

## **COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.10**

### **Commission Drafting Team Information**

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### **I. CURRENT ABA MODEL RULE 1.10**

**[There is no California Rule that corresponds to Model Rule 1.10,  
from which proposed Rule 1.10 is derived.]**

#### **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 disqualified 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) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
    - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
    - (ii) 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; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
    - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of 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 and 1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

## **Comment**

### *Definition of “Firm”*

[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2] - [4].

### *Principles of Imputed Disqualification*

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also 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 to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) 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 disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or

used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.10

Vote: 13 (yes) – 1 (no) – 0 (abstain)

### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.10

Vote: 12 (yes) – 0 (no) – 0 (abstain)

## **III. COMMISSION'S PROPOSED RULE 1.10 (CLEAN)**

### **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 Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) 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 Charlis C.* (2008) 45 Cal.4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].

#### IV. COMMISSION'S PROPOSED RULE 1.10 (REDLINE TO MODEL RULE 1.10)

##### **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 ~~disqualified~~-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)-~~or~~, (b) or (c)(3) and arises out of the ~~disqualified~~-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;

(~~iii~~) the ~~disqualified~~-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; ~~a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal;~~ and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; ~~and~~.

(~~iii~~) ~~certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer~~

~~and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of 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 [Business and Professions Code § 6068\(e\)](#) and Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A ~~disqualification prescribed by this rule~~ [prohibition under this Rule](#) may be waived by ~~the~~[each](#) affected client under the conditions stated in Rule 1.7.
- (d) The ~~disqualification of~~ [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

### ~~Definition of "Firm"~~

~~[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend upon the specific facts. See Rule 1.10, Comments [2]–[4].~~

### ~~Principles of Imputed Disqualification~~

~~[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).~~

~~[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs~~

~~of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.~~

[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.

~~[42] The rule in paragraph Paragraph (a) also~~ 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 ~~to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect.~~ See Rules ~~1.0~~1.0.1(k) and 5.3.

~~[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).~~

~~[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).~~

~~[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have~~



~~been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.~~

[83] 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 ~~disqualified~~prohibited.

~~[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.~~

~~[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.~~

~~[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.~~

[124] Where a lawyer is prohibited from engaging in certain transactions under ~~Rule 1.8, paragraph (k) of that Rule,~~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 Charlissee C.* (2008) 45 Cal.4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].

## **V. 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 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 letter.
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.
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.
4. Comment 5 does not address this rule for discipline purposes and, therefore, does not belong in the proposed rules.

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

## **VI. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY**

Ten comments, including the comment above from OCTC, were received. Six agreed with the proposed rule, three agreed if modified, and one did not indicate a position. A public comment synopsis table is provided at the end of this report.

## **VII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS**

- **Connecticut Rule 1.10** is identical to Model Rule 1.10:

### **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 disqualified 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) or (b) and arises out of the disqualified lawyer’s association with a prior firm, and
    - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

- (ii) 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; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
  - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of 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 and 1.9(c) that is material to the matter.
- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

The ABA State Adoption Chart for the ABA Model Rule 1.10, from which proposed rule 1.10 is derived, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_10.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_10.pdf)

Every jurisdiction except California and Texas has adopted a rule of professional conduct derived from Model Rule 1.10 that imputes conflicts of interest based on Rules 1.7 and 1.9 to other lawyers in the firm. Texas, however, incorporates an imputation provision into its counterparts to Model Rules 1.7 and 1.9. (See Texas Rules 1.06(f) and 1.09(b).

The ABA's State Adoption of Lateral Screening Rule Chart is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/lateral\\_screening.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.pdf)

There are 18 jurisdictions that broadly permit screening. The term “broadly permits screening” is used to describe an ethical screen provision that permits screening even if the screened lawyer had a substantial and direct involvement in the former client’s case, and even if the former and current clients’ cases are “substantially related.” A rule that broadly permits screening in effect would put private lawyers on equal footing as government lawyers who move from government to private practice or from private practice to government. Even a government lawyer who “personally and substantially participated” in the relevant matter can be screened.

