

## **AGENDA MATERIALS FOR**

### **III.C. Rules 1.10, 1.11, and 1.12**

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## MEMORANDUM

**DATE:** May 19, 2016  
**TO:** Members, Commission for the Revision of the Rules of Professional Conduct  
**FROM:** Rule 3-310 Drafting Team (Raul Martinez (L); George Cardona, Daniel Eaton, Lee Harris and Judge Stout)  
**SUBJECT:** Proposed Rules 1.10, 1.11 & 1.12 – Rules of Imputation and Screening for Conflicts of Interest

### SUMMARY:

The drafting team assigned to study rule 3-310 concerning conflicts of interest proposes that the Commission recommend adoption of new proposed rules 1.10, 1.11 and 1.12, which would serve as counterparts to ABA Model Rules 1.10, 1.11 and 1.12. Similar to the Model Rule counterparts, each of the proposed rules contains (i) a provision or provisions imputing the conflicts of a lawyer in a firm<sup>1</sup> to all other lawyers in the firm, and (ii) a provision that permits unconsented screening of a prohibited lawyer to rebut the presumption of shared confidences within the firm to enable a client of the firm to retain the lawyer of its choice despite the presence of the prohibited lawyer in the firm. In recommending the adoption of proposed rule 1.10, the drafting team has concluded there is no good reason to draw or continue the distinction between government lawyers and private firm lawyers in recognizing the efficacy and effectiveness of unconsented ethical screens. All three proposed rules largely track the corresponding Model Rule, with changes made primarily to conform the rules to the concept that the California Rules are disciplinary rules intended primarily to establish minimum standard of conduct for discipline, rather than to create civil standards for disqualification. In addition, a provision has been added to each rule, (e.g., Rule 1.10(a)(2)(iii)) to increase public protection.

### BACKGROUND:

The rule 3-310 drafting team was assigned to consider rule 3-310 in light of the ABA Model Rule framework for regulating those conflicts of interest that are currently addressed in a single rule, 3-310, through several separate conflicts rules: Model Rules 1.7 (current client conflicts); 1.8(d) (aggregate settlements); 1.8(f) (third party payments); and 1.9 (former client duties). As of the May 6-7, 2016 meeting, the Commission has approved for recommendation to the Board

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<sup>1</sup> The term “firm” is not limited to a traditional private partnership. A “firm” or “law firm” is defined in proposed rule 1.0.1(d) to mean:

[A] law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

proposed Rules 1.7 (current client conflicts); 1.8.7 (aggregate settlements); 1.8.6 (payments not from client); and 1.9 (former client duties).

In addition to studying rule 3-310, the drafting team was also asked to consider whether the California Rules of Professional Conduct should include Model Rules that address conflicts of interest issues but do not have counterparts in the current California Rules: Model Rules 1.10 (imputation and screening); 1.11 (government officials, employee and lawyer conflicts); and 1.12 (conflicts involving judges and other third party neutrals, and their staffs). For the May 6-7, 2016 meeting, the drafting team prepared a proposed rule 1.10 that by its terms not only codifies in a rule the concept of imputation of conflicts of interest, but also “broadly” permits<sup>2</sup> unconsented screening of lawyers who have moved laterally between two *private* firms. After considering the black letter of the rule submitted by the drafting team, the Commission voted 8-7 at the May 2016 meeting to approve the *concept* of a rule that broadly permits screening. The drafting team was directed to review its proposed rule and make any changes to that rule, including revising the comments as necessary, to conform it to the vote of the Commission. In addition, the drafting team was free to recommend rule counterparts to Model Rules 1.11 and 1.12.

For the June meeting, the drafting team requests that the Commission consider three ABA Model Rules that have no counterpart in the California Rules.<sup>3</sup> As part of the Commission’s consideration of such rules, this drafting team has prepared draft rule counterparts of Model Rules 1.10, 1.11 and 1.12. Each rule is described in the discussion section below.

## **DISCUSSION:**

There are three rules discussed in this section. The various provisions of each rule are briefly described in this memo. More detailed discussions are also included in the annotated redline versions of each proposed rule.

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<sup>2</sup> As explained in the Rule Assignment memo for rule 3-310, the term “**broadly permits screening**” is used to describe an ethical screen provision that permits screening even if the screened lawyer had a substantial and direct involvement in the former client’s case, and even if the former and current clients’ cases were “substantially related.” A rule that broadly permits screening in effect would put private lawyers on equal footing as government lawyers who move from government to private practice or from private practice to government. Even a government lawyer who “personally and substantially participated” in the relevant matter can be screened.

The term “**limited screen**” is used to describe a screening provision that permits screening only if a lawyer did not “substantially participate,” or was not “substantially involved,” did not have a “substantial role,” did not have “primary responsibility,” etc., in the former client’s matter, or when any confidential information that the lawyer might have obtained is deemed “not material” to the current representation or “is not likely to be significant.”

<sup>3</sup> In addition to proposed rules 1.10, 1.11 and 1.12, the Model Rules being considered, for some of which the assigned drafting teams have recommended California counterparts, are: Model Rules 2.3, 3.2, 3.9, 4.1, 4.4, 5.7, 6.1 and 8.3.

## **PROPOSED RULE 1.10 (IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE)**

There are two principal issues addressed by proposed Rule 1.10: (1) Imputation of conflicts of interest and (2) the use of an ethical screen to rebut the presumption of shared confidences that is created by the principle of imputation.

A clean version of proposed rule 1.10 is provided as **Attachment 1** and an annotated redline version of the rule is provided as **Attachment 2**.

