



**THE STATE BAR
OF CALIFORNIA**

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**III.K. Related Conflicts Rules
March 31 - April 1, 2016
Open Session Agenda**

M E M O R A N D U M

DATE: March 18, 2016

TO: Members, Commission for the Revision of the Rules of Professional Conduct

FROM: Randall Difuntorum, Director, Professional Competence

SUBJECT: Consideration of Related Conflicts of Interest Rules – ABA Model Rules 1.10, 1.11, 1.12 and 1.18

At the upcoming March 31st and April 1st meeting, it is anticipated that the Commission will complete its consideration of current rules 3-310 (Avoiding the Representation of Adverse Interest) and 3-320 (Relationship with Other Party's Lawyer). In the ABA Model Rules, there are other rules related to the topic of conflicts of interest for which there are no direct counterparts in the California rules. Those rules include:

1. Model Rule 1.10 (Imputation of Conflicts of Interest: General Rule)
2. Model Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees)
3. Model Rule 1.12 (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral)
4. Model Rule 1.18 (Duties to Prospective Clients)

In general, unless the Commission or a drafting team elects to consider other rules in connection with an assigned California rule, the Commission's work plan prioritizes completion of a study of all of the current California rules prior to consideration of any Model Rules that have no California counterpart. The drafting team assigned to rule 3-310 deferred consideration of the above listed rules and has not made any recommendations concerning them. However, due to the time constraints placed on the Commission's work, it would be prudent to have an initial discussion of these rules to ascertain the Commission's level of interest in having staff make a formal assignment prior to completion of the study of all of the California rules. Accordingly, this memorandum provides the materials listed below to facilitate that discussion. Please review these materials and be prepared to discuss the policy issue of whether any of these rules should be considered for adoption by the Commission as "clear and enforceable articulation of disciplinary standards" within the meaning of the [Commission's charter](#).

Materials Attached:

1. **Model Rule 1.10:** This Rule raises two discrete issues: (1) imputation; (2) ethical screens (walls).
 - Text of the Model Rule
 - Text of the first Commission's Proposed Rule
 - Excerpt from Model Rule 1.0 re Definition of "Screened"

- Excerpt from the Commission for the Revision of the Rules of Professional Conduct – Rules and Concepts that were Considered but are not Recommended for Adoption
- Article by Joan Rogers (August 4, 2010 ABA/BNA Lawyers Manual on Prof. Conduct, Current Reports)

2. Model Rule 1.11

- Text of Model Rule
- Text of the first Commission's Proposed Rule
- Excerpt from the Commission for the Revision of the Rules of Professional Conduct – Rules and Concepts that were Considered but are not Recommended for Adoption

3. Model Rule 1.12

- Text of Model Rule
- Text of the first Commission's Proposed Rule

4. Model Rule 1.18

- Text of Model Rule
- Text of the first Commission's Proposed Rule
- Excerpt from the Commission for the Revision of the Rules of Professional Conduct – Rules and Concepts that were Considered but are not Recommended for Adoption

**Rule 1.10 Imputation of Conflicts of Interest: General Rule
(ABA Model Rule)**

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
 - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

COMMENT

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes

apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule (First Commission's Proposed Rule)

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless
 - (1) the matter is the same as or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.
- (d) The imputation of a conflict of interest to lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

COMMENT

Definition of "Firm"

[1] Whether two or more lawyers constitute a firm for purposes of this Rule can depend on the specific facts. See Rule 1.0.1(c), Comments [1] - [3].

Principles of Imputed Conflicts of Interest

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the duties of loyalty and confidentiality owed to the client as they apply to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing the duties of loyalty and confidentiality owed to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty and confidentiality owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be prohibited from further representation. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal prohibition of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the law firm if the lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. In both situations, however, such persons must be screened from any

personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0.1(k) and 5.3. See also Comment [9].

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of each affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and Comments [14] to [17A], and that each affected client or former client has given informed written consent to the representation. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of “informed consent”, see Rule 1.0.1(e).

[7] Where a lawyer has joined a private firm or a government agency after having represented the government or another government agency, imputation is governed by Rule 1.11(b) and (c), not this Rule. Where a lawyer has become employed by a government agency after having served clients in private practice or other nongovernmental employment, the questions of whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation are matters of case law. See Rule 1.11, Comments [9B] and [9C].

[8] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through Rule 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Rule Not Determinative of Disqualification Motions

[9] This Rule does not limit or alter the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matters pertaining to disqualification. See Code of Civil Procedure section 128(a)(5); Penal Code section 1424; *In re Charlissee C.* (2008) 45 Cal.4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566.