Only four jurisdictions have adopted the Model Rule 1.10(a)(2) screening provisions verbatim: Connecticut, Idaho, Iowa and Wyoming. There are also 14 other jurisdictions that have adopted screening provisions that broadly permit screening of private lawyers similar to the Model Rule: Arizona, Delaware, D.C., Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah and Washington.

There are an additional fourteen jurisdictions that permit limited screens. The term “limited screen” is used to describe a screening provision that permits screening only if a lawyer did not “substantially participate,” or was not “substantially involved,” did not have a “substantial role,” did not have “primary responsibility,” etc., in the former client’s matter, or when any confidential information that the lawyer might have obtained is deemed “not material” to the current representation, or “is not likely to be significant.”

Fourteen jurisdictions permit screening in limited situations: Colorado, Hawaii, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin.

In addition, South Carolina permits screening of a lawyer who represents “a client of a public defender office, legal services association, or similar program serving indigent clients ....”

Although the origin and history of Model Rule 1.10 was not the primary factor in the Commission’s consideration of proposed Rule 1.10, that information is published in “A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013,” Art Garwin, Editor, 2013 American Bar Association, at pages 249 - 276, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

## **VIII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

### **A. Concepts Accepted (Pros and Cons):**

#### **1. General: Recommend adoption of the Model Rules’ framework of having:**

- (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and

(ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers) and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

- Pros: Such an approach should facilitate compliance with and enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules as other jurisdiction in the country has adopted the ABA conflicts rules framework.

- Cons: There is no evidence that the current rule regimen, i.e., a single rule (rule 3-310) and case law, has been ineffective in regulating conflicts of interest between or among clients.

2. General: Recommend adoption of proposed Rule 1.10, which would (i) incorporate into a rule of professional conduct the concept of imputation within a private law firm of conflicts of interest and (ii) permit unconsented ethical screens to be erected to rebut the presumption of shared confidences within the firm and avoid the imputation to, and consequent prohibition of, all firm lawyers when a personally prohibited lawyer laterally moves into the firm.

- Pros:

(1) Regarding the imputation aspects of the proposed rule:

(a) adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law, should protect client interests by clearly establishing in paragraph (a) that imputation is the default situation that can be avoided only if the conflict is personal to the prohibited lawyer, the lawyer is screened under narrowly specified conditions, or the client waives the rule's application.

(b) adopting a rule that incorporates imputation will promote a national standard as every other jurisdiction has incorporated the concept of imputation within a private firm into their rules of professional conduct. (See Section VI, above.)

(2) Regarding the ethical screening aspects of the proposed rule:

(a) Permitting an exception for unconsented screening in the limited situation where a lawyer “did not substantially participate” in the contested matter will provide flexibility for lawyers to move laterally without creating a significant risk that a lawyer who has acquired sensitive confidential

information about the former client's is now in the opposing party's law firm.

(b) Adopting a limited screening standard will concomitantly provide assurance that only those lawyers who were unlikely to have material acquired confidential information can be screened, thus promoting respect for the legal profession and the administration of justice.

(c) Adopting a limited screening provision that requires strict adherence to specific factors intended to assure the effectiveness of the screen will place in a rule of professional conduct an approach to screening that was sanctioned in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010). These clear standards would enhance compliance and facilitate enforcement of the rules.

(d) Under the rule, imputation will be available only for lawyers who move laterally from one firm to another. That is because the phrase "arises out of the personally prohibited lawyer's association *with a prior firm*" limits the availability of screening to situations where a prohibited lawyer has moved laterally from another firm. Put another way, a law firm could not erect a screen around those firm lawyers who had represented a former client when the lawyers were associated in the same firm in order to represent a new client against that former client. This is an appropriate limitation on screening and parallels the availability of screening for current and former government lawyers (Rule 1.11) and former judicial personnel (Rule 1.12) only when such lawyers move to new employment. This limitation operates to ensure the rule will not implicate a lawyer's duty of loyalty to the former client.

(e) Adopting a rule that permits ethical screening will recognize the current realities of legal job market and promote a national standard as thirty-two jurisdiction have incorporated into their rules of professional conduct the concept screening for lawyers moving laterally between private firms. (See Section VI, above.)