Although California does not have a rule similar to Model Rule 1.10(a) concerning imputation of conflicts, there is abundant case law in the context of disqualification motions that recognizes that when one lawyer in a law firm is disqualified, that disqualification is extended to every other lawyer in the firm, i.e., the other lawyers are vicariously disqualified. See, e.g., *Flatt v. Superior Court*, 9 Cal.4th at 283; *People ex rel Dept. of Corp. v. Speedee Oil Change Sys., Inc.*, 20 Cal.4th 1135 (1999); *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010); *Rosenfeld Const. Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 575; *Henriksen v. Great Am. Sav. & Loan* (1992) 11 Cal.App.4th 109, 117. See also State Bar Formal Ethics Op. 1998-152.

**Paragraph (a)**. The drafting team recommends the adoption of the introductory clause of MR 1.10(a) verbatim. The clause sets forth the general rule of imputation:<sup>4</sup>

- (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 ...

Historically, the word imputation when used in relation to lawyer duties within a law firm referred to the imputation of a lawyer's "knowledge" of confidential information about a particular client to all other lawyers in the lawyer's firm. The term imputation has taken on a broader meaning in case law and law review articles, however, and now is used to describe not only the imputation of knowledge, but also the imputation of "conflicts" or "duties" to other lawyers in the firm. This broader meaning is captured by the reference to both 1.9 (confidentiality duties owed a former client) and 1.7 (duty of undivided loyalty owed to every client). Consequently, proposed paragraph (a) correctly imposes imputation whether the primary value at stake is loyalty (1.7) or confidentiality (1.9).

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<sup>4</sup> Model Rule 1.10(a) provides in part:

- (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;

- [(2) a provision permitting unconsented screening, described below].

By case law, California generally does not impute disqualifications when there is a family or other close personal relationship between a disqualified lawyer and an opposing lawyer. See, e.g., *Derivi Construction & Architecture, Inc. v. Wong*, 118 Cal.App.4th 1268, 14 Cal.Rptr.3d 329 (2004); *Addam v. Superior Court*, 116 Cal.App.4th 368, 10 Cal.Rptr.3d 39 (2004); *DCH Health Services Corp. v. Waite*, 95 Cal.App.4th 829, 115 Cal. Rptr.2d 847 (2002).

Paragraph (a) contains two subparagraphs which recognize exceptions to the general rule of imputation.

*Subparagraph (a)(1) – Personal Interest Conflicts.*

Subparagraph (a)(1), which has been in existence since the original adoption of the Model Rules in 1983, provides that a conflict based on a personal interest of a prohibited lawyer is not imputed to other lawyers in the firm because such conflicts do not create a significant risk that the representation of the client by other lawyers in the firm would be materially limited (for the concept of “materially limited,” see proposed rule 1.7(b).)

*Subparagraph (a)(2) – Screening.*

Subparagraph (a)(2) is derived from the corresponding paragraph in MR 1.10 but has been modified to reflect that the rule is a disciplinary rule rather than a civil standard for disqualification (substitution of “prohibited” for “disqualified”) and to enhance assurance in the integrity and effectiveness of the implemented screen by replacing the formulaic provision in Model Rule 1.10(a)(2)(iii) with an objective standard that provides better assurance of the integrity of the screen. (See note 17).

The phrase “arises out of the disqualified prohibited lawyer’s association with a prior firm” limits the availability of screening to situations where a prohibited lawyer has moved laterally from another firm. Put another way, a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in that firm in order to represent a new client against that former client. This is an appropriate limitation on screening and parallels the availability of screening for current and former government lawyers (Rule 1.11) and former judicial personnel (Rule 1.12).

**Paragraph (b).** Paragraph (b) is identical to MR 1.10(b). It is a codification of *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752 [23 Cal.Rptr.3d 116].

**Paragraph (c).** Paragraph (c) is derived from MR 1.10(c). It provides that a client can waive any of the rule’s prohibitions.

**Paragraph (d).** Paragraph (d) clarifies that imputation under Rule 1.10 does not apply to lawyers who are associated in a firm with former government lawyers. Those situations are governed by proposed Rule 1.11.

**Comments to Rule 1.10.** There are five comments to Rule 1.10, all of which provide guidance in interpreting or applying the rule. Comments [1] to [3] are substantially truncated versions of Model Rule comments. Comment [4] is derived from D.C. Rule 1.10, cmt. [25], and is intended to clarify the application of paragraph (d)(2)(iii). Comment [5] clarifies that other law can be applied when disqualification based on a conflict of interest is at issue

**National Background – Adoption of Screening Provisions**

The following information was provided in the original Rule Assignment memo that was distributed for the February 2016 meeting.

**Broad Screening Provisions (18).** See note 2 for an explanation of “broad screen”. Only four jurisdictions have adopted the Model Rule 1.10(a)(2) screening provisions verbatim: Connecticut, Idaho, Iowa and Wyoming. Nevertheless, there are 14 other jurisdictions that have adopted screening provisions that broadly permit screening of private lawyers similar to the Model Rule: Arizona, Delaware, D.C., Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah and Washington.

**Limited Screen Provisions (14).** See note 2 for an explanation of “limited screen”. Jurisdictions that permit screening in limited situations are: Colorado, Hawaii, Indiana, Massachusetts,

Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin. In summary, a total of 32 jurisdictions have a rule that expressly permits unconsented screening of lawyers moving laterally between private firms.

### **PROPOSED RULE 1.11 (SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICIALS AND EMPLOYEES)**

The drafting team recommends adoption of proposed Rule 1.11, which largely tracks the black letter of Model Rule 1.11. The rule governs imputation and screening in the governmental context.

A clean version of proposed rule 1.11 is provided as **Attachment 3** and an annotated redline version of the rule is provided as **Attachment 4**.