[10] Rule 1.10 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (a) or (b). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

**Rule 1.0(k) re Definition of “Screened”
(Excerpt from ABA Model Rule 1.0)**

* * * * *

- (k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

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COMMENT

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Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

**Model Rule 1.10(a)(2) Imputation of Conflicts of Interests:
General Rule (re use of an ethical wall or screen to rebut imputation)
(Excerpt from the First Commission's Rules and Concepts
that were Considered but are not Recommended for Adoption)**

Model Rule 1.10 addresses two concepts: (i) the imputation of a lawyer's conflict to other members in the lawyer's firm on the ground that lawyers in a firm regularly share confidential information of their clients; and (ii) the availability of an "ethical screen" (also referred to as an "ethical wall") to rebut that presumption of shared confidences. In the public comment draft, the Commission recommended adoption of a rule that closely tracked the Model Rule, but without an ethical screen provision. After initial public comment distribution, the Commission recommended adoption of a modified version of Model Rule 1.10 that would have permitted, in limited circumstances, the screening of a lawyer who moves from one private firm to another.^{1/} However, a minority of the Commission took the position that no rule which provides that an ethical screen could effectively rebut the presumption of shared confidences in the context of a lawyer moving from one private firm to another should be adopted. The Board of Governors Committee on Regulation and Admissions considered the Commission's recommendation (including the view of the Commission minority) at its March 5, 2010 meeting and the Board Committee determined not to recommend that the Board adopt any part of the proposed Rule, including that part of the Rule which addressed the concept of imputation of one lawyer's prohibition to other members in the firm. As to the screening provision, the Board Committee observed that the concept of ethical screens, in the context of lateral attorney movement from one private law firm to another, was an unsettled issue in California. As to the provisions concerning imputation, the Board concluded that the concept of imputation is well-settled in California case law and that a Rule of Professional Conduct was not necessary. In accordance with the Board Committee's action, a California version of Model Rule 1.10 is not being recommended for adoption.

At its May 14, 2010 meeting, the Board Committee revisited its decision not to adopt any counterpart to Model Rule 1.10 and decided to adopt a version of Model Rule 1.10 without that Rule's screening provision. As it had at its earlier March 2010 meeting, the Board Committee determined that the concept of ethical screens, in the context of lateral attorney movement from one private law firm to another, was an unsettled issue in California, and was better left to resolution by case law. It recognized, however, the importance of having an imputation rule, and voted to adopt a version of Model Rule 1.10 without a provision for screening based on a recommendation of the Commission. In addition, a Comment to the Rule was included to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because the Rule does not expressly provide for screening. See Comment [10] to proposed Rule 1.10.

At its June 25 – 26, 2010 meeting, the Commission considered public comments both for and against inclusion of a screening provision in proposed Rule 1.10. The Commission also considered the California Supreme Court's action on a petition for review of the Court of Appeals decision in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620]. On June 23, 2010, the Supreme Court denied review and also denied all requests that the Court of Appeal decision be depublished. After further discussion, the Commission voted to request that the Board of Governors reconsider the issue of including a screening provision in proposed Rule 1.10.

At its meeting on July 22 – 24, 2010, the Board considered the Commission's request to reconsider the inclusion of a limited screening provision and the Board again determined that screening was unsettled and better left to further development in the case law. In part, this approach to the issue of screening offers the advantage of case-by-case refinement of screening principles in the appellate courts and in the Supreme Court and such developments could be monitored and inform any potential future State Bar consideration of screening standards in the rules.

^{1/} Only lawyers who had not "substantially participated" in the prior representation would be eligible for screening under the modified rule the Commission proposed.



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Model Rules

California Bar Readies New Rules for Court But Circulates Seven for Additional Scrutiny

The California State Bar's board of governors July 24 approved five dozen new or amended professional conduct rules for submission to the state supreme court, in one of the final steps in the bar's multi-year initiative to update the state's standards governing lawyer behavior.

The board stopped short, however, of confirming a complete package of proposed rule changes. Seven rules are being sent out for an additional 30-day public comment period so that lawyers may look over modifications that the drafting commission recently made to those proposals.

At the July 24 meeting, the board reversed itself and stripped from Rule 1.5 a controversial provision on non-refundable fees. The change was urged by the criminal defense bar, which adamantly opposed any restrictions on nonrefundable fees.

Marking another about-face, the board approved an aspirational rule on pro bono publico service. After the board turned down a proposed pro bono rule in May, the access to justice community swung into action, spoke out on the subject, and persuaded the board to change its mind. In a related change, the board also endorsed a proposal to let lawyers and firms share court-awarded legal fees with a referring nonprofit organization.

In other notable action at the meeting, the board of governors:

- rejected a rule that would have required lawyers to report colleagues' felonious conduct;
- nixed—once again—proposals to allow firms to institute screening measures in some circumstances without client consent, which would have prevented imputation of a lawyer's conflict from prior work at another firm or from a discussion with a prospective client;
- spurned a provision on imputation of conflicts and unilateral screening within government law offices; and
- went along with a recommendation not to endorse a rule on inadvertently transmitted material.

In comments to BNA, Mark L. Tuft of Cooper White & Cooper in San Francisco said that the drafting commission "has made significant improvement in the professional conduct rules for California lawyers in a num-

ber of areas but more remains to be done." Tuft is a vice-chair of the commission.

Pathway to Supreme Court. The changes were developed by the bar's Special Commission for the Revision of the Rules of Professional Conduct, which was asked to evaluate California's existing professional conduct rules in light of developments occurring since the last major updates to the California rules in 1989 and 1992.