○ Cons:

(1) With respect to imputation, there is no evidence that the current California regulatory framework has been ineffective in applying the doctrine of imputation to a private law firm.

(2) With respect to screening, the policy of promoting lateral movement of lawyers between or among different law firms should not take precedence over the duty of confidentiality, which in California is stricter than in any other jurisdiction. A client should be assured that the client's former lawyer will not be resident in a lawyer firm representing a client with interests adverse to the

former client. This assurance should continue to promote candor by clients in lawyer-client consultations.

3. Substitute the terms “prohibited” and “prohibition” for “disqualified” and “disqualification” throughout the rule.
  - Pros: The substitution accurately reflects that the rule is a disciplinary rule rather than a civil standard for disqualification.
  - Cons: Regardless of whether the rule is part of a set of disciplinary rules, it will be relied upon and cited to by courts in the context of disqualification motions, just as rule 3-310 currently is.
4. Recommend adoption of paragraph (a), which sets forth the default rule in the introductory clause: any prohibition on representation under rules 1.7 (current client conflict) or 1.9 (former client conflict) will be imputed to all lawyers in the firm unless either subparagraph (a)(1) [personal interest conflict] or subparagraph (a)(2) [screening] applies, with screening available only in situations where a lawyer has moved laterally.
  - Pros: Favoring adoption of paragraph (a):
    - (1) Regarding subparagraph (a)(1), personal interest conflicts of a lawyer traditionally have not been imputed to a law firm in California. See, e.g., *DCH Health Services Corp. v. Waite*, 95 Cal.App.4th 829, 115 Cal. Rptr.2d 847 (2002). There is no reason why this approach should not continue to be recognized.
    - (2) Regarding subparagraph (a)(2), see ¶. 2, Pros.
  - Cons: See ¶. 2, Cons.
5. Recommend rejection of two requirements in Model Rule 1.10(a)(ii) for erecting a screen: that the written notice to the former client include (i) a statement of the firm's and of the screened lawyer's compliance with these Rules; (ii) a statement that review may be available before a tribunal.
  - Pros: Neither requirement provides any meaningful assurance to the former client of the screen's effectiveness.
  - Cons: There is no reason not to require those statements. Failure to include these Model Rule provisions in a rule that is expressly patterned on the model rule will likely operate to undermine confidence in the legal profession and the administration of justice.
6. Recommend adoption of paragraph (b), which is a codification of *Goldberg v. Warner/Chappell Music, Inc.* (2005) 125 Cal.App.4th 752 [23 Cal.Rptr.3d 116].

- Pros: Paragraph (b) incorporates Model Rule 1.10(b), which was adopted as the law of California by the court in *Goldberg v. Warner/Chappell Music, Inc.*, above. The concept recognized in *Goldberg* is that if a lawyer who has represented a client and acquired confidential information has left the firm, and no other lawyer who has acquired confidential information remains, then there is no one left in the firm with knowledge that can be imputed to other lawyers in the firm.
  - Cons: None identified.
7. Recommend adoption of paragraph (c), which provides that each affected client (current and former clients) can waive the imputation of conflicts under the rule.
- Pros: Paragraph (c) expressly states what is already implied in current rule 3-310, which provides that a client can give informed written consent to a conflicted representation. If a client can consent to such a representation, then it should follow that a client can waive the imputation of one lawyer's conflict to other lawyers in the firm. Clarifying this concept in the rule should enhance compliance and facilitate enforcement.
  - Cons: There is no need to "clarify" the concept, which logically follows from the informed written consent provision in current rule 3-310(E).
8. Recommend adoption of paragraph (d), which excludes government lawyers from the application of Rule 1.10.
- Pros: By directing government lawyers to Rule 1.11, which incorporates its own imputation provisions for conflicts involving current and former government lawyers, compliance with the mandated procedures in the government lawyer context will be enhanced and their enforcement facilitated.
  - Cons: None identified.
9. Recommend adoption of the comments to the proposed Rule:
- Pros: There are six comments to proposed Rule 1.10, all of which provide interpretative guidance or clarify how the proposed rule, which identifies several situations under which imputation can be avoided or does not apply, should be applied.

