

McCurdy, Lauren

RE: Rule 1.10
3/27/09 Commission Meeting
Open Session Agenda Item III.X.

From: Mark Tuft [MTuft@cwclaw.com]
Sent: Wednesday, June 16, 2010 9:10 AM
To: Kevin Mohr; Vapnek, Paul W.
Cc: JoElla L. Julien; Robert L. Kehr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Difuntorum, Randall; McCurdy, Lauren
Subject: RE: RRC - 3-310 1-10 - Public Comment Chart - By Commenter

I agree with Kevin's additions to the chart.

Mark L. Tuft
Cooper, White & Cooper LLP
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17th Floor
San Francisco, CA 94111
(415)433-1900
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From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Wednesday, June 16, 2010 9:05 AM
To: Vapnek, Paul W.
Cc: Mark Tuft; JoElla L. Julien; Robert L. Kehr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Difuntorum, Randall; McCurdy, Lauren
Subject: Re: RRC - 3-310 1-10 - Public Comment Chart - By Commenter

Greetings:

I've attached Draft 2.1 (6/15/10) of the public comment chart, which adds the comments of Senator

et al. and OCTC re Rule 1.10, and provides responses. For Senator, I simply copied and pasted the response to COPRAC. For OCTC, I copied and pasted the previous responses of the Commission to OCTC points, which had been made before. All are highlighted in yellow.

As to whether the Commission should vote screening up or down, there is precedent for diverging from the BOG in the vote the Commission took on modifications to fee agreements. Notwithstanding the revisions that the Commission drafted to address BOG concerns, the vote was against the provisions the BOG eventually adopted.

Please let me know if you have any questions. Thanks,

Kevin

Attached:

RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc

Vapnek, Paul W. wrote:

I agree with Mark that we (the Commission) should go on record as supporting some form of screening in this rule, and I expressed that view at our last meeting. The Supreme Court should know what we recommended even if the Board disagrees with us.

From: Mark Tuft [<mailto:MTuft@cwclaw.com>]

Sent: Tuesday, June 15, 2010 5:15 PM

To: JoElla L. Julien; Robert L. Kehr; Kevin Mohr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Vapnek, Paul W.

Cc: Difuntorum, Randall; McCurdy, Lauren

Subject: RRC - 3-310 1-10 - Public Comment Chart - By Commenter

<<RRC - 3-310 1-10 - Public Comment Chart - By Commenter - XDFT1 (6-14-10).doc>>

Attached is a draft response to COPRAC's recommendation that Rule 1.10 be amended to include screening as provided in Model Rule 1.10. If it is the will of the Commission to respond in this fashion, the same response can be made to similar comments more recently received from several law firms.

I personally am not satisfied with the response because it refers the Board's actions and does not respond on the merits. Although the Board rejected our propose rule with limited screening and recently approved the rule without screening, I personally believe the Commission should go on record that there should be an imputation rule with limited screening. I opposed the rule that was initially sent to the Board because it contained unworkable restrictions on limited screening that, in my opinion, had not been properly vetted by the Commission. I also oppose unlimited screening as reflected in the current version of Model Rule 1.10(a)(2) and advocated by COPRAC. The Supreme Court is entitled to our views on this important issue as well as COPRAC's and a response to COPRAC and the other commenters that the Board has rejected screening is not sufficient.

I urge us to take a position on the policy issue that COPRAC and others have raised whether California should provide for screening in a rule of professional conduct rather than through the piecemeal case-by-case approach and, if so, whether non-consensual screening should be limited to

lateral attorneys who are not substantially involved in the matter and who are not "switching sides." The Board's action on the proposed rule has not precluded COPRAC from expressing its views and the Court at a minimum should have the benefit of our position on the merits.

This message may contain confidential information. If you are not the intended recipient and received this message in error, any use or distribution of this message is strictly prohibited. Please also notify us immediately by return e-mail, and delete this message from your computer system. Thank you.

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Rule 1.10 Imputation of Conflicts: General Rule
[Sorted by Commenter]

TOTAL = __ Agree = __
 Disagree = __
 Modify = __
 NI = __

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes		<p>COPRAC supports the implementation of screening in California through the Rules of Professional Conduct, and accordingly urges the adoption of paragraph 1.10(a)(2) of the Model Rule. COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties.</p> <p>In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Even if case law develops to permit screening as a method to avoid disqualification, the absence of</p>	<p>The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board rejected the proposed rule. The Board subsequently approved the proposed rule without any provision for screening. \</p>

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

Rule 1.10 Imputation of Conflicts: General Rule
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TOTAL = ___ Agree = ___
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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					screening in the rule could nevertheless subject a lawyer to discipline.	
3	Office of Chief Trial Counsel ("OCTC")	M		1.10(a)	<p>1. Commenter is concerned with the use of the term "knowingly" in paragraph (a). This appears to sanction the lack of conflict procedures regarding clients of other members of the firm and is inconsistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." The same should apply here. Although negligence is not a basis for discipline, gross negligence or recklessness is. Thus, what conflict procedures, if any, exist should be an important factor in determining if the attorney violated this rule and should be disciplined. Also, by using the term "knowingly," the Commission may inadvertently affect disqualification rulings in civil and criminal cases.</p> <p>2. As it has noted with respect to other rules, the commenter believes there are too many comments and many are too long and seem more appropriate for treatises, law review articles, and ethics opinions.</p>	<p>1. The Commission disagrees with the commenter and has retained the "knowingly" standard in the rule and comment. As in other jurisdictions that have adopted imputation as a disciplinary standard, the Commission's position is that the Model Rule's standard should be adopted. Although a lawyer without actual knowledge could be properly disqualified in a civil action, the lawyer would not be subject to discipline. California should not depart from this approach, which is taken in every jurisdiction.</p> <p>2. The Commission disagrees. The comments provide useful guidance to lawyers and courts on the application of the Rule.</p>
				Comment	Comment [1] simply states that whether two	The Commission did not make a change. Comment