**Paragraph (a)** sets out the basic rule of imputation for lawyers who are former government employees. It is similar to MR 1.11(a) except that (i) “public official” is substituted for “public officer” to conform the rule to the term used in proposed rule 4.2 (communication with a represented person), (ii) California’s historical heightened “informed written consent” requirement is incorporated; and (iii) a sentence from RRC1’s proposed Rule 1.11 has been added to clarify that although judges and judicial employees are government employees, their conduct after leaving government employment is governed by rule 1.12.

**Paragraph (b)** provides that a prohibited former government lawyer can be screened to avoid the disqualification of the firm with which the former government employee is now associated. It is similar to MR 1.11(b) except that the word “prohibited” is substituted for “disqualified” throughout the rule for the same reason similar changes have been made to rule 1.10, and subparagraph (b)(3) has been added. (See discussion of proposed rule 1.10(a)(2), above, and attached annotated redline version of proposed Rule 1.11, at note 5.)

**Paragraph (c)** prohibits a lawyer who has acquired confidential government information (e.g., tax information) about a person from representing another private individual with interests adverse to that person “in a matter in which the information could be used to the material disadvantage of that person.” It is derived from MR 1.11(c) but the syntax has been reordered for purposes of clarification. Paragraph (c) also provides that the personally prohibited lawyer can be screened. New subparagraph (c)(2) has been added. (See discussion of proposed rule 1.10(a)(2), above, and attached annotated redline version of proposed Rule 1.11, at note 5.)

**Paragraph (d)** sets forth requirements for a lawyer who moves from private practice into government employment. See also proposed Comment [8] and associated note in the attached annotated redline version of the Rule. The paragraph is nearly identical to Model Rule 1.11(d).

**Paragraph (e)**, which defines “matter” for the purposes of Rule 1.11, is identical to MR 1.11(e). RRC1 similarly recommended adoption of MR 1.11(e) verbatim.

**Comments to Rule 1.11.** There are nine comments to Rule 1.11, all of which provide guidance in interpreting or applying the rule. Comment [1] clarifies that Rule 1.10 does not apply to conflicts in the governmental context. Comment [2] clarifies that the prohibitions in paragraphs (a)(2) and (d)(2) apply regardless of whether the lawyer is adverse to a former client. Comments [3] and [4], derived from RRC1 Rule 1.11, cmt. [4A] and NY Rule 1.11, cmt. [4A], have no counterpart in the Model Rule. RRC1 Comment [4A] has been divided into two comments to clarify the purposes of Rule 1.11(a)(1) and (c), respectively, and provide guidance on when those provisions apply. This is particularly true of paragraph (c), which is intended to protect confidential government information regardless of whether the now private lawyer learned of the info when acting as a lawyer (paragraph (c) refers to the now private lawyer having acquired the information as a “public official or employee of the government”). Comment [5], which is similar

to proposed Rule 1.13, cmt. [6], explains that determining who or what is the client when more than one government agency is involved is beyond the scope of the rules. Comment [6] includes an important clarification of how the screening requirement regarding fees in subparagraphs (b)(1) and (c)(1) is applied. Comment [7] explains that joint representation of the government and a private person may be permitted. Comment [8] provides a critical explanation of the requirements under paragraph (d) for obtaining consent not only from the government agency but also from the former client. (See annotated redline and note 18.) Finally, Comment [9] has been added to clarify that rule 1.11 is primarily intended for purposes of discipline, and whether a lawyer or law firm will or will not be disqualified is a matter to be determined by the appropriate tribunal and is not necessarily dictated by this Rule.

### **National Background – Adoption of Model Rule 1.11**

The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.11: Special Conflicts Of Interest For Former And Current Government Officers and Employees,” revised January 5, 2016, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_11.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_11.authcheckdam.pdf) [Last visited 5/21/16]

Every jurisdiction except California has adopted some version of Model Rule 1.11. Twenty-two jurisdictions have adopted Model Rule 1.11 verbatim.<sup>5</sup> Most of the remaining jurisdictions largely track the Model Rule language, with only non-substantive changes. However, there are ten jurisdictions that have departed substantially from the language of the Model Rule,<sup>6</sup> including jurisdictions that address the issue of part-time government employment.<sup>7</sup>

### **PROPOSED RULE 1.12 (FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL)**

The drafting team recommends adoption of proposed Rule 1.12, which largely tracks the black letter of Model Rule 1.11. The rule governs imputation and screening in when judges or other third party neutrals, or their staff, move into private practice.

A clean version of proposed rule 1.12 is provided as **Attachment 5** and an annotated redline version of the Rule is provided as **Attachment 6**.

**Paragraph (a)** states the general prohibition on a former judge, arbitrator, etc., or the judge’s staff from participating in a case in which they were personally and substantially involved. It is identical to MR 1.12(a) except for California’s heightened consent requirement being substituted.

**Paragraph (b)** prohibits negotiations for employment while still working as a judge, or for the judiciary or other third party neutral. The drafting team recommends replacing the phrase “negotiate for” with the phrase “participate in discussions regarding prospective.” This

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<sup>5</sup> The jurisdictions are Connecticut, Delaware, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

<sup>6</sup> The jurisdictions are: Arizona, District of Columbia, Georgia, Missouri, New Jersey, New York, Oregon, Tennessee, Texas, and Virginia.

<sup>7</sup> See, e.g., Missouri Rule 1.11(e).



replacement language is taken from RRC1's proposed rule 1.12 and is consistent with the Model Rule language in covering negotiations for employment, but also is broader and clearer by covering, for example, initial employment interviews that might not be strictly regarded as employment negotiations. In addition, the language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics.

