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Here are my thoughts on this proposed Rule ---

- 1) I would remove paragraph (c)((iii). The lawyers' belief in the adequacy of the screen is irrelevant b/c Rule 1.0.1(k) has an objective standard for screening. The lawyers' state of mind does not add anything meaningful or pertinent but could cause confusion.
- 2) Paragraph (b)(2) also should refer to § 6068(e)(1).
- 3) On Comment [1]:
 - a. What is the basis for the statements in the second and third sentences? It does not appear to explain anything in the Rule
 - b. If those sentence are retained, I would begin the second sentence: "Paragraph (a) also does not prohibit"
- 4) In Comment [5] the section symbol should be used in place of the word.

May 27, 2016 Tuft Email re 1.10 to Drafting Team, cc Difuntorum, Mohr & A. Tuft:

Proposed paragraph (a)(2) ("broad screening") represents a major change in California law while "limited screening" adopted in 14 jurisdictions is more in line with current case law and the principles articulated by the Supreme Court. First, screening has not, nor should it, be permitted in "side-switching" cases in the private sector. The court in *Kirk v. First American Title Ins. Co.*, 183 Cal. App. 4th 776, 800, 814 (2010) conceded that imputation of the "tainted" lawyer's conflict remains "automatic" when the "tainted" lawyer was actually involved in the former client's representation and "switches sides" in the same case. The court affirmed *Henriksen v. Great American Saving & Loan Ass'n*, 11 Cal. App. 4th 109 (1992) in holding that "no amount of screening will be sufficient" in a "side-switching" case.

Second, "screen" and "screening" are define in the Model Rules as procedures intended to effectively safeguard the former client's confidential information. During the considerable debate in the ABA House of Delegates over whether to adopt "broad" vs. "limited" screening, the proponents argued, without the benefit of authority, that screening under the rule applies when the prohibited lawyer owes the former client a duty of loyalty and not simply confidentiality. It is doubtful our Supreme Court would approve screening as a means of satisfying a lawyer's duty of loyalty under *Wutchumna* and more recent cases. I was involved in the ABA debate and could fine no reported case approving an ethical wall to avoid imputation of an in-coming lawyer's duty of loyalty to a former client who joins the opposing law firm that is charged with undermining and attacking the lawyer's prior work.

Third, it is not entirely clear whether "broad screening" would or should put private lawyers on equal footing with government lawyers. There are many public policy reasons for permitting screening in the public sector that do not apply in the private sector. See, e.g., *Chambers v. Superior Court*, 121 Cal. App. 3d 893, 902 (1981) – ex government lawyers would have a harder time finding employment in the private sector); alternative public defender and other public agency offices necessary to serve the public interest. Screening supervising government lawyers is not as broad in California as in some other states. *CCSF v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 (2006).

Fourth, paragraph (b)(2)(iii) does not afford much protection. Case law requires that the preventative measures must be effective to insure confidentiality of the former client's information. See *Kirk*, supra., 183 Cal. App. 4th at 809-814 on the typical elements of an effective ethical wall which are to be evaluated on a case-by-case basis. Two fundamental qualities of an ethical wall are (1) timely implementation and adequate procedures that eliminate the opportunity for disclosure of confidential client information. Proposed paragraph (b)(2)(iii) reduces this standard by requiring that the "tainted" lawyer and the lawyers handling the current matter have a "reasonably believe" that the measures taken will be effective in preventing "material" information from being disclosed. The rule invites disputes and expensive litigation on what constitutes a "reasonable belief" and what is "material" information. Case law imposed the burden on the law firm and not the affected client to insure that the measures are in fact timely and effective.