

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.8.11

Commission Drafting Team Information

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I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 1.8(k),
from which proposed Rule 1.8.11 is derived.]**

Rule 1.8(k) Conflict Of Interest: Current Clients: Specific Rules

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

Comment

* * * * *

Imputation of Prohibitions

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

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.8.11

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.8.11

Vote: 12 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE 1.8.11 (CLEAN)

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

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.

IV. COMMISSION'S PROPOSED RULE 1.8.11 (REDLINE TO ABA MODEL RULE 1.8(k))

Rule ~~1.8(k) Conflict Of Interest: Current Clients: Specific~~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 ~~(j)~~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 ~~(j)~~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.

V. RULE HISTORY

There is no California rule that corresponds to Model Rule 1.8(k). The ABA did not adopt Model Rule 1.8(k) until 2002 as part of its Ethics 2000 comprehensive study and revision of the Model Rules. 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_mission/e2k_rule18rem.html

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule.
2. The Commission should strike the Comment to this rule, except for the last sentence in the Comment. The Comment just repeats the rule, which is clear on its face.

- **State Bar Court:** No comments received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Four comments, including the above-referenced comment from OCTC, were received. Two agreed with the proposed rule, one disagreed, and one agreed only if the proposed rule were modified. A public comment synopsis table, with the Commission's responses to the comments received, is provided at the end of this report.

VIII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

- **Maine Rule 1.8(k)** is identical to Maine Rule 1.8(k):

Rule 1.8(k) Conflict of Interest: Current Clients: Specific Rules

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

The ABA State Adoption Chart for the ABA Model Rule 1.8(k), from which proposed rule 1.8.11 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_8.pdf
- 35 states have adopted Model Rule 1.8(k) verbatim (AL, AZ, AR, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MN, MO, MT, NE, NH, NM, NC, OH, OK, OR, PA, RI, SC, SD, UT, VT, WV, and WY); 7 jurisdictions have adopted a rule that is similar to 1.8(k) (AK, CO, DC, NV, VA, WA, and WI); and 9 states have not adopted a rule derived from Model Rule 1.8(k) (CA, GA, MI, MS, NJ, NY, ND, TN, and TX).

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Adopting a rule separate from the general imputation rule (proposed rule 1.10) that imputes prohibitions in the 1.8 series of rules to lawyers within the prohibited lawyer's firm.
 - **Pros:** As noted in section V, above, the ABA Ethics 2000 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. Because conflicts that the 1.8 series of rules are intended to prevent are not necessarily cured by obtaining the client's consent or by the erection of an ethical screen within the law firm, this specific rule, which does permit either, is necessary to protect the client's interests. Further, by adopting this rule, where client consent is appropriate, (e.g., proposed rule 1.8.1 [3-300]), it will be available on a rule-by-rule basis in the 1.8 series.
 - **Cons:** At present, California has addresses imputation of conflicts of interest and other prohibited representations in case law. See, e.g., *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776. There appears to be no evidence that client or public protection has been diminished by that approach. If anything,
2. Adopting a single comment, derived from Model Rule 1.8, cmt. [20], as revised.
 - **Pros:** 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.

- Cons: See “Cons” to paragraph A.1, above.

B. Concepts Rejected (Pros and Cons):

1. Adding a comment that clarifies that only the prohibition on representation of a lawyer in the law firm is imputed, not any

- Pros: [Insert text here]
- Cons: [Insert text here]

2. [Insert text here]

- Pros: [Insert text here]
- Cons: [Insert text here]

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission’s reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. Proposed rule 1.8.11 is a substantive change to the current California rules and thus would appear to be a change in a lawyer’s duties as there is no counterpart in the current rules, because imputation has largely been addressed in California by case law, there arguably is no change in duties.¹

¹ That is one mention of imputation in the current California Rules. The sixth Discussion paragraph to Rule 3-310 provides:

“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.”

However, that provision would not apply to the prohibitions in the 1.8 series. The 1.8 series of rules are largely derived from other provisions of the current California rules. Proposed rule 1.8.1 is derived from rule 3-300; 1.8.3 from rule 4-400, 1.8.5 from rule 4-210, 1.8.6 and 1.8.7 from rules 3-310(F) and (D), respectively, 1.8.8 from rule 3-400, 1.8.9 from rule 4-300, and 1.8.10 from rule 3-120.

D. Non-Substantive Changes to the Current Rule:

1. References to subparagraphs (a) – (i) of Rule 1.8 have been replaced with the stand alone numbering of the proposed rules 1.8.1 – 1.8.9.

All other changes, including the designation of proposed rule 1.8.11 and the other rules in the 1.8 series as separate, standalone rules rather than as paragraphs in a single rule as in the ABA Model Rules, are non-substantive.

E. Alternatives Considered:

The only alternative considered was not to recommend adoption of the proposed rule.

X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Board of Trustees of the State Bar of California adopt proposed Rule 1.8.11 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.8.11 in the form attached to this Report and Recommendation.