A question was raised recently about whether client consent waiving a conflict of interest to an attorney who takes different sides of the same legal issue in unrelated cases can revoke that consent.

This question first raises the issue of whether and under what circumstances a client can give consent to such a conflict of interest. This issue was addressed by Bar Counsel in Opinion #155, issued in January 1997. That opinion answered the following question:

The lawyer represents one client who is a party in Lawsuit A, and a second client who is a party in Lawsuit B. The two lawsuits are unrelated except that they present the same legal issue. The clients' interests are conflicting in the sense that they desire opposite resolutions of the same issue. The lawyer proposes to represent both clients, thereby causing the lawyer simultaneously to advocate opposing positions on the common legal issue.

That opinion cited Bar Rule 3.4(b)(l), defining a conflict of interest as follows:

Representation would involve a conflict of interest if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another current client, to a former, or to a third person, or by the lawyer's own interest.

It also referenced the Comment to Model Rule 1.7, which stated:

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 position 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.

At the time, no similar commentary was found in the Maine Bar Rules.

Finally, the opinion noted that the Reporter's Notes to the 1993 revision to Bar Rule 3.4(b) specifically states:

It was not intended that the interests of two or more clients would be deemed conflicting solely because, in otherwise unrelated proceedings, a lawyer might be required to advance contradictory legal positions on their behalf.

The opinion concluded that although an "issue conflict" standing alone is not a conflict within the meaning of Bar Rule 3.4(b), counsel has an obligation to both clients under Rule 3.6(a)(1) to employ "reasonable care and skill" and to "employ the lawyer's best judgment" in the representation of her clients. It further concluded that "[i]n light of this rule, an attorney must be mindful of the possibility that contemporaneously arguing opposite sides of the same issue before the same judge or panel of judges could impair her effectiveness on behalf of both clients, thereby arguably violating Rule 3.6(a)(1). It is not possible to define all the circumstances in which this rule might be implicated, since it will depend on the particular facts and
circumstances."

Since that opinion, the Maine Rules of Professional Conduct 1.7 has been adopted. Part (a) of that Rule states:

(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 would be directly adverse to another client, even if representation would not occur in the same matter or in substantially related matters; or

(2) there is a significant risk that the representation of one or more clients would 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.

Part (b) of the Rule provides that, notwithstanding such a conflict-of-interest, a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer would be able to provide competent and diligent representation to each affected client; and (2) each affected client gives informed consent, confirmed in writing. In addition to applying to conflicts between individuals, the Rule also applies to "issues conflicts" as discussed above.

The Committee does not believe the adoption of this Rule changes its Opinion #155 as to whether consent to an issue conflict can be given. However, a new question that has arisen, under the Maine Rules of Professional Conduct, Comment 21, is whether a client who has given such consent may revoke that consent and terminate the lawyers' representation at any time.

This language in the Comment is not found within the Rule itself. The Comments were not adopted by the Law Court with the New Rules. Regardless, the Committee does not believe this limits the client's ability to revoke consent to a conflict once given based on the language of Rules 1.2 and 1.16.

Rule 1.2 involves the scope of representation and allocation of authority between a lawyer and a client. Section (a) of this Rule states, in part, that "Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Further, Rule 1.16, Declining or Terminating Representation, specifically states that a lawyer shall not represent a client if the lawyer is discharged. Applying those rules, the Committee believes it is clear that the client's ability to revoke a consent to a conflict is not diminished as a result of the New Rules and that a client may revoke such consent and such revocation must be honored by the lawyer.