Although the project began nine years ago, the bar recently put it on an accelerated schedule and released a series of six groups of proposed rules for public comment. The proposals were hashed out in four hearings before a subgroup of the board of governors, the Committee on Regulation and Admissions, that is tasked with evaluating the proposed rules before their consideration by the full board of governors. After each hearing, the board voted on the new and amended standards, reserving the right to reconsider the entire package after a public comment period on the full set of rules. See 25 Law. Man. Prof. Conduct 651; 26 Law. Man. Prof. Conduct 50; 26 Law. Man. Prof. Conduct 166; and 26 Law. Man. Prof. Conduct 324.

By omitting a screening rule, the state bar's board of governors "has abdicated its responsibility to make recommendations to the Supreme Court."

PAUL W. VAPNEK
TOWNSEND & TOWNSEND & CREW

The meeting in July was the board's opportunity to consider the full package—68 rules—in its entirety. The proposals were first vetted within the regulations and admissions committee on July 23-24 before the full board acted July 24. It is anticipated that the board will finish up its work on the proposed updates at the bar's annual meeting in late September, and then send the entire package to the California Supreme Court, possibly in October.

None of the proposed rules can take effect until they are approved by the court. Observers contacted by BNA were reluctant to predict when the court might take action, especially now that Chief Justice Ronald M. George has announced his retirement as of Jan. 2 and a

new chief justice, Tani Cantil-Sakauye, has been nominated to take his place.

Nonrefundable Fees Rule, Gone. As initially formulated by the rules revision commission and adopted by the board, Rule 1.5 featured a new standard on nonrefundable fees, which essentially would have prohibited lawyers from charging such a fee except in limited situations. The proposal was based on a Washington state rule.

The idea alarmed the criminal defense bar, which has long charged fees deemed “nonrefundable” or “earned upon receipt.” In an impassioned letter to the board, prominent Los Angeles criminal defense attorney Barry Tarlow argued that far from protecting clients, the proposed rule would leave the money earmarked for defense fees vulnerable to seizure by prosecutors seeking forfeiture of a criminal defendant’s assets or by creditors trying to get their hands on a bankrupt debtor’s property.

In response to the public comments—all of which were negative—the commission tried to come up with an acceptable alternative, based on an Arizona rule, in

which lawyers would be allowed to characterize fees as nonrefundable or earned on receipt if the client is informed of the right to fire the lawyer and that the lawyer may or may not have to refund part of the fee if discharged, and if the client agrees to the arrangement in a signed writing. The criminal defense bar was unhappy with this proposal as well, and the board voted to kill it.

‘Political Decision.’ Western State University law professor Kevin E. Mohr, who serves as consultant to the rules revision commission, told BNA that he is disappointed about the rejection of the provision on nonrefundable fees. The commission, he said, believed that the rule would protect the public and, except for the requirement of a signed writing, simply restated existing California law. The Minnesota bar recently sent a proposed rule on nonrefundable fees to the state supreme court, he noted.

In an interview with BNA, Paul W. Vapnek, who serves as a vice-chair of the rules revision commission, characterized the board’s action to remove the provision as a political decision. “There is no such thing as a nonrefundable fee,” Vapnek said. He practices with

Proposed California Lawyer Conduct Standards Weave Unique Content Into Framework of Model Rules

Of the 60 proposed California Rules of Professional Conduct that the California State Bar’s board of governors has approved to date, some follow parts of the corresponding ABA models with little change, such as the ABA rules on lawyers’ serving as third-party neutrals (Model Rule 2.4), meritorious claims and contentions (Model Rule 3.1), supervisory duties within law firms (Model Rules 5.1 through 5.3), and most of the ABA provisions that govern marketing of lawyers’ services (Model Rules 7.1 through 7.5).

On the other hand, the board voted to retain numerous unique California standards, either as standalone rules or as provisions woven into the framework of the ABA models. For example, Rule 1.1 carries forward California’s current standard on the subject of competence, which forbids a lawyer to “intentionally, recklessly, or repeatedly” fail to provide legal services with competence.

Only a few of the newly approved rules, such as Rule 5.6 (restrictions on lawyer’s right to practice) and Rule 7.5 (firm names and letterheads), adopt the corresponding ABA standard in its entirety. Instead, most of the new rules carry forward some content from California’s existing

provisions, along with language or concepts from the ABA model and entirely new wording. Examples:

- The new California rule on fees continues the state’s standard prohibiting an “unconscionable” or illegal fee, whereas Model Rule 1.5 prohibits an “unreasonable” fee.

- Rule 1.5.1, which addresses fee division among lawyers, carries forward an existing California rule that permits pure referrals.

- Rule 1.6 on confidentiality omits some of the features of the ABA template, such as the exceptions in the ABA model that allow attorneys to reveal client information to prevent or mitigate a client’s fraud or crime that used the lawyer’s services.

- Rules 1.10 and 1.18 do not state that firms may implement screening measures without client consent to avoid imputation of a lawyer’s disqualifying conduct.

- Rule 1.13 omits the provision in Model Rule 1.13 that in some circumstances allows corporate counsel to act as a whistle-blower to report wrongdoing outside the organization.