Comment [1], derived in part from Model Rule 1.12, cmt. [1], explains the concept of substantial participation and provides factors to consider.

Comment [2] notes that the rule does not apply when the prohibited person is a nonlawyer, for example, a secretary, or a person who acquired confidential information as a nonlawyer, e.g., a law student, but cautions that such a person should be screened.



Comment [3] clarifies the application of paragraph (a)(2)(ii) to partnership shares. Comment [4] clarifies that Rule 1.8.11, not rule 1.10, applies to conflicts that arise under the 1.8 series of rules. This is an important clarification and reference. Conflicts in the 1.8 series typically are not cured by a client's consent to permit a different lawyer in the firm handle the matter and so should not be subject to the consent provisions in Rule 1.10.

Comment [5] refers lawyers to the 5 series of rules involving supervisory duties within a law firm so that such lawyers can better comprehend their duties vis-à-vis screens.

Comment [6] notes that this disciplinary rule does not necessarily govern disqualification motions in the courts.

- Cons: The rule is sufficiently transparent so as to not to require further clarification in comments.

## **B. Concepts Rejected (Pros and Cons):**

1. Recommend the adoption of a screening provision that would broadly permit unconsented screening in the private firm to private firm lateral movement context.

- Pros: There are several reasons to broadly permit screening and not limit its availability to a lawyer who “did not substantially participate in the same or a substantially related matter”:

(1) Broadly-permitted screening is allowed for lawyers who move to a private firm and “personally and substantially participated” in a matter while a government lawyer. Such lawyers can be screened under both proposed Rule 1.11 [and Model Rule 1.11] and under California case law. However, there is no principled reason to distinguish government from private lawyers in this situation. See *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 806 n.25, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010) (“The law cannot possibly be that [the law firm] could effectively screen [the tainted lawyer] if he was tainted from information obtained when he worked for the Department of Insurance, but cannot effectively screen him if he was tainted from information obtained when he worked for Fireman's Fund.”)

(2) It is questionable whether the reasons for distinguishing government and private lawyers still hold. See *Kirk*, 183 Cal.App.4th at 806 n.24, 108 Cal.Rptr.3d 620.<sup>1</sup>

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<sup>1</sup> The court stated:

In cases of a tainted attorney working in a government office, the courts have concluded the following policy considerations justify the use of only a rebuttable presumption of imputed knowledge: (1) public sector attorneys do not have a financial interest in the

(3) Lawyers, whether government or private, take the same oath and are subject to the same duties of confidentiality; there is no reason to view one group as more honest or ethical than the other.

(4) The concerns expressed regarding loyalty in a “side-switching” case, below, apply equally to current government lawyers who have moved from private practice to government employment, yet unrestricted screening is permitted in those situations. (See, e.g., *City of Santa Barbara v. Superior Court*, *supra*, 122 Cal.App.4th at pp. 24-25, 18 Cal.Rptr.3d 403.)

(5) Despite not being subject to the same duty of confidentiality, nonlawyer employees and former law students are allowed to be screened regardless of the extent of their exposure to a former client's confidential information.

○ Cons: There are several reasons not to broadly permit screening:

(1) 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 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.

(2) The duty of loyalty is implicated in a side-switching case. It is doubtful our Supreme Court would approve screening as a means of satisfying a lawyer’s duty of loyalty under *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505] and more recent cases.

(3) It is not certain 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* (1981), 121 Cal. App. 3d 893, 902 (1981); but cf. *Kirk*, 183 Cal.App.4th at 806 n.24.)

