



THE STATE BAR OF CALIFORNIA

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OFFICE OF PROFESSIONAL CONDUCT

PLANNING, AND DEVELOPMENT

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III.C. ATT1 Rule 1.8(k)
June 2-3, 2016
Open Session

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 Rule 1.8.11 – Rule of Imputation for the 1.8 series of Rules

Summary:

The drafting team assigned to study rule 3-310 concerning conflicts of interest recommends that the Commission recommend adoption of new proposed rule 1.8.11, which would function as the counterpart to ABA Model Rule 1.8(k), which sets forth the rule of imputation for all of the conflicts in Model Rule 1.8. The proposed rule is necessary because by its terms, proposed Rule 1.10 as recommended by the drafting team does not apply to the 1.8 series of rules being proposed by this Commission. Proposed rule 1.8.11 would provide that while lawyers are associated in a firm, a prohibition based on rules 1.8.1 through 1.8.9 would apply to all lawyers in the firm. The rule would not apply to prohibitions based on rule 1.8.10 (sex with client) because that prohibition is personal and not applied to associated lawyers.

Background:

The rule 3-310 drafting team was assigned to consider rule 3-310 in light of the ABA Model Rule framework for regulating the conflicts of interest addressed in 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 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 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 imputation of conflicts of interest but also broadly permits unconsented screening of lawyers who have moved laterally between two private firms. After considering the black letter rule submitted by the drafting team, the Commission voted 8-7 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 the rule, including the comments, that conformed to the vote of the Commission.

For the June meeting, the Commission is being asked to consider a number of ABA Model Rules that have no counterpart in the California Rules.¹ For the June meeting, this drafting team has prepared draft rule counterparts of Model Rules 1.10, 1.11 and 1.12. These are described in a separate memorandum. During consideration of proposed rule 1.10, however, it became apparent that no drafting team had been assigned the task of considering Model Rule 1.8(k), which provides for imputation of conflicts arising out of situations governed by Model Rule 1.8. At the request of staff, the drafting team undertook the task and after consideration of the Model Rule and RRC1's proposed rule 1.8.11, proposes that the Commission recommend the adoption of rule 1.8.11.

Discussion:

As proposed by the drafting team, Rule 1.8.11 would provide:

Proposed Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

[1] A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm with the personally prohibited lawyer. For example, one lawyer in a law firm may not enter into a business transaction with a client of another lawyer associated in the law firm without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.

(The rule also is attached to this memorandum as Exhibit 1.)

Prior to 2002, imputation of conflicts arising under Model Rule 1.8 were handled by reference to Model Rule 1.10. However, the Ethics 2000 Commission determined that the Model Rule 1.8 conflicts were better addressed in a separate imputation provision that would apply solely to that rule. The Commission reasoned that Rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. The Ethics 2000 Reporter explained the change:

1. Treat imputation under Rule 1.8 rather than 1.10

The [Ethics 2000] Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under paragraph (k), an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under Rule 1.10); moreover, there is no exception here (as there is in Rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

See Ethics 2000 Reporter's Explanation of Changes, Model Rule 1.8, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem.html

¹ 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.

RRC1 also considered whether to recommend adoption of an imputation rule to be applied to the 1.8 series of Rules.² Similar to the Ethics 2000 Commission, RRC1 concluded a separate imputation rule was warranted.

The Proposed Blackletter Rule.

The drafting team found the Ethics 2000 Commission's reasoning, joined in by RRC1, to be persuasive and proposes rule 1.8.11.

Proposed rule 1.8.11 carries forward the rule proposed by RRC1. A redline version of the rule, compared to Model Rule 1.8(k), is included as Exhibit 2. RRC1 made no substantive changes to the Model Rule; as can be seen by reference to the redline, all of the changes were made to conform the Model Rule to the structure of the 1.8 rules series, each Model Rule paragraph being a separate, standalone rule. Proposed rule 1.8.11, however, would be a substantive change to the current California rules and a change in a lawyer's duties as there is no counterpart in the current rules.³

The Proposed Comment to the Rule

The drafting team proposes that the Commission recommend including a single comment to the rule. After a lead-in sentence, the comment provides an important example of how rule 1.8.11 would be applied when a rule 1.8.1 prohibition on entering into a business transaction with a client is triggered. Explaining how a rule is applied is an appropriate subject for a comment and the drafting concluded the specific example was highly relevant to an understanding of the rule. The last sentence of the comment distinguishes the one exception to the rule, proposed rule 1.8.10, because that rule is personal to the lawyer involved.

Conclusion:

In accordance with the foregoing, the drafting team proposes that the Commission recommend the adoption of rule 1.8.11 as part of the revised California Rules of Professional Conduct.

² Because this Commission also decided that the provisions in Model Rule 1.8 should remain standalone rules as most of the California counterparts to MR 1.8 provisions are, and that they should be numbered to correspond to the MR counterpart provisions (e.g., MR 1.8(a) is proposed Rule 1.8.1 [3-300], MR 1.8(e) is proposed Rule 1.8.5 [4-210]), it is necessary to refer to the "1.8 series" rather than "rule 1.8." Proposed rule 1.8.11 would correspond to Model Rule 1.8(k).