**Paragraph (c).** The introductory clause of paragraph (c) is derived from RRC1 Rule 1.12(c). It permits screening only of law clerks to avoid imputation in a law firm. Screening is permitted only for law clerks because concerns over reduced confidence in the administration of justice by screening adjudicative officers is not as great for law clerks. See *Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863]. Further, not permitting screening of law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.

The subparagraphs in paragraph (c) concerning screening requirements are similar to those in proposed rule 1.11.

**Paragraph (d)** is identical to Model Rule 1.12(d).

**Comments to Rule 1.12.** There are three comments to Rule 1.12, all of which provide guidance in interpreting or applying the rule. Comment [1] is derived largely from RRC1's modification of the Model Rule comment. Language has been added to clarify that the rule also applies when a lawyer acquired confidential information while working in a court, even if the lawyer was not directly involved in the matter, for example, when a law clerk not working on a matter discusses the matter with another clerk who is working on the matter. Comment [2] alerts lawyers to possibility that other law or codes of conduct might impose more stringent standards than this disciplinary rule. Comment [3] includes the important clarification of how the screening requirement regarding fees in subparagraph (c)(1) is applied.

### **National Background – Adoption of Model Rule 1.11**

**Model Rule 1.12.** The ABA State Adoption Chart, entitled "Variations of the ABA Model Rules of Professional Conduct, Rule 1.11: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral," revised January 5, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_12.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_12.authcheckdam.pdf) [Last visited 5/21/16]

Every jurisdiction except California has adopted some version of Model Rule 1.12. Sixteen jurisdictions have adopted Model Rule 1.12 verbatim.<sup>8</sup> The remaining jurisdictions largely track the Model Rule language, with only non-substantive changes.

### **CONCLUSION:**

In accordance with the foregoing, the drafting team proposes that the Commission recommend the adoption of rules 1.10, 1.11 and 1.12 as part of the revised California Rules of Professional Conduct.

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<sup>8</sup> The jurisdictions are Arizona, Delaware, Idaho, Iowa, Kansas, Louisiana, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, and Vermont.

## **ATTACHMENT 1**

### **Clean version of proposed Rule 1.10, Draft 2.1A (5/18/16)**

#### **Rule 1.10 Imputation Of Conflicts Of Interest: General 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 prohibited 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), (b) or (c)(3) and arises out of the prohibited lawyer's association with a prior firm, and
    - (i) the prohibited lawyer is timely screened [in accordance with Rule 1.0.1(k)] 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; 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) the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client.
- (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 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**

[1] Paragraph (a) 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. See Rules 1.0(k) and 5.3.

[2] 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 prohibited.

[3] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through 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.

[4] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.

[5] Standards for disqualification, and whether in a particular matter (1) a lawyer's conflict will be imputed to other lawyers in the same firm or (2) the use of a timely screen is effective to avoid that imputation, are also the subject of statutes and case law. See, e.g., 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.

## ATTACHMENT 2

### Redline annotated version of proposed Rule 1.10, Draft 2.1A (5/18/16)

#### Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

- (a)<sup>9</sup> 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)<sup>10</sup> the prohibition is based on a personal interest of the ~~disqualified~~ prohibited 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)<sup>11</sup> the prohibition is based upon Rule 1.9(a), ~~or~~ (b) or (c)(3)<sup>12</sup> and arises out of the ~~disqualified~~ prohibited lawyer's association with a prior firm, and

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<sup>9</sup> The introductory clause of paragraph (a) is identical to the corresponding clause in MR 1.10. The drafting team agrees with including that clause in the rule. Although RRC1 received some objections to the use of "knowingly" in its proposed rule 1.10, the definition of "know" in proposed rule 1.10(f) expressly states that "A person's knowledge may be inferred from circumstances," so a lawyer cannot deliberately ignore the existence of a prohibition in the lawyer's firm.

<sup>10</sup> Subparagraph (a)(1) is nearly identical to MR 1.10(a)(1), the only difference being to substitute "prohibited" for "disqualified".

Pros: The term "prohibited" is more appropriate for a disciplinary standard that is not intended as a civil standard for determining whether a lawyer should be disqualified.

Con: Regardless of the rule's function as a disciplinary rule, courts refer to the Rules in deciding disqualifying motions. The concept that the rules addressing conflicts of interest are solely disciplinary in nature is not accurate.

<sup>11</sup> Paragraph (a)(2), the provision that permits unconsented screening, is derived from MR 1.10, with changes to conform to the rule's purpose as a disciplinary rule and also to conform it to proposed Rule 1.9. See previous and next footnotes.

It should also be noted that the phrase "arises out of the disqualified prohibited lawyer's association with a prior firm" limits the availability of screening to situations when a prohibited lawyer has moved laterally from another firm. Put another way, a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in that firm in order to represent a new client against that former client. This is an appropriate limitation on screening and parallels the availability of screening for current and former government lawyers (Rule 1.11) and former judicial personnel (Rule 1.12).

<sup>12</sup> Reference to paragraph (c)(3) of proposed Rule 1.9 has been added because that provision is another source of prohibition for which screening should be available. Rule 1.9(c)(3) provides that "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

without the informed written consent of the former client, accept representation adverse to the former client where, by virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation.

- (i)<sup>13</sup>the ~~disqualified-prohibited~~ lawyer is timely screened in accordance with Rule 1.0.1(k)<sup>14</sup> from any participation in the matter and is apportioned no part of the fee therefrom;
- (ii)<sup>15</sup> 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;~~<sup>16</sup> 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)<sup>17</sup> ~~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;~~

Pros: Conforms this rule to the Commission's proposed Rule 1.9, which departs from MR 1.9 by the addition of paragraph (c)(3). Paragraph (c)(3) is an additional basis not found in the Model Rule for imputing the conflict of a personally prohibited lawyer to the rest of that lawyer's firm.

