

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 did not substantially participate in the same or a substantially related matter;
 - (ii) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (iii) 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.
- (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, 1.9(c), and Business and Professions Code § 6068(e) 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] In determining whether a prohibited lawyer's previously participation was substantial, a number of factors should be considered, such as the lawyer's level of responsibility in the prior matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter.

[2] 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 1.0.1(k) and 5.3.

[3] Paragraph (a)(2)(ii) 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.

[4] 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.

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

[6] 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 § 128(a)(5); Penal Code § 1424; *In re Charlisse C.* (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597]; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 [45 Cal.Rptr.3d 464]; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].

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 - (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 did not substantially participate in the same or a substantially related matter;
 - (ii) the prohibited lawyer is timely screened* ~~in accordance with Rule 1.0.1(k)~~¹ from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (iii) 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.
- (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, 1.9(c), and Business and Professions Code § 6068(e) 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] [In determining whether a prohibited lawyer's previously participation was substantial, a number of factors should be considered, such as the lawyer's level of responsibility in the prior](#)

¹ [The phrase has been deleted. It was added as a reminder that the Commission had deferred consideration of the definition of "screen" in Rule 1.0.1 until after the 3-310 drafting team had considered including screens in the Rules and the Commission's adoption of the definition. We do not cross-reference a definition's section in any other rule.](#)

matter, the duration of the lawyer’s participation, the extent to which the lawyer advised or had personal contact with the former client, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter.²

[2] 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 1.0.1(k) and 5.3.

[23] Paragraph (a)(2)(ii) 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.

[34] 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.

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

[56] 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 § 128(a)(5); Penal Code § 1424; *In re Charlisse C.* (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597]; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 [45 Cal.Rptr.3d 464]; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].³

² Comment [1] added as suggested by COPRAC and OCBA. See Ohio Rule 1.10, cmt. [5B], which explains “substantial responsibility.”

³ Citation added in response to COPRAC and OCBA comments.

**Proposed Rule 1.10 Imputation of Conflicts of Interest: General Rule
Synopsis of Public Comments**

TOTAL = 10	A = 6
	D = 0
	M = 3
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
2016-32e	Law Professors (Zitrin) (07-25-16)	Yes	A	1.10	The commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in dicta in <i>Kirk v. First American Title Ins. Co.</i> , 183 Cal.App.4th 776 (2010).	No response required.
2016-52e	Law Professors (Zitrin) (08-24-16)	Yes	A	1.10	The commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in dicta in <i>Kirk v. First American Title Ins. Co.</i> , 183 Cal.App.4th 776 (2010).	No response required.
X-2016-43bc	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Yes	A		<p>COPRAC supports this rule in general. However, COPRAC believes that the rule should provide more guidance to lawyers with respect to the meaning of the term “substantially participate.”</p> <p>1. The screening allowed under proposed Rule 1.10 is limited to “the same or substantially related” matters in which the conflicted lawyer did not “substantially participate.” COPRAC believes that it is important to provide guidance on what the term “substantially participate” means in subparagraph (a)(2)(i). This is not a term that appears elsewhere in the proposed rules and does not</p>	<p>1. The Commission agrees and has added Comment [] to the proposed Rule.</p>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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					<p>exist in the current California rules or case law concerning ethical screens. Given that fact, COPRAC believes that the Commission should include a comment that provides guidance on the meaning and application of the term.</p> <p>Ohio has a similar limitation in its Rule 1.10, although it uses the term “substantial responsibility” and applies that limitation only to situations where that lawyer’s new firm is on the other side of the same matter for which the lawyer had substantial responsibility at his or her former firm. In such an instance, Ohio Rule 1.10 will not allow screening. Ohio’s Rule 1.10 contains a comment that explains what “substantial responsibility” means:</p> <p>“A lawyer who was the sole or lead counsel for a former client in a matter had substantial responsibility for the matter. Determining whether a lawyer’s role in representing the former client was substantial in other circumstances involves consideration of such factors as the lawyer’s level of responsibility in the matter, the duration of the</p>	

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					<p>lawyer’s participation, the extent to which the lawyer advised or had personal contact with the former client and the former client’s personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the matter.”</p> <p>Ohio Rule 1.10, Comment [5B]</p> <p>COPRAC recommends that a similar comment be included in proposed Rule 1.10, particularly since a similar term (“participated substantially”) is employed in proposed Rule 1.11, and is used there for a different purpose.</p> <p>2. COPRAC further recommends that Comment [5] include a citation to <i>Kirk v. First American Title Ins. Co.</i>, 183 Cal.App.4th 776 (2010). While the other cases cited in the comment provide useful guidance in non-civil litigation contexts, the citation to <i>Kirk</i>, which applies in the civil litigation context, would provide additional useful guidance.</p>	<p>2. The Commission agrees and has added the reference to <i>Kirk</i>.</p>
X-2016-66j	San Diego County Bar Association (Riley) (09-15-16)	Y	A		We commend and support the Commission’s adoption of this proposed rule that permits “screening” of lawyers who have	No response required.