- Rule 1.14, on representing clients with diminished capacity, is much narrower than the ABA model in terms of what a lawyer is permitted to do to protect the client.

- Rule 1.15 is a complete rewrite of the ABA standard on safekeeping client funds and property.

- Rule 3.3 makes a lawyer’s duty of candor subordinate to the duty of confidentiality to clients.

- Rule 3.7, which addresses lawyers as witnesses, applies only to jury trials, honors a client’s informed choice to consent to the lawyer’s dual role, and omits Model Rule 3.7’s substantial hardship exception.

- Rule 3.9 requires lawyers to disclose that they are appearing in a representative capacity except when the lawyer is simply seeking publicly available information. It omits the ABA model’s requirement that lawyers in this situation comply with Rule 3.5 as well as parts of Rules 3.3 and 3.4.

- Rule 4.2 follows the ABA standard on communications with represented persons, but adds more detail and carries forward some provisions of the current California rule, such as standards on communicating with officers and employees of a represented organization.

- Rule 8.4 prohibits not only criminal acts that reflect adversely on a lawyer’s honesty, trustworthiness, or fitness, but also those that involve moral turpitude.

Townsend & Townsend & Crew in San Francisco and is co-author of *California Practice Guide: Professional Responsibility*, published by the Rutter Group.

Vapnek and Mohr pointed out that California's current rules are silent about putting advance fees in a client trust account, and the California Supreme Court sidestepped the issue three decades ago in *In re Baranowski*, 593 P.2d 613 (Cal. 1979). Most lawyers other than criminal defense attorneys and the bankruptcy bar put advance fees in their trust accounts, Vapnek said.

Proposed Rule 1.15 would speak to this point by stating: "A lawyer may, but is not required to, deposit an advance for fees in a trust account."

Pro Bono Rule, Redux. In May the board voted against adopting a version of Model Rule 6.1, which addresses voluntary pro bono service.

The committee was influenced in part by concerns raised in a comment letter submitted by the California Young Lawyers Association, which lodged a half-dozen objections to the proposal. Among other things, the group asserted that it would be inappropriate to place an aspirational pro bono rule with professional conduct standards that can subject lawyers to discipline. It also contended that the proposed rule was unnecessary because three aspirational pro bono standards already exist in California.

Representatives from the pro bono and access to justice community mobilized a strong effort to resurrect Rule 6.1. More than three dozen organizations and individuals submitted comments urging the board to adopt a pro bono rule, and people spoke up on the issue at public hearings on the proposed rules.

The tide turned strongly in favor of adopting the pro bono rule by the time the issue came before the regulation and admissions committee in July. The committee approved the rule by a 5-3 vote, and the board went along with that decision.

The committee and the board also accepted the commission's recommendation to add a provision, based on Model Rule 5.4(a)(4), that allows lawyers to share court-awarded fees with referring nonprofit organizations. Although the board originally turned down this proposal after some commenters expressed concern that bogus nonprofit entities might proliferate to take advantage of the rule, public comment heavily favoring the proposal carried the day, Mohr explained.

Screening Proposals Shot Down, Again. Although the drafting commission did not originally include any provision for firms to use screening measures to avoid imputation of a lateral hire's conflicts from work at another firm, ethics committees from local bar associations urged the commission to reconsider.

The commission went back to the drawing board and formulated a narrow screening provision, but in March the board of governors rejected proposed Rule 1.10 in its entirety, including the proposed screening rule.

In May, the board revisited the subject and adopted a general rule on imputation of conflicts—but without any screening measure. Similarly, the board adopted a rule on prospective clients patterned on Model Rule 1.18—but without the screening provision in the ABA model that enables firms to escape imputation of a disqualifying conflicts arising from a lawyer's discussions with a would-be client.

In between those meetings, a California appellate court handed down *Kirk v. First Am. Title Ins. Co.*, 108

Cal. Rptr.3d 620, 26 Law. Man. Prof. Conduct 239 (Cal. Ct. App. 2010), which indicated that a law firm's use of effective screening measures may in some circumstances enable the firm to avoid vicarious disqualification based on an incoming lawyer's knowledge of client confidences acquired at another private firm.

In the final proposals sent to the bar in July, the commission asked the board to consider offering the California Supreme Court two versions of Rules 1.10 and 1.18—one in which the rules include a screening provision, and one in which they don't. In resurrecting the screening proposals, the commission pointed out that the California Supreme Court declined to review *Kirk* and opted not to "depublish" the appellate opinion.

The regulation and admissions committee was not happy to have the topic reappear. It flatly refused to reconsider screening for Rule 1.10; all of the committee members voted against that version of the rule. With regard to Rule 1.18, the inclusion of a screening provision was defeated by a narrower 5-2 vote. The full board too spurned the screening alternatives.

Similarly, the committee and the board rejected a proposal to permit government law offices to use screening measures to avoid imputation of a conflict arising from a lawyer's prior work in private practice. Model Rule 1.11, which addresses conflicts of former and current government lawyers, has no such provision for screening in the private-to-public scenario.

