UNDER CURRENT RULE 1.7, MAY A LAWYER CONTINUE TO JOINTLY REPRESENT MULTIPLE CLIENTS WHEN THEIR INTERESTS POTENTIALLY OR ACTUALLY CONFLICT SO LONG AS THE LAWYER HAS OBTAINED THE INFORMED WRITTEN CONSENT OF EACH CLIENT?

SUMMARY

It is generally permissible for a lawyer to represent multiple clients in the same or closely related matters if each affected client first provides informed written consent. However, California Rules of Professional Conduct, rule 1.7(d) states three exceptions to this general rule. This opinion analyzes a lawyer’s conflicts under rule 1.7(d) in two hypothetical situations.¹

FACTS PRESENTED

We analyze current rule 1.7 using the following hypotheticals involving the joint representation of multiple clients.²

#1. Driver and Passenger were involved in a vehicle collision. It appears the collision was caused solely by the negligence of Potential Defendant and that there is no basis for a claim against Driver for comparative negligence or otherwise. Lawyer A represents Driver and Passenger for their respective claims against Potential Defendant prior to filing a civil action. Lawyer A accepted the joint representation of Driver and Passenger after each consented in writing following Lawyer A’s written disclosure to them of the relevant circumstances and material risks, including any actual and reasonably foreseeable adverse consequences of the proposed joint representation. Lawyer A’s written disclosure included the possibility that, taken together, Passenger’s and Driver’s

¹ A lawyer’s representation of two or more clients in the same matter or closely related matters properly is called a “joint representation.” See, e.g., Roush v. Seagate Technology, LLC (1970) 150 Cal. App. 4th 210, 225.

² This opinion only addresses the ethics issues under rule 1.7. It does not address aggregate settlements governed by rule 1.8.7 or possible substantive issues of contract, insurance, or other legal issues. All references to a “rule” are to the California Rules of Professional Conduct.
injuries might justify a recovery exceeding the Potential Defendant’s insurance policy limits. Lawyer A prepares an updated written conflict disclosure upon learning that Driver has underinsured motorist insurance and obtains new written consents from both clients to seek recovery on Passenger’s behalf from Driver’s insurance carrier while continuing to concurrently represent both clients. Are these new informed written consents effective to permit Lawyer to make a claim against Driver’s insurance on Passenger’s behalf?

#2. Assume the same basic facts as in Situation #1 except: (a) Lawyer A has filed a lawsuit on behalf of both clients so that Potential Defendant now is Defendant; and (b) Lawyer A recognizes that it is reasonably foreseeable that Driver could be found to be at least partially responsible for the accident so that Passenger could have a claim against Driver. May Lawyer A with the informed written consent of both Driver and Passenger: (i) continue the joint representation of Driver and Passenger and (ii) assert a claim on behalf of Passenger in the action against Driver’s insurance?

**AUTHORITIES CITED**

**California Rules of Professional Conduct:**

Rules 1.0.1(e), 1.0.1(e-1), 1.0.1(h), 1.0.1(i), 1.0.1(m)
Rule 1.7(a), (b), (d)
Rule 1.8.7
Former rule 3-310(C)(1) and (2)

**Cases:**

People ex rel. Dept. of Corps. v. SpeeDee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135
Klemm v. Superior Court (1977) 75 Cal.App.3d 893
In the Matter of Sklar (Rev. Dept. 1994) 2 Cal State Bar Ct. Rptr. 602.
Spindle v Chubb/Pacific Indem. Group (1979) 89 Cal.App.3d 706
Franson v. City and County of Honolulu (D.Hawaii 1/25/2017) 2017 WL 372976
Johnson v. Clark Gin Serv., Inc. (12/1/2016) 2016 WL 7017267
Malibu Media, LLC v. Doe (M.D. Penn. 10/25/2016) 2016 WL 6216142
Statutes:

Bus. & Prof. Code § 6131.

DISCUSSION

Rule 1.7 provides in applicable part:

(a) A lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.

(b) A lawyer shall not, without informed written consent from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person, or by the lawyer's own interests.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(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; and

(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. (Emphasis added.)

Rule 1.7(a) addresses the concurrent representation of two or more clients whose interests are “directly adverse” in the same or in separate matters. The primary consideration addressed in the rule is the lawyer's duty of undivided loyalty owed to each client. See rule 1.7, Comment [1]. Whether or not the matters are related and regardless whether the lawyer possesses confidential information belonging to the first client that is relevant to the other client or
second matter, the duty of undivided loyalty is implicated when a lawyer’s representation of one client is directly adverse to another current client.

Rule 1.7(b), on the other hand, recognizes that a lawyer’s duties, relationships, or interests might interfere with the lawyer’s “ability to consider, recommend or carry out an appropriate course of action.” See rule 1.7, Comment [4]. This implicates the lawyer’s duties of loyalty, competence, and independent professional judgment.

