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May 23, 2016 Marlaud Email re 1.18 to Drafting Team, cc Chair, Difuntorum, Mohr, McCurdy & Lee:

Please see attached OCTC memo with comments concerning Rule 1.18. Please consider these comments in preparation for the June meeting.

Attached:

RRC2 - [4-100][3-400][3-410][3-700][[1.8.5A][6.1][1.10][1.18][2.3][3.9][4.1][4.4][5.7][8.3] - 05-19-16 OCTC Memo to RRC2.pdf

May 19, 2016 OCTC Memo [Dresser] re 1.18 to RRC2:

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H. ABA Model Rule 1.18 [Duties to Prospective Clients]

Please see OCTC's February 12, 2016 comment regarding rule 3-310. California law includes the substance of Model Rule 1.18. Additionally, the rules pertaining to competence and client confidences have been previously addressed.

February 12, 2016 OCTC Email to RRC:

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

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

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

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

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

May 24, 2016 Kehr Email re 1.18 to Difuntorum & Mohr:

Here are my comments on this proposed Rule:

1) Regarding paragraph (a):

a. Insert ",directly or through an authorized representative," after "who". The additional words come from Cal. Evid. Code § 951, which defines "client" as follows: "As used in this article, 'client' means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent." I recommend consistency with this statutory definition b/c any variation when language otherwise is so close could lead someone to think we intended a different standard. Proposed Comment [1] attempts to pick this up in its first sentence, but it is not accurate as drafted b/c the representative is not a prospective client, and I think the entire § 951 standard should be in a single place.

b. Also in the first line of paragraph (a), insert "the" before "purpose";

c. The second line of proposed paragraph (a) begins with "securing legal advice", but that does not accurately copy Evid. C. § 951, where the phrase is "securing legal service or advice." I would not modify the statutory language.

2) Paragraph (d)(2)(i) raises a policy issue. The Commission voted to permit non-consensual screening under Rule 1.9 so that a transient lawyer's new firm is not disqualified merely b/c the arriving lawyer would be. The Commission needs to decide whether the same freedom is appropriate when the disqualifying information is obtained by the current firm. The dynamic involved in a pristine firm screening an arriving lawyer might be seen as materially different from what would occur inside a law firm when a firm lawyer obtains confidential information from a prospective client when no screen was in place when the confidential information was received.

3) If the Commission decides to recommend non-consensual screening under Rule 1.18, paragraphs (d)(2) and (d)(2)(i) would conflict with each other, and to conflict with the Commission's recommended Rule 1.9. If the personally prohibited lawyer is timely screened, it doesn't make any difference how much information that lawyer possesses, whether that information is as a result of work at a prior firm (Rule 1.9) or as a result of communications with a prospective client (Rule 1.18).

4) The bracketed paragraph (d)(2)(iii) raises another policy issue. Screening requirements will be defined by case law for disqualification purposes. Should the disciplinary standard vary from whatever case law now or later requires? If so, there should be a Comment clarifying the narrow scope of this paragraph. That limitation is implied by the recommended use of "prohibited" instead of the MR's "disqualified", but I would make the limitation explicit.

5) I don't understand the meaning of the second sentence of proposed Comment [1] or what it clarifies about the Rule. I would like to discuss this at our meeting.

6) Regarding Comment [2]:

a. The second sentence could be read as implying that information necessarily is entitled to protection under this Rule if communicated to a lawyer under the reasonable belief that the lawyer is willing to discuss forming a lawyer-client relationship. I don't think that is right.

Many law firm websites allow readers to email firm lawyers but contain a warning that the sender should not include any confidential information. I believe this Comment needs to account for that situation. This might be done by inserting after "advice" in the fourth line of the proposed Comment: "... or who provides confidential information after being cautioned not to do" If that addition is made, "or" in the seventh line should be removed.

b. Also on the second sentence, I don't see what is added by "by any means".

c. The final sentence of proposed Comment [2] says that a person "who communicates information to a lawyer without a good faith intention to seek legal advice or representation," is not a prospective client. This addition came from the first Commission and was an effort to resolve the uncertainty over what happens when a potential litigant interviews a series of lawyers for the purpose of disqualifying them. I have two thoughts about this:

i. The first Commission placed this in a Comment, but under our current directions from the Supreme Court this seems to be definitional rather than explanatory and therefore properly part of the Rule.

ii. Whichever way the Commission decides to handle the placement question, I think there should be a separate vote on this exception due to its importance and novelty.

7) Proposed Comment [3] amounts to practice guidance. Yes, a lawyer being interviewed should obtain information needed to check for possible conflicts before obtaining confidential information from a prospective client, but once the lawyer obtains confidential information the person is a prospective client under this Rule unless an exception applies. I recommend removing this Comment.

8) Each sentence in proposed Comment [4] merely repeat the Rule and can be removed. The two cites to Rule 1.0.1 will not be needed if the Rules are published with hyperlink or some other indication that particular terms are defined.

9) Proposed Comment [5] will depend on what the Commission decides to do with screening under this Rule, but in any event I would not include a partial definition of what is required to make a screen effective.