In omitting provisions on screening, the board of governors "did the right thing in allowing the courts to consider the development of rules in this area based on facts presented to them."

ROBERT L. KEHR
KEHR, SCHIFF & CRANE

On the other hand, proposed California Rule 1.11, like the ABA model, allows private law firms to implement screening measures to escape imputation of a former government lawyer's conflict from having substantially participated in a matter or acquired confidential government information about a matter. Similarly, proposed California Rule 1.12 permits screening of former judicial law clerks, but unlike Model Rule 1.12, not of former judges.

Right Thing, or Ducking Responsibility? In comments to BNA, commission member Robert L. Kehr, who practices with Kehr, Schiff & Crane in Los Angeles, stated that the board of governors "did the right thing in allowing the courts to consider the development of rules in this area based on facts presented to them."

He pointed out, for example, that in *People v. Gama-che*, 106 Cal. Rptr.3d 771 (Cal. 2010), the California Supreme Court held that the trial court did not abuse its discretion in refusing to disqualify the entire San Bernardino County district attorney's office after the office instituted a nonconsensual ethics screen, reasoning in part that the office was large enough to permit effective screening. Does this imply, Kehr asked, that screening without client consent will be permitted only in large

law firms? The commission did not have the time to explore such nuances, he said.

But Vapnek suggested that the board's action was politically motivated—that it did not want to appear to be favoring big law firms. “Kirk lays out the parameters of screening beautifully,” he said.

By omitting a screening rule, the board “has abdicated its responsibility to make recommendations to the Supreme Court,” Vapnek asserted.

No ‘Snitch Rule.’ Of the 68 proposed rules that the drafting commission sent to the bar in July, the only one that the board totally rejected was a narrow version of Model Rule 8.3, which requires lawyers to notify disciplinary authorities upon learning that another lawyer has committed a violation of professional conduct rules that casts serious doubt on the lawyer's honesty or fitness as a lawyer.

The narrower California proposal would have required lawyers to inform disciplinary authorities when they know that another lawyer has committed “a felonious criminal act” that raises a substantial question about the lawyer's honesty or fitness as a lawyer. At present, California has no ethics rule that requires lawyers to report other attorneys' misconduct.

At the July meeting, some members of the regulation and admissions committee wondered how lawyers could be sure that another lawyer's conduct is a “felonious criminal act.” In the end, the committee and the board jettisoned the proposal.

Vapnek said the rejection of proposed Rule 8.3 “came as a bit of a surprise” to him, although he noted that “the ‘snitch rule’ has never been very popular.”

The rule got a bad name because of the *Himmel* case, he said, referring to *In re Himmel*, 533 N.E.2d 790 (Ill. 1988), in which a lawyer was disciplined for failing to report a client's former counsel even though the client, who was suing the former counsel for malpractice, had forbidden him to do so.

Respecting Others. The board accepted the commission's recommendation not to adopt any part of Model Rule 4.4, which addresses respect for the rights of third persons.

Model Rule 4.4(a) forbids lawyer conduct that has no substantial purpose other than to “embarrass, delay, or burden” a third person. In recommending that California not adopt this provision, the commission expressed concern that the vagueness of these words could lead to inconsistent enforcement of the rule, and that the directive would chill legitimate advocacy because many proper litigation techniques may result in delay or embarrassment for an opponent.

Model Rule 4.4(b) sets out a lawyer's duties upon receipt of inadvertently transmitted material. Although the commission initially proposed that California enact a version of this standard, it ultimately recommended against adopting the rule, partly because “a lawyer's duties concerning inadvertently transmitted writings often are fact bound inquiries” and therefore difficult to specify in a rule that will have disciplinary consequences. The commission also noted that case law may continue to evolve in this area of lawyer conduct in response to variations in factual situations.

A minority of the commission disagreed with the decision not to endorse Rule 4.4. The recommendation not to adopt this rule will signal to lawyers and the public that the legal rights of third persons are not entitled to

the same protection in California as they are in other jurisdictions, according to the minority.

Covert Activity Exception. The regulation and admissions committee went along with a new Comment [2C] to Rule 8.4 that makes the dishonesty rule inapplicable to a lawyer's supervision of covert activity. The new comment states:

[2C] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules. “Covert activity,” as used in this Rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. Covert activity may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future.

The comment has its genesis in *In re Gatti*, 8 P.3d 966, 16 Law. Man. Prof. Conduct 468 (Or. 2000), and a subsequent rule change in that state. The commission initially included a covert activity exception in a public comment draft of Rule 4.1 (truthfulness in statements to others); however, when it decided not to recommend a version of Rule 4.1, it shifted the proposed exception to the comment to Rule 8.4.

Some ABA Standards Left Out

Omitted from the proposed California rules are standards addressed by ABA Model Rule 1.3 (diligence), Model Rule 1.8(d) (literary or media rights), Model Rule 1.8(i) (proprietary interest in subject matter of representation), Model Rule 2.3 (evaluation for use by third parties), Model Rule 3.2 (expediting litigation), Model Rule 4.1 (truthfulness in statements to others), Model Rule 4.4 (respect for rights of others), Model Rule 5.7 (law-related services), Model Rule 7.6 (political contributions to obtain government legal engagements or appointments by judges), and Model Rule 8.3 (reporting misconduct).