Taken alone, rules 1.7(a) and 1.7(b) generally permit a lawyer to concurrently represent in the same matter two or more clients whose interests conflict so long as each client provides informed written consent. California case law has long acknowledged that, even in a litigation setting, clients might be permitted to elect to be represented by one lawyer, notwithstanding that certain types of conflicts potentially or actually exist between the clients, so long as adequate disclosure is made in writing and the clients consent in writing.\(^3\) Rules 1.7(a) and (b) do not alter a lawyer’s ability to jointly represent multiple clients as provided by former rules 3-310(C)(1) and (2).

However, rule 1.7(d) identifies three situations where even informed written consent is ineffective to allow a lawyer to concurrently represent two or more clients in the same matter. This means that in these three situations joint clients cannot effectively consent to their representation by the same lawyer even if (i) the lawyer were to fully disclose the risks and reasonably foreseeable adverse consequences of the joint representation and (ii) after consideration of the risks and consequences, the clients provided consent in writing.\(^4\) See rules 1.0.1(e), 1.0.1(e-1).

First, even with informed written consent, rule 1.7(d)(1) permits a lawyer to accept or continue a representation that comes within rule 1.7 only if the lawyer “reasonably believes” that the lawyer will be able to represent each client competently and diligently. Second, rule 1.7(d)(2) requires that any client-consented representation not be prohibited by law.\(^5\) Third, rule 1.7(d)(3) prohibits a lawyer from representing a client in asserting a claim against another

\(^3\) See, e.g., In the Matter of Respondent K (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335.

\(^4\) There are situations in which a lawyer cannot obtain consent. Examples include situations in which the lawyer’s duty of confidentiality, whether the duty arises by virtue of an attorney-client relationship, by statute or otherwise, prevents the lawyer from providing an adequate disclosure to a client from whom the lawyer is seeking consent (see rule 1.7, Comment [7], Bus. & Prof. Code 6068(e) and rule 1.6 and in situations where a client lacks capacity to provide informed consent.

\(^5\) An example of a representation prohibited by law is found in Bus. & Prof. Code section 6131, which prohibits a lawyer who has prosecuted an accused person from representing the accused in a subsequent civil action against the government concerning the same matter.
client the attorney represents in the same litigation or other proceeding before a tribunal. Of relevance to the hypotheticals presented in this Opinion are paragraphs (d)(1) and (d)(3).

**Rule 1.7(d)(1)**

Rule 1.7(d)(1) requires that, before taking on a joint representation, the lawyer must “reasonably believe” that the lawyer will be able to provide competent and diligent representation to each affected client.” The term “reasonably believes” is defined in rule 1.0.1(i), which provides that the term, “when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” This definition means that, under rule 1.7(d)(1), the lawyer must subjectively believe in the ability to provide competent and diligent representation and that this belief is objectively reasonable under all of the facts and circumstances.  

Rule 1.7(d)(1) also accords with California case law. In Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, a lawyer jointly represented a divorcing couple. The court held that the lawyer should be permitted to represent the couple because the conflict in representing them jointly was merely potential and not actual; the divorce was uncontested and the clients were in agreement on all issues including an opposing governmental claim that the husband should be ordered to pay a small amount of child support; and each consented to the joint representation. However, Klemm also stated: “As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.” Id. at 898. That is, where the lawyer is called upon to assert a claim on behalf of one client against the interests of another client at a contested hearing, compromised representation will result which would render the lawyer incapable of providing competent representation to both clients, thus prohibiting the concurrent representation.

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California Rule 1.7(d)(3)

Rule 1.7(d)(3) permits a lawyer to concurrently represent multiple clients only if “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.”

Although there is no California court decision interpreting the meaning of rule 1.7(d)(3)’s prohibition of the “assertion of a claim” by one client against another client represented by the same lawyer in the same proceeding before a “tribunal,” California case law has long held that such a situation would not be permitted. The court in Klemm v. Superior Court, supra, 75 Cal. App. 3d 893 at 898 explicitly recognized that: “[such] representation would be per se inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.” (Emphasis added.)

The Klemm court recognized, however, that before jointly-represented clients’ interests become actually adverse, necessitating the same lawyer to advocate opposing positions in the same matter and requiring the lawyer’s withdrawal from representation, it would be possible for the lawyer to continue to represent both clients. In distinguishing between a potential and an actual conflict, the court stated:

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7 The word “tribunal” is defined in rule 1.0.1 (m): “‘Tribunal’ means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.” This definition excludes mediation because a decision that results from a mediator’s actions is voluntary to the parties.