Cons: Imputation because of a prohibition under paragraph (c)(3), which is an attempt to capture the limited *loyalty* duty that is owed former clients per *Wutchumna*, should not be avoided by implementation of a screen, which is designed to rebut the inference of shared confidences, not loyalty.

<sup>13</sup> Subparagraph (a)(2)(i) is derived from MR 1.10(a)(2)(i)

<sup>14</sup> Drafting team consensus to add the phrase "in accordance with Rule 1.0(k)" to emphasize that the screen must conform with the requirements set forth in Rule 1.0.1(k), which defines "screened" as follows:

[(k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.

The phrase is placed in brackets because it might be deemed unnecessary should this Commission confirm its earlier decision to follow the Code of Judicial Ethics and set off each instance of a defined term by an asterisk, or by italic, underlined or bold font.

<sup>15</sup> Subparagraph (a)(2)(ii) is based on MR 1.10(a)(2)(ii).

<sup>16</sup> Drafting team consensus to delete the middle two clauses of subparagraph (a)(2)(ii).

<sup>17</sup> Drafting team consensus to substitute a version of Colo. Rule 1.10(e)(4), as revised, for MR 1.10(a)(2)(iii). Colo. Rule 1.10(e)(4) provides:

(4) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

Pros: The imposition of an objective standard ("reasonably believe") is more protective of a former client's interests than the Model Rule's formulaic requirement of providing "certifications" at "reasonable intervals". As provided in proposed Rule 1.0.1(l), "Reasonable belief" or

~~at reasonable intervals upon the former client's written request and upon termination of the screening procedures~~ the personally prohibited lawyer, and any other lawyer participating in the matter in<sup>18</sup> the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective<sup>19</sup> in preventing material information from being disclosed to the firm and its client.

- (b)<sup>20</sup> 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)<sup>21</sup> A ~~disqualification prescribed by prohibition under~~ this ~~rule~~ Rule may be waived by ~~the each~~<sup>22</sup> affected client under the conditions stated in Rule 1.7.

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‘reasonably believes’ when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” That the lawyers’ reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not, then the partner’s decision would be a “reasonable resolution of an arguable question of professional duty,” so there would be no conflict with rule 5.2(b) as posited in the “Cons,” below.

Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission’s proposed rule 5.2(b) is unclear. Proposed rule 5.2(b) provides that: “A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” Where a subordinate and supervisor are both participating in a matter and the subordinate does not believe the firm’s screening procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied? Further, although including an objective standard might be an improvement on the Model Rule, that in itself is not a sufficient reason to eliminate the requirement of providing the former client with “certifications of compliance.” There is no reason that both requirements should not be included in the rule.

<sup>18</sup> Drafting team consensus to substitute “any lawyer participating in the matter in the firm” for “the partners of the firm” in the Colorado provision, and to add a comment cross referencing proposed Rules 5.1 (Responsibilities of Managerial and Supervisory Lawyers) and 5.3 (Responsibilities Regarding Nonlawyer Assistance). See Comment [4], below.

<sup>19</sup> Drafting team consensus during 4/20/16 teleconference to substitute “will be effective” for “is likely to be effective” in subparagraph (a)(2)(iii).

<sup>20</sup> Paragraph (b), which is identical to MR 1.10(b), is a codification of *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752 [23 Cal.Rptr.3d 116].

<sup>21</sup> Paragraph (c) is derived from MR 1.10(c). Concerning the substitution of “prohibition” for “disqualification,” See note 2.

- (d)<sup>23</sup> The ~~disqualification-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<sup>24</sup>**

##### **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].<sup>25</sup>~~

##### **Principles of Imputed Disqualification<sup>26</sup>**

~~[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).<sup>27</sup>~~

~~[3]—The rule in paragraph (a) does not prohibit representation when 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.<sup>28</sup>~~

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<sup>22</sup> Drafting team agrees with RRC1’s substitution of the term “each” for “the” to clarify that the firm lawyers have a duty to obtain the consent not only of the former client but also the current client.

<sup>23</sup> Paragraph (d) is derived from MR 1.10(d). The phrase “imputation of a conflict of interest to” has been substituted for “disqualification of” for the same reason “prohibited” has been substituted for “disqualified” throughout the rule. See note 2.

<sup>24</sup> **Note:** The proposed comments are base in part on the Model Rule comments and in part of the comments proposed by RRC1, as modified to reflect changes the drafting team has made to the black letter.

<sup>25</sup> Drafting team consensus to delete MR 1.10, cmt. [1]. There is already a definition of “firm” in proposed Rule 1.0.1(c).

<sup>26</sup> With the deletion of Comment [1], the remainder of the Comment addresses principles of imputation, so the subtitle has been deleted.

<sup>27</sup> Drafting team consensus to delete MR 1.10, cmt. [2] because it merely states the policy underlying the rule.

<sup>28</sup> Drafting team consensus to delete MR 1.10, cmt. [3] as unnecessary exposition.



~~[41] The rule in paragraph 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.<sup>29</sup>

~~[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).~~<sup>30</sup>

~~[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).~~<sup>31</sup>

~~[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.~~<sup>32</sup>

~~[82]~~ 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~~prohibited.<sup>33</sup>

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<sup>29</sup> Drafting team consensus to recommend adoption of MR 1.10, cmt. [4], as revised. This is an important provision that clarifies the rule applies to lawyers and not necessarily to non-lawyer employees of the firm.

<sup>30</sup> Drafting team consensus to delete MR 1.10, cmt. [5], which explains paragraph (b). The blackletter is sufficiently clear to stand by itself.

<sup>31</sup> Drafting team consensus to delete MR 1.10, cmt. [6]. The first sentence of the comment simply restates the rule and the remainder states the obvious.