³ Compare rule 3-310(B) and the accompanying sixth Discussion paragraph which provides that: "Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation."

EXHIBIT 1

Proposed Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

(Clean Version)

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm with the personally prohibited lawyer. For example, one lawyer in a law firm may not enter into a business transaction with a client of another lawyer associated in the law firm without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.

EXHIBIT 2

Redline Comparison of Rule 1.8.1 to Model Rule 1.8(k)

~~Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules~~ Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

* * *

~~(k)~~ While lawyers are associated in a law firm, a prohibition in ~~the foregoing paragraphs~~
~~(a)~~ Rules 1.8.1 through ~~(i)~~ 1.8.9 that applies to any one of them shall apply to all of them.

Comment

* * *

Imputation of Prohibitions

~~[20] Under paragraph (k), a~~ A prohibition on conduct by an individual lawyer in
~~paragraphs (a) Rules 1.8.1~~ through ~~(i) 1.8.9~~ also applies to all lawyers associated in a
law firm with the personally prohibited lawyer. For example, one lawyer in a law firm
may not enter into a business transaction with a client of another ~~member of lawyer~~
associated in the law firm without complying with ~~paragraph (a) Rule 1.8.1~~, even if the
first lawyer is not personally involved in the representation of the client. ~~The~~ This Rule
does not apply to Rule 1.8.10 since the prohibition ~~set forth in paragraph (j) in that Rule~~
is personal and is not applied to associated lawyers.

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May 19, 2016 Mohr Email re 1.8.11 to Drafting Team, cc Difuntorum, A. Tuft, McCurdy & Lee:

I've attached a memo re proposed Rule 1.11, draft 1.2 (5/19/16), for your review. Please let us know of any edits or additions by close of business today. Thanks,

Attached:

RRC2 - [1.8.11] - Rule 1.8.11 - Memo - DFT1.2 (05-19-16)-CLEAN.doc

May 19, 2016 Eaton Email re 1.8.11 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

Looks fine to me.

May 19, 2016 Martinez Email re 1.8.11 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

I am not sure the drafting team went through and compared this Rule to the approved versions of Rules 1.8.1 through 1.8.9. I am hoping all the parts fit. However, in comparing, as an example Rule 1.8.3 (that a lawyer shall not solicit a client to make a substantial to the lawyer) to Rule 1.8.11, does Rule 1.8.11 mean that the acts of the lawyer violating Rule 1.8.3 are imputed to other lawyers in the firm? If Rule 1.8.11 in this context means that the Rule 1.8.3 prohibition applies to all lawyers in the firm doesn't that make Rule 1.8.11 redundant since the former by its terms applies to any lawyer? Alternatively, if Rule 1.8.11 is a rule of imputation doesn't it conflict with Rule 5.1 in this context?

May 19, 2016 Mohr Email re 1.8.11 to Drafting Team, cc Difuntorum, A. Tuft, McCurdy & Lee:

The rule does not impose vicarious liability. Rather it provides that if one lawyer is prohibited from engaging in certain conduct then all other lawyers in the firm are similarly prohibited from engaging in the conduct, i.e., they are vicariously prohibited from engaging in the conduct.

To use 1.8.3 (gifts from client) as an example, a lawyer is prohibited from accepting gifts from the client, period. There is no exception for the client giving his or her informed written consent to a gift. The concern is overreaching or the exertion of undue influence by the lawyer, not a specific concern with the duty of loyalty (1.7) or the duty of confidentiality (1.9) as rule 1.10(a) is focused. Bringing in another lawyer in your firm to draft the devising instrument will not allay concerns that the lawyer has engaged in overreaching or undue influence with the client. That's why the probate code requires an independent lawyer, not just the advice to the client to retain an independent lawyer. Again, the client's consent will not cure the concern w/ overreaching, etc.

Therefore, Rule 1.8.11 does not provide exceptions to the imputation of the prohibition except for the prohibition on sex w/ client, which is a prohibition that is personal to the lawyer engaging in sexual relations with the client.

The problem with putting all of the 1.8 series rules under rule 1.10 is that the latter rule has an exception under paragraph (c) that permits the client to "waive" the prohibition. That doesn't work for the 1.8 series of rules. I hope this helps. Thanks,

May 19, 2016 Martinez Email re 1.8.11 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

The problem is the ABA's use of the word "imputation" which per Black's Law Dictionary means: "The act or an instance of imputing something, esp. fault or crime, to a person; an accusation or charge..." The ABA creates a new term- "imputation of prohibitions"--which is foreign to practicing lawyers. The concept of imputation can also refer to knowledge or notice being imputed to others. But imputing "prohibitions"?? So I don't see the need to use the concepts of imputation or vicarious. The idea that other lawyers are "vicariously" prohibited from engaging in the prohibited conduct seems superfluous. The connection between 1.10 and this Rule will not be apparent to the average lawyer or judge. If the idea is to exempt Rules 1.8.1 through 1.8.9 from the informed consent aspect of 1.10 why not just say that. The ABA missed the opportunity to draft clear and simple rules. That ship has sailed.