Although some concern was expressed at the committee's meeting that a covert activity exception might encourage lawyers to engage in sneaky or underhanded conduct, the board ultimately approved the proposed comment.

In his remarks to BNA, Mohr pointed out that the exception is limited to covert activity that is lawful, a restriction reinforced by the admonition in Rule 1.2(d) that lawyers must not assist a client in unlawful activity. A cross-reference to that rule has been added in the version that is circulating for public comment, he said.

Prosecutors' Obligations. Model Rule 3.8(d), which most states have adopted as part of their binding lawyer conduct rules, requires prosecutors in a criminal case to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to

the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.”

In ABA Formal Ethics Op. 09-454 (2009), the ABA ethics committee advised that this rule does not simply codify the Supreme Court’s landmark decision in *Brady v. Maryland*, 373 U.S. 83 (1963), which held that criminal defendants have a due process right to receive favorable information from the prosecution. The disclosure obligation created by Rule 3.8(d) is more demanding than the constitutional obligation recognized in *Brady* and its progeny, the committee said.

As formulated by the drafting commission, California’s version of Rule 3.8(d) would have required prosecutors to “comply with all constitutional obligations, as defined by relevant case law,” regarding timely disclosure of potentially exculpatory evidence.

The regulation and admissions committee and the board itself preferred the broader language of the ABA model, however.

The remainder of the proposed rule on the special responsibilities of prosecutors largely follows Model Rule 3.8, albeit with several variations. The board voted to include paragraphs (g) and (h) of the model rule, which the ABA added in 2008; these paragraphs obligate prosecutors to take certain steps when they know of evidence indicating the innocence of a convicted defendant.

Law Professors’ Concerns. Law professor John Cary Sims of the University of the Pacific, McGeorge School of Law, attended the board meeting on behalf of a group of law professors to convey their concerns about the proposed rules. These points were set forth in a June 15 letter drafted by professors Geoffrey C. Hazard, Deborah L. Rhode, and Richard Zitrin, and signed by more than two dozen other academics.

In an interview with BNA, Sims explained that the group is concerned that the proposed rules retrench to some extent from California’s strong client-protective traditions. “A lot of our objections have to do with protective parts of the Model Rules being dropped,” he said, citing Rules 1.3 (diligence) and 4.1 (truthfulness in statements to others) as examples.

The group also objects, Sims said, to language in the comment to Rule 1.1 (competence) that the rule is not intended to apply to a single act of negligent conduct or a single mistake. That wording “almost creates a safe harbor” even when a lawyer’s conduct is egregious, Sims said.

According to Sims, the law professors also have concerns about California Rule 3.3(c), which provides that the duty of candor to tribunals continues to the end of the proceeding or the end of representation, whichever comes first. In addition, he noted that the terminology rule contains a narrow definition of “tribunal.” These departures from the ABA models, he said “are shaving

the edges to make it less likely that lawyers will be able to prevent corruption of the process.”

The group also objects, Sims said, that the proposed rules do not require California lawyers to go through the formalities of the rule on lawyer-client business transactions when a fee agreement is modified during representation. He pointed out that Rule 1.5 merely requires lawyers, when making a modification adverse to a client’s interests, to advise the client in writing to seek the advice of independent counsel and give the client a reasonable opportunity to do so.

Although the board did not modify the rules in response to these objections, Sims said the law professors will continue to press their concerns about the rule proposals.

Sims emphasized, however, that “our group is very supportive of the package as a whole.” Overall, he said, the commission has done a superb job of taking the best parts of the current California rules and integrating them with the platform of the Model Rules.

Detailed Guidance. In particular, Sims expressed enthusiasm about the extensive comments to the proposed rules.

Although the bar’s Office of Chief Trial Counsel objected to including so many comments, Sims said they will help lawyers figure out their obligations under the rules. “The purpose is not to get people disciplined, but to guide their conduct,” he observed.

Vapnek too lauded the wide-ranging comments. “If lawyers read the comments, they will more readily understand what the rules require,” he said.

Additional Comment Period. The board deemed necessary an additional 30-day window for public comment as to seven proposed rules because the drafting commission made substantive changes to those rules after the previous public comment period closed.

The seven at issue are Rule 1.0 (terminology); Rule 2.1 (advisor); Rule 3.3 (candor toward tribunals); Rule 3.8(d) (prosecutor’s obligations regarding disclosure of exculpatory evidence); Rule 4.2 (communications with represented persons); Rule 5.4 (“Financial and Similar Arrangements with Nonlawyers”); and Rule 8.4 (misconduct).

The deadline for comment is Aug. 23.

BY JOAN C. ROGERS

Full text of the 68 proposed rules sent to the board of governors in July, along with extensive background materials, is posted at <http://bog.calbar.org/docs/agendaItem/Public/agendaitem1000006956.pdf>.

The public comment notice is posted, along with a link to the seven rules that are being aired for public comment, at <http://www.calbar.ca.gov/AboutUs/PublicComment/201019.aspx>.