8 A “potential” conflict is not the same as a “hypothetical” conflict. In Havasu Lakeshore Investments, LLC v. Fleming (2013) 217 Cal.App.4th 770, 779, the court distinguished between the two concepts:

[W]e recognize that a mere hypothetical conflict is insufficient. Rather, there must be some identifiable potential conflict. In Carroll v. Superior Court (2002) 101 Cal.App.4th 1423, 1430, 124 Cal.Rptr.2d 891, the appellate court “interpret[ed] the Rule 3–310 concept of potential conflict to mean, at least in the [juvenile] dependency context, a reasonable likelihood an actual conflict will arise.” Subsequently, our Supreme Court approved Carroll’s interpretation in a juvenile dependency case. Similarly, a major treatise defines a potential conflict under rule 3–310 to mean “a reasonably foreseeable set of circumstances which could impair the attorney’s ability to fulfill his or her professional obligations to each client in the proposed representation.” (Emphasis in original)

The court recognized that a restrictive interpretation of the term “potential conflict” is necessary because otherwise, “potential conflicts of interest would be inherent in every case of multiple representation.” Id. at note 7. Whenever there is a potential conflict of interest, a lawyer must obtain the necessary informed written consent to joint representation.
However, if the conflict is merely potential, there being no existing dispute or contest between the parties represented as to any point in litigation, then with full disclosure to and informed consent of both clients there may be dual representation at a hearing or trial. [citations omitted.] Id. at 899

The court then concluded that under the posture of the case before it, there was no actual conflict between the husband and wife as to child support: being fully informed, the wife did not want child support and the husband did not want to pay it. The only adversity that existed was between the husband and wife on the one hand, and an independent outside party—the county—on the other. Id. The lawyer was not being called on to assert a claim by the wife against the husband, or vice versa; and there was no suggestion that the lawyer might not be able to competently advise both husband and wife as to their reasonable alternatives. Therefore, the court issued a writ reversing the trial court’s denial of the couple’s request to be jointly represented. See also, Spindle v Chubb/Pacific Indem. Group (1979) 89 Cal.App.3d 706, (relying on Klemm, holding that the lack of an actual conflict of interest defeated the plaintiff’s claim that the defense lawyer was improperly representing joint interests).

Neither Klemm nor Spindle involved a joint representation of clients in the same proceeding before a tribunal where one client asserted a claim against the other. Such a representation is prohibited regardless of the client’s consent. Klemm remains a correct statement of California’s standards. It was recently followed in State Comp. v. Drobot (C.D. Cal. 2016) 192 F. Supp. 3d 1080 and is part of the foundation for rule 1.7(d)(3). See rule 1.7, Comment [8].

Rule 1.7(d)(3) applies to a specific situation, i.e., where one jointly-represented client is asserting a claim against another in a proceeding before a tribunal, such that, in Klemm’s words, the lawyer “could not advocate the interests of one client without adversely injuring those of the other.” 75 Cal.App.3d at 898. Even with written consent by the affected clients, there is the separate issue of preserving a fair judicial system and the public’s perception of fairness. As noted in Drobot, supra, “[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar.” Accordingly, “[t]he important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process.” 192 F. Supp. 3d at 1087-88 (quoting People ex rel. Dept. of Corps. v. SpeeDee Oil Change Systems, Inc. (1999) 20 Cal.4th 1135, 1145).
The decision of the State Bar Court in In the Matter of Sklar (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, confirms that had the lawyer in that case obtained from the clients an appropriate written waiver of the potential conflicts of interest that arose in a case involving concurrent representation of a driver and passenger, the lawyer would not have been found culpable of misconduct for failing to obtain informed written consent to waivable potential conflicts.

**Conclusions regarding whether the lawyer can continue to represent the clients in the two hypotheticals presented:**

**Hypothetical #1.**

Under hypothetical # 1, it appears Potential Defendant driver is 100% at fault and Driver has no fault. Further, it is assumed there are no facts tending to suggest that Lawyer A will be unable to provide competent and diligent representation to both Driver and Passenger, so the requirements of rule 1.7(d)(1) are satisfied. Finally, given that Passenger does not, on the hypothetical facts presented, have a claim against Driver, there would be no claim to be asserted by Passenger against Driver in the same proceeding before a tribunal, so the requirements of rule 1.7(d)(3) are also satisfied. Lawyer A can obtain informed written consent from Driver and Passenger to seek benefits on behalf of both under the Driver’s underinsured motorist insurance policy.

**Hypothetical #2.**

Hypothetical #2 presents a different situation. The hypothetical facts assume Driver in this instance is at least partially responsible for the accident. The specific question asked is whether Lawyer A, while jointly representing Driver and Passenger, can assert a claim on behalf of Passenger against Driver. Prior to the time that the matter is presented to the tribunal, Lawyer A is ethically permitted to concurrently represent Driver and Passenger after written disclosure and with informed written consent. After a lawsuit has been filed and regardless of whether it is objectively reasonable that Lawyer A could competently and diligently represent both Driver and Passenger, Lawyer A would be prohibited by rule 1.7(d)(3) from representing both Driver and Passenger before a tribunal, because Lawyer A would be asserting a claim against one client for another client.

[This opinion is issued by the Los Angeles County Bar Association’s Professional Responsibility and Ethics Committee. It is not binding on the courts, the State Bar of California, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.]