2. Recommend adoption of Model Rule 1.10(a)(2)(iii), which requires that the

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matters on which they work, so have less of an incentive than private attorneys to breach client confidences; (2) public sector attorneys do not recruit clients or accept fees, so have no financial incentive to favor one client over another; (3) disqualification increases the costs for public entities, raising the possibility that litigation decisions will be driven by financial considerations rather than the public interest; and (4) automatic vicarious disqualification will restrict the government's ability to hire attorneys with relevant private sector experience. (*City of Santa Barbara v. Superior Court*, *supra*, 122 Cal.App.4th at pp. 24-25, 18 Cal.Rptr.3d 403.) We note that, except for the last consideration, none of the other three could possibly apply in the context of a former government attorney working in a private law firm. Nonetheless, courts have not hesitated to apply only a rebuttable presumption of imputed knowledge in those cases as well. (*Chambers v. Superior Court*, *supra*, 121 Cal.App.3d at pp. 898-901, 175 Cal.Rptr. 575.)

screened lawyer and a partner of the firm certify that the screen complies with the requirements under the Rules.

- Pros: A former client is entitled not only to be notified of the existence of the screen, but also to be assured that the steps taken to protect that client's information are effective.
- Cons: The required "certifications" do not necessarily provide any assurance to the former client that the screen is indeed effective, and provides the client with no meaningful recourse for investigating its effectiveness.

3. Recommend adoption of a provision in place of Model Rule 1.10(a)(2)(iii), based on Colorado Rule 1.10(d)(4), which would have required that:

"the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being disclosed to the firm and its client."

- Pros: This clause provides an objective standard ("reasonably believes") for testing the effectiveness of the screen. It provides a better test of the an ethical screen's effectiveness than does MR 1.10(a)(2)(iii)'s requirement that requires the prohibited lawyer and a partner of the screening firm provide at regular intervals upon request of the former client "certifications of compliance with the Rules and with the screening procedures" with which the former client has been provided as required by rule 1.10(d)(2)(ii). The imposition of an objective standard ("reasonably believe") is more protective of a former client's interests than the Model Rule's formulaic requirement of providing "certifications" at "reasonable intervals." As provided in proposed Rule 1.0.1(l), "Reasonable belief" or 'reasonably believes' when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." That the lawyers' reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not, then the partner's decision would be a "reasonable resolution of an arguable question of professional duty," so there would be no conflict with rule 5.2(b) as posited in the "Cons," below.
- Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission's proposed rule 5.2(b) is unclear. Proposed rule 5.2(b) provides that: "A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Where a subordinate and supervisor are both participating

in a matter and the subordinate does not believe the firm's screening procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied?

4. Substitute California's heightened requirement of "informed written consent" for the "written notice" standard in paragraph (a)(2)(iii).

- Pros: It is a more client-protective requirement that a lawyer obtain "informed written consent" from any affected former client. Model Rule 1.10, on the other hand, employs a more lenient and less-protective requirement of requiring only "written notice."
- Cons: Requiring informed written consent is a function of the underlying conflicts rule (e.g., rule 1.7 or 1.9) and is not justified in the limited circumstance of screening. Giving written notice is appropriate in the screening setting because it provides the former client the relevant information to protect their interest. If informed written consent is used then that person would be given an effective veto power. The proposed rule, like Model Rule 1.10, strikes the right balance between a client's right to counsel of choice and duties owed to former clients.

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. Although the concept of imputation in proposed Rule 1.10 exists in current law, e.g., *Flatt v. Superior Court*, 9 Cal.4th at 283; *People ex rel Dept. of Corp. v. Speedee Oil Change Sys., Inc.*, 20 Cal.4th 1135 (1999); *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776, 108 Cal.Rptr.3d 620 (2010), *review denied* (6/23/2010); *Rosenfeld Const. Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 575; *Henriksen v. Great Am. Sav. & Loan* (1992) 11 Cal.App.4th 109, 117; State Bar Formal Ethics Op. 1998-152, the proposed rule would nevertheless be a substantive change in that the concept would now be included as a disciplinary rule.

**D. Non-Substantive Changes to the Current Rule:**

Not applicable.

**E. Alternatives Considered:**

None.

## **IX. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

### **Recommendation:**

That the Board of Trustees of the State Bar of California adopt proposed Rule 1.10 in the form attached to this Report and Recommendation.

### **Proposed Resolution:**

RESOLVED: That the Board of Trustees adopts proposed Rule 1.10 [1-400] in the form attached to this Report and Recommendation.