May 19, 2016 Cardona Email re 1.8.11 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

I think Kevin's memo will serve as a vehicle for presenting to the full commission the issue of whether to follow the ABA in having 1.8.11 or not. Hence, I agree with putting the memo in, with the understanding that Raul's concerns will be raised and this will be an issue at the meeting.

May 19, 2016 Eaton Email re 1.8.11 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

I agree with George that the dialogue between Raul and Kevin, which will be distributed before the meeting, will allow the issue to be aired at the meeting.

May 19, 2016 Martinez Email re 1.8.11 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

That would be expedient. We could add to the Comment:

"However a violation of Rules 1.8.1 through 1.8.9 by a lawyer is not imputed to lawyers associated in the firm who did not participate in the violation."

May 19, 2016 Harris Email re 1.8.11 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

I agree with Dan, George and Raul that the matter is fleshed out sufficiently with Kevin's memo and in the dialogue.

May 19, 2016 Stout Email re 1.8.11 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

I also agree.

May 19, 2016 Mohr Email re 1.8.11 to Drafting Team, cc Difuntorum, A. Tuft, McCurdy & Lee:

I agree with George and Dan that we should circulate the memo for consideration of rule 1.8.11 at the June meeting. I'm writing this for the benefit of discussion that will likely take place at that meeting. I'm assuming this will be part of the emails that will be provided to the Commission.

First, I want to reiterate that neither this rule nor rule 1.10 has anything to do with imputing liability or a violation of a rule to lawyers who did not personally commit a violation. If a lawyer in your firm enters a business transaction with a client without complying with 1.8.1 [3-300], then the lawyer has committed a violation of the rule, and may be subject to discipline for that violation, but the violation is not imputed to you and you are not subject to discipline. Put another way, the duties of other lawyers in your firm to their clients are imputed to you; the other lawyers' violations of those duties are not. On the other hand, because those duties are imputed to you, if you enter a business transaction with your partner's client without complying with 1.8.1 [3-300], then you have committed a violation of 1.8.1 even though you have never represented your partner's client. That is the gist of the second sentence (example) in 1.8.11.

Second, it's important to point out that the ABA rules do not use the word "imputation" or "impute" or any other variation of that word in the blackletter of any rule, unless the title of rule 1.10 is considered part of that rule's black letter. The word "impute" or a variant of it does show up several times in the comment to rules 1.7, 1.9, 1.10, 1.11 and 1.12, and in the subheading for comment [20] to rule 1.8 (i.e., the proposed comment to proposed rule 1.8.11, as revised). However, it does not appear in the black letter of any Model Rule.

The phrase you focus on, "impute prohibitions," was my inartful attempt to explain what the rule is designed to do. I should have used a phrase like "impute conflicts" which is what the court opinions and the ABA rules use. The ABA rules, however, do not use the phrase "impute prohibition," so the ABA is blameless as to my lexical faux pas. Essentially, rule 1.8.11 provides that with respect to the 1.8 series of rules, if any lawyer in a firm can't do it, no other lawyer in the firm can.

Moreover, it is not just an issue of consent. The screening provisions of 1.10 are inapplicable to the conflicts in the 1.8 rules series. How would screening a lawyer, which is intended to protect the confidential information of a former client, make it permissible for another lawyer in the firm entering into a business transaction with the screened lawyer's current client? How would screening a lawyer assuage the concerns of 1.8.2 (use of a current client's information to the disadvantage of a client) remedy the violation of the duty of loyalty that rule 1.8.2 is intended to address? You can't screen out the duty of loyalty. The same considerations apply with the other 1.8 series rules. They are all current client conflicts and implicate loyalty to some extent.

You could put the 1.8 series under the aegis of rule 1.10 and then include several comments with examples explaining why the provisions are inapplicable. Ethics 2000, however, saw that it is more straightforward to have a separate imputation (or vicarious prohibition) rule for the 1.8 series. I agree with their approach.

Thanks for raising the point. I think it is important to get it out there. I also think, however, that in this case, the ABA has it right. Thanks,

May 19, 2016 Martinez Email re 1.8.11 to Drafting Team, cc Difuntorum, Mohr, A. Tuft, McCurdy & Lee:

The problem is that the Rule is not entirely clear and the lack of clarity is not apparent to the ordinary reader. To clear up the ambiguity one has to go through the entire litany of the ABA

conflict rules and explain what the ABA actually intended. Your lengthy explanation proves the point.

With respect to the statement that the ABA rules do not use the phrase "impute prohibition," actually ABA Comment [20] is entitled "Imputation of Prohibitions".