<sup>32</sup> Drafting team consensus to delete MR 1.10, cmt. [7]. The comment states the obvious, which is already stated with sufficient clarity in paragraph (a)(2).

<sup>33</sup> Drafting team consensus to recommend adoption of MR 1.10, cmt. [8] as comment [2]. The comment provides interpretative guidance concerning the application of subparagraph (a)(2)(i) regarding the prohibition of a screened lawyer from collecting fees from the matter on which the lawyer is screened..



~~[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.<sup>34</sup>~~

~~[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.<sup>35</sup>~~

~~[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.<sup>36</sup>~~

~~[123] Where a lawyer is prohibited from engaging in certain transactions under [Rules 1.8.1 through 1.8.9](#), ~~Rule 1.8, paragraph (k) of that Rule~~ [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.<sup>37</sup>~~

~~[\[4\] The responsibilities of managerial and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply to screening arrangements implemented under this Rule.<sup>38</sup>](#)~~

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<sup>34</sup> Drafting team consensus to delete MR 1.10, cmt. [9] as restating the black letter’s requirements and stating the obvious..

<sup>35</sup> Drafting team consensus to delete MR 1.10, cmt. [10] as no longer relevant as the referenced MR provision has been substituted. See note 9, above.

<sup>36</sup> Drafting team consensus during 5/12/16 teleconference to delete MR 1.10, cmt. [11] because it merely restates what is already stated with sufficient clarity in the blackletter of paragraph (d).

<sup>37</sup> Drafting team consensus during 5/12/16 teleconference to recommend adoption of MR 1.10, cmt. [12], as proposed Comment [3]. The reason for this comment is to direct readers to proposed Rule 1.8.11, which is the imputation rule for the miscellaneous conflicts that are addressed in Rules 1.8.1 through 1.8.9. In the Model Rules, those rules are paragraphs in a single rule numbered 1.8, so the imputation paragraph for Model Rule 1.8(a) through (i) is MR 1.8(k). The prohibition under 1.8(j) [our proposed Rule 1.8.10] (sex with client) is personal and not imputed to other lawyers in the firm.

<sup>38</sup> Drafting team consensus during 5/12/16 teleconference to recommend adoption of this comment, which is derived from D.C. Rule 1.10, cmt. [25]. See discussion that follows.

See note 18, above, concerning subparagraph (a)(2)(iii). This provision is derived from D.C. Rule 1.10, cmt. [25], which provides:

[25] The responsibilities of partners, managers, and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply in respect of screening arrangements under Rule 1.10(b)(3).

The term used in proposed Rules 5.1 and 5.3, “managerial and supervisory lawyers” has been substituted for “partners, managers, and supervisory lawyers” and “to” substituted for “in respect of”.

[5] Standards for disqualification, and whether in a particular matter (1) a lawyer's conflict will be imputed to other lawyers in the same firm or (2) the use of a timely screen is effective to avoid that imputation, are also the subject of statutes and case law. See, e.g., Code of Civil Procedure section 128(a)(5); Penal Code section 1424; *In re Charlisse C.* (2008) 45 Cal.4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566.<sup>39</sup>

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<sup>39</sup> Drafting team consensus to recommend adoption of this Comment to alert lawyers that other law can be applied when disqualification based on a conflict of interest is at issue.

### **ATTACHMENT 3**

#### **Clean version of proposed Rule 1.11, Draft 1.3 (5/15/16)**

#### **Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees**

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public official 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 official 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;
  - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and
  - (3) the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client.
- (c) Except as law may otherwise expressly permit, a lawyer who was a public official 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:
  - (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) the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public official 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] Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.

[2] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client.

[3] By requiring a former government lawyer to comply with Rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. 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 paragraph (a)(1).

[4] Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public official or employee of the government, 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. 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. 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.

[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. 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 [6]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

[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] 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.

[8] A lawyer serving as a public official or employee of the government 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).

[9] This Rule is not intended to address whether in a particular matter: (1) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency or (2) the use of a timely screen will avoid that imputation. The imputation and screening rules for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th at 847, 851-54 and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403]. Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code section 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264].

## ATTACHMENT 4

### Redline annotated version of proposed Rule 1.11, Draft 1.3 (5/15/16)

#### Rule 1.11 Special Conflicts Of Interest For Former And Current Government ~~Officers~~ Officials<sup>40</sup> And Employees

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public ~~officer~~official 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~~official or employee, unless the appropriate government agency gives its informed written consent<sup>41</sup>; ~~confirmed in writing~~, to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).<sup>42</sup>
- (b) When a lawyer is ~~disqualified~~prohibited<sup>43</sup> 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~~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~~Rule; ~~and~~
  - (3) the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client.<sup>44</sup>

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<sup>40</sup> Drafting team consensus to substitute “public official” for “public officer” to conform the term used to the term in proposed rule 4.2 (communication with represented person).

<sup>41</sup> Change made to incorporate California’s historical heightened consent requirement.

<sup>42</sup> Drafting team consensus to include this sentence from RRC1’s proposed Rule 1.12 to clarify that although judges and judicial employees are government employees, their conduct after leaving government employment is governed by rule 1.12.

<sup>43</sup> The introductory clause of paragraph (b) is nearly identical to MR 1.11(B), the only difference being to substitute “prohibited” for “disqualified”.

Pros: The term “prohibited” is more appropriate for a disciplinary standard that is not intended as a civil standard for determining whether a lawyer should be disqualified.

Con: Regardless of the rule’s function as a disciplinary rule, courts refer to the Rules in deciding disqualifying motions. The concept that the rules addressing conflicts of interest are solely disciplinary in nature is not accurate.