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					<p>moved from one firm to another, such that the whole firm—arguably including lawyers in different offices or practices—is not tainted with the conflict, while at the same time protecting the client’s interests by requiring prompt written notice to the affected former client, arguably giving that affected former client not only the opportunity to object but also to challenge the current representation.</p>	
X-2016-67e	Orange County Bar Association (Friedland) (09-16-16)	Y	M		<p>We generally agree with the approach taken by the Commission regarding imputation of conflicts, but we have a few suggestions.</p> <p>1. First, Section (a)(2)(i) of the proposed rule introduces the concept of “substantially participate,” which is not a concept used in Model Rule 1.9. We disagree that a lawyer cannot be screened if he or she substantially participated in a matter for his or her previous firm. If a screen is effective, then it is effective no matter the lawyer’s previous level of participation. At a minimum, if the Commission keeps the requirement, we believe it would be helpful to define or at least explain this term in the</p>	<p>1. The Commission has added Comment [1]. See response 1 to COPRAC, X-2016-43bc, above.</p>

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					<p>comments, as it is not obvious what level of participation in a matter would be considered substantial.</p> <p>2. Second, the proposed rule for the first time includes the possibility of screening to address a conflict of interest. We suggest adding the word “appropriately” to the phrase “timely screened” such that Section (a)(2)(ii) would read, “the prohibited lawyer is timely <u>and appropriately</u> screened. . . .”</p> <p>3. Third, Section (a)(2)(ii) and Comment [2] provide that a screened lawyer may not be apportioned any of the fees from the screened matter. We believe this concept – which has been part of the Model Rule – is not clear, and is often misunderstood by attorneys. We suggest adding an explanation, and even an example or two, in the comments as to what is meant by this phrase.</p> <p>4. Finally, we believe a reference to the <i>Kirk</i> case would be helpful in one of the comments, as that case provides a good and</p>	<p>2. The Commission did not make the suggested change. A “screen” is defined in proposed Rule 1.0.1(k). That provision requires that the screening procedures be “adequate under the circumstances.” To add a further requirement in an individual rule that the lawyer be “appropriately” screened would be redundant.</p> <p>3. The Commission has not made the suggested change. It believes that Comment [2] (renumbered [3] in the revised draft) is clear and requires no further clarification.</p> <p>4. The Commission agrees and has added the reference to <i>Kirk</i>.</p>

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					thorough description of what constitutes an adequate screen.	
X-2016-68e	Law Professors (Zitrin) (09-21-16)	Y	A		Although Rule 1.10 was not addressed by the first commission or in the first ethics professors' letter, the second commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in <i>dicta</i> in <i>Kirk v. First American Title Ins. Co.</i> , 183 Cal.App.4th 776 (2010). While we have concerns that <i>Kirk</i> itself may provide too broad a path towards screening, your proposed rule follows the thoughtful memorandum of commission member Mark Tuft on this issue, as well as the recommendation of principal letter author Richard Zitrin, made individually to the commission on June 2, 1016. As such, the commission has happily resisted the temptation, argued by some on the commission, to use a broader screening rule that do a disservice to the public and to clients.	No response required.
X-2016-104y	Office of Chief Trial Counsel (OCTC) (Dresser) (09-27-16)	Y	M		1. OCTC is concerned with the use of the term "knowingly" in subparagraph (a) for the same reasons expressed regarding that term in proposed Rule 1.9 and the General Comments of this	1. The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge

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					<p>letter.</p> <p>2. OCTC supports Comments 1 and 2. If the Commission adopts proposed rules 5.1 and 5.3 OCTC supports Comment 4. If the Commission does not, this Comment should be rewritten.</p> <p>3. The Commission may want to reconsider whether Comment 3 is necessary in light of the clear language of subsection (a) of this proposed rule.</p>	<p>can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge that another lawyer in the lawyer's firm is prohibited from representing the client because of Rules 1.7 or 1.9. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule.</p> <p>2. As the Commission has not changed its view on Rules 5.1 and 5.3, no response required.</p> <p>3. The Commission did not make the suggested change. Although the Commission agrees that paragraph (a) clearly states that it applies only if the prohibition is based on Rules 1.7 and 1.9, the public comment received on 1.8.11 suggests that there remains some confusion regarding the application of this Rule. Consequently, it has retained Comment [3] (renumbered [4] in the revised Rule),</p>

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					4. Comment 5 does not address this rule for discipline purposes and, therefore, does not belong in the proposed rules.	4. The Commission has not made the suggested change. Although the Rules are intended for discipline, courts and lawyers still regularly consult the rules and cited to them in deciding disqualification motions. Comment [5] recognizes this. It clarifies that a rule of discipline does not necessarily override a court's inherent power to control the proceedings before it.
X-2016-115d	Lamport, Stanley (09-29-16)	N	M		Proposed Rule 1.10 should be revised as shown on the attached redline. The Suggested Revision addresses two issues: (i) eliminating unconsented screening, and (ii) making clear in paragraph (b) that a firm can never be adverse to a former client when it retains the former client's confidential information that is material to the matter.	The Commission has not made the suggested changes. It continues to believe that in appropriate circumstances an timely screen can effectively provide assurance that a former client's confidential information will not be compromised.
X-2016-120I	LGBT Bar Association of Los Angeles (King) (09-27-16)	Y	A		Supports the adoption of proposed Rule 1.10.	No response required.
	Treat, Hon. Charles, Judge of Contra Costa Superior Court (10-06-2016).	N	NI		Concerning comments [9] and [10]: I assume this has already been debated at length, and the ship has sailed on this point. I	No response is possible. There are no comments [9] and [10] to the Rule. The commenter's submission

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					nevertheless comment that it's disappointing that the Rules will not provide a reliable source of law and guidance on disqualification issues, nor on the viability of screens.	appears to be addressed to the first Commission's proposed Rule.