**Rule 1.11 Special Conflicts Of Interest For Former
And Current Government Officers And Employees
(ABA Model Rule)**

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
 - (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
 - (1) is subject to Rules 1.7 and 1.9; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
 - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (e) As used in this Rule, the term "matter" includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to

screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

**Rule 1.11 Special Conflicts Of Interest For Former And
Current Government Officers And Employees
(First Commission's Proposed Rule)**

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
 - (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).
- (b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - (1) the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.
- (c) Except as law may otherwise expressly permit, a lawyer who was a public officer or employee and, during that employment, acquired information that the lawyer knows is confidential government information about a person, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
 - (1) is subject to Rules 1.7 and 1.9; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent; or
 - (ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term “matter” includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to these Rules, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See, e.g., Business and Professions Code section 6131. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0.1(e-1) for the definition of “informed written consent.”

[2] Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Concerning imputation and screening within a government agency, see Comments [9B] and [9C], below.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later government or private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by paragraphs (a)(2) and (d)(2).

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer’s professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent this Rule from imposing too severe an obstacle against entering public service. The limitations of representation in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than imputing conflicts to all substantive issues on which the lawyer worked, serves a similar function.

[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while

representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely screened. Thus, a purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because the conflict of interest is governed by paragraphs (a) and (b), the latter agency is required to screen the lawyer. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [14]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].

Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)

[6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule 1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially

[9A] A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).

This Rule Not Determinative of Disqualification

[9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal.App.3d 892 [144 Cal.Rptr. 34]. Regarding prosecutors in criminal matters, see Penal Code section 1424.

[9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.

Matter

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

**Proposed Rule 1.11(e) Special Conflicts of Interest for Former
and Current Government Officers and Employees (requiring
imputation of conflicts when government lawyer has moved from
private practice and use of an ethical wall or screen to rebut imputation)
(Excerpt from the First Commission's Rules and Concepts
that were Considered but are not Recommended for Adoption)**

During the initial public comment distribution, the Commission recommended adoption of a version of Model Rule 1.11 that would have included paragraph (e), which has no counterpart in the Model Rule. Paragraph (e) was intended to address the duties of government lawyers who had left employment in the private sector or other non-government employment. In response to concerns expressed by the Department of Justice concerning paragraph (e), it was revised following the initial round of public comment to provide:

- (e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government agency as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:
 - (1) the personally prohibited lawyer is timely screened from any participation in the matter; and
 - (2) as soon as practicable after the need for screening arises, and unless prohibited by law or a court order, the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements.

The comments corresponding to paragraph (e) provided:

[2] Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. [Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.] Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Similarly, paragraph (e) provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, but also provides for screening and notice in certain situations.

* * *

Screening of Current Government Lawyers Pursuant to Paragraph (e)

[9B] Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely screened and notice is given as soon as practicable to the former client to enable it to ensure the government's compliance with the screen. But see Comment [9D]

[9C] Paragraph (e)(2) recognizes that, in some circumstances, it may not be practicable for the government agency to provide prompt notice to the former private client. The government agency may not be able to locate the former client. An

investigation by the government may be compromised if the fact of the investigation is not kept confidential. For example, if notice that the former lawyer of the target of the investigation is being screened would pose a significant risk that the investigation would be compromised, the government agency may delay providing notice of the screen. However, not providing notice promptly under paragraph (e)(2) should be the exception.

This Rule Not Determinative of Disqualification

[9D] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34].

The Commission included a slightly different version of paragraph (e) in the initial public comment draft of proposed Rule 1.11 in recognition of California case law that expressly provides for imputation within government offices and requires screening to avoid the consequences of such imputation. E.g., *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864]. Following the initial round of public comment, the Commission made the aforementioned changes in response to the Department of Justice Comment. However, the Board of Governors Committee on Regulation and Admissions considered the Commission's recommendation at its May 14, 2010 meeting and the Board Committee determined not to recommend that the Board adopt paragraph (e) and instead conform the Rule more closely to the Model Rule. As with other rules concerning ethical screens, the Board Committee took the position that the law of screening of lawyers who move from the private sector or other non-government employment to government employment should be developed through court decisions. To facilitate the development of case law, the Board Committee recommended, and the Board of Governors adopted, a comment with no counterpart in the Model Rule that is intended to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because this Rule does not expressly provide for screening. See Comment [9C] to the ALT1 version of Rule 1.11. The Board Committee, relying on the concerns expressed by the Department of Justice, also expressed concern that, notwithstanding the changes the Commission made to the Rule following the initial round of public comment, the provision in paragraph (e) that requires notice to the former client might compromise ongoing investigations of a screened lawyer's former client. This revised version of the Rule was issued for a subsequent round of public comment.

After a subsequent round of public comment that ended on June 15, 2010, the Commission considered public comments received on the revised version of proposed Rule 1.11 which, as noted, did not include a paragraph (e) imputation and screening provision. After further discussion, the Commission voted to request that the Board of Governors reconsider including paragraph (e) in proposed Rule 1.11. In particular, the Commission believed that revisions to the notice provision in the Rule and addition of a clarifying comment following the initial public comment adequately addressed the concerns expressed by the Department of Justice and the Board Committee about paragraph (e)'s notice requirement. At its meeting on July 22 – 24, 2010, the Board again determined that paragraph (e) should not be included in the Rule. In accordance with the Board's decision, proposed Rule 1.11 does not include paragraph (e) and leaves the issue of imputation and screening within a government agency to case law development.