<sup>44</sup> Drafting team consensus to add a provision derived from Colo. Rule 1.10(e)(4) to this Rule. Colo. Rule 1.10(e)(4) provides:

- (c) Except as law may otherwise expressly permit, a lawyer ~~having who was a public official or employee and, during that employment, acquired~~ information that the lawyer knows is confidential government information about a person ~~acquired when the lawyer was a public officer or employee~~,<sup>45</sup> 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, 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 ~~which 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:
- (1) the ~~disqualified~~ personally prohibited<sup>46</sup> lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client.<sup>47</sup>
- (d)<sup>48</sup> Except as law may otherwise expressly permit, a lawyer currently serving as a public ~~officer~~ official 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<sup>49</sup>; ~~confirmed in writing~~; or
    - (ii) negotiate for private employment with any person who is involved as a

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(4) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

The drafting team has made a similar recommendation for proposed rules 1.10 and 1.12.

Pros: See note 17.

Cons: See note 17.

<sup>45</sup> Nonsubstantive syntax change to clarify the intent of the provision.

<sup>46</sup> See note 43.

<sup>47</sup> See note 44.

<sup>48</sup> Paragraph (d) sets forth requirements for a lawyer who moves from private practice into government employment. See also proposed Comment [8] and associated note.

<sup>49</sup> See note 41.

party, or as a lawyer for a party, or with a law firm for a party,<sup>50</sup> 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. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.~~<sup>51</sup>

~~[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.~~

[3] By requiring a former government lawyer to comply with Rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. This provision applies regardless of whether the lawyer was working in a “legal” capacity. Thus, information learned by the lawyer

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<sup>50</sup> The phrase “or with a law firm for a party” has been added to broaden the scope of the prohibition on negotiation to encompass not only negotiating with the particular lawyer who is representing the party, but also that lawyer’s law firm.

<sup>51</sup> Comment [1] has been added to clarify that Rule 1.10 does not apply to conflicts that arise from former or current government employment.



while in public service in an administrative, policy or advisory position also is covered by paragraph (a)(1).<sup>52</sup>

~~[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.~~

[4] Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public official or employee of the government, 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. 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. 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.<sup>53</sup>

[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~~ Because the conflict of interest is governed by ~~paragraph (d) paragraphs (a) and (b),~~ the latter agency is ~~not~~ required to screen the lawyer ~~as paragraph (b) requires a law firm to do. The question of whether.~~ 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 [96]. See also Civil Service Commission v. Superior Court (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].<sup>54</sup>

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<sup>52</sup> Comment [3], derived from RRC1 Rule 1.11, cmt. [4A] and NY Rule 1.11, cmt. [4A], has no counterpart in the Model Rule. It has been added to clarify the purposes of Rule 1.11(a)(1) and (c) and provide guidance on when the rule applies.

<sup>53</sup> Comment [4] is also derived from RRC1 Rule 1.11, cmt. [4A] and NY Rule 1.11, cmt. [4A]. The drafting team recommends dividing those comments in two because each contains two separate concepts better presented in separate comments.

<sup>54</sup> Comment [5] is derived from MR 1.11, cmt. [5] and RRC1 Rule 1.11, cmt. [5]. The second sentence has been amended to conform to California law. The reference in the Model Rule Comment to "paragraph (d)" has been changed to "paragraphs (a) and (b)" because the latter

[6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule ~~4.0~~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.<sup>55</sup>

~~[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.<sup>56</sup>

~~[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.~~

[8] A lawyer serving as a public official or employee of the government 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).<sup>57</sup>

[9] This Rule is not intended to address whether in a particular matter: (1) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency or (2) the use of a timely screen will avoid that imputation. The imputation and screening rules

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paragraphs govern the situation that is described. See also Explanation of Changes for Comment [2], above.

In the last sentence, the cross-reference has been changed to Comment [6] of proposed Rule 1.13 because that is the counterpart in proposed Rule 1.13 of Comment [9] of Model Rule 1.13.

A reference to *Civil Service Commission v. Superior Court* has been added to direct readers to that important case on the issue of when a government entity is the same or a different client.

<sup>55</sup> Comment [6] is derived from MR 1.11, cmt. [6]. The phrase "for former government lawyers" has been added for clarification. The second sentence clarifies the application of subparagraphs (b)(1) and (c)(1).

<sup>56</sup> Comment [7] is identical to MR 1.11, cmt. [9].

<sup>57</sup> Comment [8] has no counterpart in the Model Rule. It is derived from RRC1 Rule 1.11, cmt. [9A], and has been added to make clear precisely what consents a former government lawyer must obtain to personally participate in a matter. Although subparagraph (d)(2)(ii) appears on its face to require only the consent of the government agency, the consent of the private lawyer's former client is also required because (d)(1) makes that lawyer subject to Rule 1.9, under which a former client's consent is required for an otherwise prohibited lawyer's personal participation in a matter. The drafting team is concerned that without this clarifying comment, the requirement of the former client's consent will not be apparent.

for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th at 847, 851-54 and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403]. Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code section 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264].<sup>58</sup>

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<sup>58</sup> Comment [9] has no counterpart in the Model Rule. It is derived from RRC Rule 1.11, cmts. [9B] and [9C], as revised by the drafting team. It has been added to clarify that this Rule is primarily intended for purposes of discipline, and whether a lawyer or law firm will or will not be disqualified is a matter to be determined by the appropriate tribunal and is not necessarily dictated by this Rule.

