privilege and the rule of confidentiality have been separated. This Comment addresses the privilege.

[31] This Comment is a modified version of the portion of Comment [6] (*Ed. Note: This is Comment [7] in current KRPC 2.2.)*) to current Rule 2.2 that addresses the effect of the obligation of confidentiality on common representation. Unlike current Comment [6],

this Comment gives more explicit guidance to lawyers, emphasizing that they should discuss confidentiality at the outset of the representation and that in most cases the common representation will be proper only if the clients have agreed that the lawyer will not maintain confidences between them.

[32] This Comment combines and substantially modifies Comments [8] (*Ed. Note: This is Comment [9] in current KRPC 2.2.*) and [9] (*Ed. Note: This is Comment [10] in current KRPC 2.2.*) to current Rule 2.2 and addresses the requirement of informed consent. It specifies that, when seeking to establish or adjust a relationship between clients, the lawyer must explain how such a role differs from the partisan role expected in other circumstances. It further requires the lawyer to explain the implications of the changed role on the client's responsibility for making decisions.

[33] This new Comment is a slightly modified version of Comment [10] (*Ed. Note: This is Comment [11] in current KRPC 2.2.*) to current Rule 2.2. The changes are stylistic.

Organizational Clients

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

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

[35] This Comment maintains current Comment [14] (*Ed. Note: This is Comment [13] in current KRPC 1.7.*) with modifications designed to reflect that, when problems arise with a lawyer director, the lawyer may either resign as director or cease acting as the corporation's lawyer, and to advise the lawyer of the possible consequences of discussing matters at board meetings while the lawyer is present in the capacity of director.

[15] The Commission proposes to delete current Comment [15] (*Ed. Note: This is Comment [14] in current KRPC 1.7.*) and the associated caption because it addresses questions outside the disciplinary context.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

The only variance from MR 1.7 is that the Committee added the last sentence to Rule 1.7(b)(4) to emphasize the importance of providing the client with adequate information to give an informed consent.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.