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral (ABA Model Rule)

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.
- (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.
- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.
- (d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

**Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
(First Commission's Proposed Rule)**

- (a) Except as stated in paragraph (e), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.
- (b) A lawyer shall not participate in discussions regarding prospective employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating, personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm for a party in a matter in which the clerk is participating personally and substantially, but only with the approval of the judge or other adjudicative officer.
- (c) Except as provided in paragraph (d), if a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter.
- (d) If a lawyer is disqualified by paragraph (a) because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal, no lawyer in a law firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
 - (1) the disqualified lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.
- (e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. "Personally and substantially" includes the receipt or acquisition of confidential information that is material to the matter. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire confidential information. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. Compare this comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed written consent. See Rule 1.0.1(e-1). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6 and Business and Professions Code section 6068(e), they

typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm.

[4] Paragraph (d) provides that conflicts of a lawyer personally disqualified because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal will be imputed to other lawyers in a law firm unless the conditions of paragraph (d) are met. Requirements for screening procedures are stated in Rule 1.0.1(k). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 1.18 Duties to Prospective Client (ABA Model Rule)

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 1.18 Duties to Prospective Client (First Commission's Proposed Rule)

- (a) A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.
- (b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal confidential information learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the prospective client have given informed written consent.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Hence, although the range of a prospective client's information that is protected is the same as that of a client, a law firm is permitted, in the limited circumstances provided under paragraph (d), to accept or continue representation of a client with interests adverse to the prospective client in the subject matter of the consultation. See Comments [3] and [4]. As used in this Rule, prospective client includes an authorized representative of the client.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or to discuss the prospective client's matter in the lawyer's professional capacity, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer's professional capacity would not have such a reasonable expectation. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]. In addition, a person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the communication is not a prospective client within the meaning of this Rule.

[2A] Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must

learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial consultation or during the subsequent investigation, paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rules 1.7 and 1.9, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of "informed consent". However, the lawyer must take reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent the prospective client.

[6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from either accepting or continuing the representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that is material to the matter. For a discussion of the meaning of "materially adverse" as used in paragraph (c), see Rule 1.9, Comment [7]. For a discussion of the meaning of "substantially related" as used in paragraph (c), see Rule 1.9, Comments [4] – [6].

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d), the consequences of imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients.

[8] Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

**Model Rule 1.18(d)(2): Duties to Prospective Client
(re use of an ethical wall or screen to rebut imputation)
(Excerpt from the First Commission's Rules and Concepts
that were Considered but are not Recommended for Adoption)**

During the initial public comment distribution, the Commission recommended adoption of a version of Model Rule 1.18 that would have tracked Model Rule 1.18(d)(2) and its related comments and permitted, in the limited circumstances contemplated under the Rule, the screening of a lawyer who had received confidential information of a prospective client so long as the lawyer took reasonable measures to avoid exposure to more confidential information than was reasonably necessary to determine whether the lawyer would, or even could, represent the prospective client. Following public comment, the Commission decided not to recommend the adoption of any rule counterpart to Model Rule 1.18. Two separate groups of Commission members dissented from that position. One group favored adoption of a version of the Rule that substantially tracked the public comment draft, i.e., provided for screening as in Model Rule 1.18(d)(2). A second group of dissenters favored adoption of a version of the Rule without paragraph (d)(2). The Board of Governors Committee on Regulation and Admissions considered the Commission's recommendation (including the views of the two groups of dissenters) at its May 14, 2010 meeting and the Board Committee, agreeing with the second group of dissenters, voted to recommend adoption of a version of Rule 1.18 without paragraph (d)(2) and its screening provision. As with Rule 1.10, the Board Committee determined that whether the timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter best left to be determined by the case law. Further, as it did with Rule 1.10, the Board Committee recommended adding a Comment to the Rule to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because the Rule does not expressly provide for screening. See Comment [8] to proposed Rule 1.18.

At its June 25 – 26, 2010 meeting, the Commission considered public comments both for and against inclusion of a screening provision in proposed Rule 1.18. The Commission also considered the California Supreme Court's action on a petition for review of the Court of Appeals decision in *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620]. On June 23, 2010, the Supreme Court denied review and also denied all requests that the Court of Appeal decision be republished. After further discussion, the Commission voted to request that the Board of Governors reconsider the issue of including a screening provision in proposed Rule 1.18.

At its meeting on July 22 – 24, 2010, the Board considered the Commission's request to reconsider the inclusion of a limited screening provision and the Board again determined that screening was unsettled and better left to further development in the case law. In part, this approach to the issue of screening offers the advantage of case-by-case refinement of screening principles in the appellate courts and in the Supreme Court and such developments could be monitored and inform any potential future State Bar consideration of screening standards in the rules.