## **ATTACHMENT 5**

### **Clean version of proposed Rule 1.12, Draft 1.1 (5/18/16)**

#### **Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral**

- (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 written consent.
- (b) A lawyer shall not participate in discussions regarding prospective employment with any person who is involved as a party or as 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) If a lawyer is prohibited 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 firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
  - (1) the prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom;
  - (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; and
  - (3) the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client.
- (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. "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. The term "adjudicative officer" includes such officials as judges pro tempore, referees and special masters. ""

[2] 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] [Requirements for screening procedures are stated in Rule 1.0.1(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.

## ATTACHMENT 6

### Redline annotated version of proposed Rule 1.12, Draft 1.1 (5/18/16)

#### Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

- (a)<sup>59</sup> 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 written consent, ~~confirmed in writing~~.
- (b)<sup>60</sup> A lawyer shall not ~~negotiate for~~ participate in discussions regarding prospective employment with any person who is involved as a party or as 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 ~~negotiate for~~ participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm for a party, ~~involved~~ in a matter in which the clerk is participating personally and substantially, but only after with the ~~lawyer has notified the approval of the~~ judge or other adjudicative officer.
- (c)<sup>61</sup> If a lawyer is ~~disqualified~~ prohibited<sup>62</sup> 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 firm

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<sup>59</sup> Paragraph (a) is identical to MR 1.12(a) except that California's heightened informed written consent requirement has been substitute.

<sup>60</sup> Paragraph (b) is derived from MR 1.12(b). However, the drafting team recommends two changes.

First, the phrase "negotiate for," that appears in two places, has been replaced with the phrase "participate in discussions regarding prospective." The replacement language is consistent with the Model Rule language in covering negotiations for employment but also is broader and clearer by covering, for example, initial employment interviews that might not be strictly regarded as employment negotiations. In addition, the language tracks the language used in Canon 3E(5)(h) of the California Code of Judicial Ethics.

Second, the phrase "or with a law firm for a party" has been added for clarification. It makes clear that negotiations are prohibited not only with a lawyer actually appearing in the matter, but also with that lawyer's law firm.

<sup>61</sup> The introductory clause of paragraph (c) is derived from RRC1 Rule 1.12(c). It permits screening only of law clerks to avoid imputation in a law firm. Screening is permitted only for law clerks because concerns over reduced confidence in the administration of justice by screening adjudicative officers is not as great for law clerks. See *Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863]. Further, not permitting screening of law clerks, as is done in other jurisdictions, would place practical limits on job opportunities for temporary clerks in high volume assignments, and might discourage their accepting positions with the courts because of that limitation.

<sup>62</sup> The term "prohibited" has been substituted for "disqualified".

Pros: The term "prohibited" is more appropriate for a disciplinary standard that is not intended as a civil standard for determining whether a lawyer should be disqualified.

with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

- (1) the ~~disqualified-prohibited~~ lawyer is timely and effectively<sup>63</sup> 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~~Rule; ~~and~~
  - (3) the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client.<sup>64</sup>
- (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. “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 the Comment to Rule 1.11.~~ The term “adjudicative officer” includes such officials as judges pro tempore, referees, and special masters, ~~hearing officers and other parajudicial officers, and also lawyers who serve as part-~~

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Con: Regardless of the rule’s function as a disciplinary rule, courts refer to the Rules in deciding disqualifying motions. The concept that the rules addressing conflicts of interest are solely disciplinary in nature is not accurate.

<sup>63</sup> The drafting team recommends adding “and effectively” to “timely” to emphasize that not only must a screen be implemented in a timely manner, but it also must be effective.

<sup>64</sup> Drafting team consensus to include paragraph (a)(2)(iii) from proposed Rule 1.10. That paragraph refers to the screening of “material information.” The prohibition in 1.10 is based on a lawyer’s disqualification under 1.9(a) and (b), which prohibit representation of a lawyer who either was previously involved in the same or substantially related matter [1.9(a)] or has otherwise acquired material information by association in the lawyer’s former law firm [1.9(b)]. This Rule does not have the same predicate. Nevertheless, this provision remains appropriate: First, a clerk is privy to material confidential information gleaned from discussions with the judge or other participation in the matter (see, e.g., Comment [1]); and second, there does not appear to be a reason to require a screen with different requirements for a matter arising from previous work for a judge. The drafting team has made similar recommendations re Rules 1.10 and 1.11.

As to the addition of the provision, there are further pros and cons:

Pros: See note 17.

Cons: See note 17.

~~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, these Rules correspond in meaning.~~<sup>65</sup>

~~[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.~~<sup>66</sup>

~~[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.~~<sup>67</sup>

~~[4] [Requirements for screening procedures are stated in Rule 1.0.1(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.~~<sup>68</sup>

~~[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.~~<sup>69</sup>

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<sup>65</sup> Drafting team consensus to recommend adoption of Comment [1] as revised. The comment is derived largely from RRC1's modification of the Model Rule comment. Language has been added to clarify that the rule also applies when a lawyer acquired confidential information while working in a court, even if the lawyer was not directly involved in the matter, for example, when a law clerk not working on a matter discusses the matter with another clerk who is working on the matter. Language has also been added to the third sentence of the Model Rule comment to explain more precisely the kinds of duties that would fall outside the Rule.

<sup>66</sup> Drafting team consensus to recommend adoption of Comment [2] as revised (i.e., only the last sentence of MR 1.12, cmt. [2]). The Comment alerts lawyers to possibility that other law or codes of conduct might impose more stringent standards than this disciplinary rule.

<sup>67</sup> Drafting team consensus to delete MR 1.12, cmt. [3] as unnecessary exposition.

<sup>68</sup> Drafting team consensus to recommend adoption of MR 1.12, cmt. [4] as proposed Comment [3], with the first sentence bracketed. The second sentence clarifies the application of paragraph (c)(1).

<sup>69</sup> Drafting team consensus to delete MR 1.12, cmt. [5] because it restates the rule.