

**RRC2 – Rule 3-310 [1.7, 1.8.6, 1.8.7, 1.9, 1.10, 1.11]
Post-Agenda E-mails, etc. – Revised (March 28, 2016)
Drafting Team: Martinez (Lead), Cardona, Eaton, Harris, Stout**

Table of Contents

February 12, 2016 OCTC Email to RRC:.....	1
February 14, 2016 Kehr Email re 1.8.6 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:	1
February 14, 2016 Kehr Email re 1.8.7 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:	1
February 14, 2016 Martinez Email re 1.8.7 to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:	2

February 12, 2016 OCTC Email to RRC:

* * *

D. Rule 3-310 [Avoiding the Representation of Adverse Interests]

OCTC does not oppose a broad definition of conflicts of interest. “Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client, a third person or by his own interests.” (People v. Bonin (1989) 47 Cal.3d 808, 835, citing generally to ABA, Model Rules Prof. Conduct (1983) rule 1.7 and com. thereto.)

The Discussion following rule 3-310 speaks to conflicts where “written consent may not suffice [to waive the conflict] for non-disciplinary purposes.” OCTC does not oppose revisions to the rule that would prohibit the waiver of specific conflicts, such as the representation of multiple clients with adverse interests at trial.

Disciplinary case law holds that an attorney is conclusively presumed to have obtained adverse confidential information from a client or former client when she accepts new employment that is adverse and substantially related to the representation of the client or former client. That is, actual possession of confidential information need not be demonstrated. (See, In the Matter of Lane (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747.) The exception to the presumption arises only where the attorney can show that there was no opportunity for confidential information to be divulged. This case law should not be disturbed. Without the conclusive presumption, a disciplinary proceeding would require the client or attorney to disclose the communications the rule is intended to protect.

The courts should be permitted to develop the law regarding ethical walls, imputation, and advanced waivers.

February 14, 2016 Kehr Email re 1.8.6 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

I support this proposal, including your shortening of the first Commission's Comments ... except for an extra comma. We agreed at the last meeting that, when a comma comes shortly after the end of a series, the last two items in the series are not separated by a comma. To be consistent with this style, we should remove the comma that follows the word "charged" -

before the lawyer has entered into an agreement for, charged, or accepted
compensation, as required by this Rule.

February 14, 2016 Kehr Email re 1.8.7 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:

Here are my thoughts on this proposal ---

1) Current rule 3-310(D) and proposed Rule 1.8.7 share a drafting flaw in speaking in terms of a lawyer entering into a settlement agreement. The lawyer does not b/c the lawyer is a party. This an instance in which the MR has it right: "A lawyer who represents two or more clients shall not participate in making an aggregate settlement"

- 2) The proposed Comment should be part of the Rule b/c it defines rather than explains when the Rule applies. There are several ways to do this, but I suggest making the current proposal paragraph (a) and labeling the proposed Comment as paragraph (b).
- 3) I think it is important to clarify in a Comment which settlements come within the scope of this Rule: "An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters." More could be said, but I think this is the bare minimum.
- 4) Some of the first Commission's Comments could be replaced with this: "Also see Rules 1.2(a) (concerning client's decision making authority) and 1.4 (concerning a lawyer's duty to communicate with a client).

February 14, 2016 Martinez Email re 1.8.7 to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:

- 1) The reason we did not follow the ABA language was out a concern that "participate in making an aggregate settlement" could be viewed as prohibiting even preliminary discussions leading to the settlement and reach attempted violations of the rule. Also, current rule 3-310(D) uses "enter into an aggregate settlement." RRC-1 addressed this with a comment stating that the rule "permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients."
- 2) Agree, it's an exception to the rule.
- 3) I agree we need a definition of "aggregate settlement." I'm not sure the RRC-1 definition does the job. In a civil case the clients agree to accept (or pay) one total sum. An aggregate settlement binds the clients collectively. Instead of defining the term, perhaps we can use that as an example.
- 4) The Commission Charter has made us "comment-averse," but this rule may need more clarification via comments. I think it would help if we adopted something like RRC-1 Comments 1-4.