Rule 1.10 Imputation of Conflicts: General Rule
[Sorted by Commenter]

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				[1]	or more lawyers constitute a firm depends on specific facts. However, neither the rule nor Comment [1] provides guidance as to what constitutes a law firm.	[1] provides a cross-reference to proposed Rule 1.0.1(c) – which defines “law firm” – and cmts. [2]-[4] thereto. The Commission does not believe that it is possible to define in advance how the term “law firm” will be applied in all situations. For example, there might be facts under which two independent law firms work so closely together that they should be considered a single law firm for purposes of imputation.
				Comment [3]	Comment [3] should be clarified or stricken.	The Commission has made no change. Comment [3] is derived nearly verbatim from Model Rule 1.10. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment “deals with the elimination of imputation of a lawyer’s personal-interest conflicts to others in the firm because there is no risk to loyal and effective representation of the client. The Comment also provides illustrations of when this exception to imputation might and might not apply.” See also proposed Rule 1.7.
				Comment [4]	Comment [4] discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people.	The Commission has retained this Comment, which is based on Model Rule 1.10, cmt. [4]. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment reflects current case law and “is intended to give guidance to lawyers about important practical questions.”
				Comment [9]	Comment [9] needs more clarification or should be stricken	The Commission has not made the requested change to Comment [9]. As noted in the

Rule 1.10 Imputation of Conflicts: General Rule
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						Explanation of Changes to proposed Rule 1.10, the comment has been added to signal that the Rule, which in effect has codified the court-created doctrine of imputation, is not intended to override a court's inherent authority to monitor and control the conduct of persons before it. Nevertheless the Commission has made some clarifying changes to the Comment and added references to California case law.
2	Senator, Stuart N. (Alston & Baird LLP, Duane Morris LLP, Morgan Lewis & Bockius LLP, and Munger Tolles & Olson LLP)	M	Yes	Model Rule 1.10(a)(2)	<p>Whether it is ethically proper to use a screen for non-government lateral hires to avoid an imputation of a conflict of interest is squarely before the Board, and the proposal to defer this question as "a matter of case law" should be revisited.</p> <p>Trends in the legal profession over the past three decades, including massive growth in the size of law firms and a dramatic spike in attorney mobility, have undermined the rationale for automatic vicarious disqualification. Because lawyer mobility is now an embedded feature of the legal profession, in marked contrast to the situation a generation ago, the automatic vicarious disqualification rule imposes far greater constraints on the industry today.</p> <p>Ethical screens have been shown to be effective to protect confidential client</p>	<p>The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board rejected the proposed rule. The Board subsequently approved the proposed rule without any provision for screening.</p>

Rule 1.10 Imputation of Conflicts: General Rule
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					<p>information. As the court in <i>Kirk v. First American Title Ins. Co.</i> put it, "[t]here is no legitimate reason to believe that the same screening could not work in the context of private attorneys in a private firm." <i>Kirk</i>, supra, at * 16.</p> <p>The commenter urges the Board of Governors to reconsider its present position and adopt the approach to ethical screens set forth in ABA Model Rule 1.10(a)(2).</p>	

Rule 1.10: Imputation of Conflicts of Interest: General Rule
(Commission's Proposed Rule - Clean Version)

- (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 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.
- (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 as 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 section 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

Definition of "Firm"

- [1] Whether two or more lawyers constitute a firm for purposes of this Rule can depend on the specific facts. See Rule 1.0.1(c), Comments [2] - [4].

Principles of Imputed Conflicts of Interest

- [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the duties of loyalty and confidentiality owed to the client as they apply 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 the duties of loyalty and confidentiality owed to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty and confidentiality owed by each lawyer with whom the lawyer is associated. Paragraph (a) 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(b).
- [3] The rule in paragraph (a) does not prohibit representation where 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 prohibited from further representation. 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 prohibition 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 by others in the law firm if the lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. In both situations, however, such persons 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(k) and 5.3. See also Comment [9].
- [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 current 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 Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c).

- [6] Rule 1.10(c) removes imputation with the informed consent of each 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 Comments [14A] to [17A], and that each affected client or former client has given informed written consent to the representation. 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 1.0.1(e).
- [7] Where a lawyer has joined a private firm or a government agency after having represented the government or another government agency, imputation is governed by Rule 1.11(b) and (c), not this Rule. Where a lawyer has become employed by a government agency after having served clients in private practice or other nongovernmental employment, imputation is governed by Rule 1.11(e).
- [8] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through Rule 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.

Rule Not Determinative of Disqualification Motions

- [9] This Rule does not limit or alter the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matter pertaining to disqualification. See Code of Civil Procedure section 128(a)(5); Penal Code section 1424; *In re Charisse C.* (2008) 45 Cal.4th 145; *Rhabum v. Superior Court* (2006) 140 Cal.App.4th 1566.

[10] Rule 1.10 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (a) or (b). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

June 9, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 1.0 (Agenda Item III.A)
- 3.3 (Agenda Item III.MM)
- 4.3 (Agenda Item III.WW)
- 5.1 (Agenda Item III.ZZ)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - TUFT - DFT1 (06-09-10).pdf
- RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT1 (04-22-10).doc
- RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.pdf
- RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.doc
- RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.pdf
- RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.doc
- RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.pdf
- RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.doc
- RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.pdf
- RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.doc

June 14, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark,

New comments in opposition or recommending modifications have been received for the following rules and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

- 1.10 (Agenda Item III.X)
- 1.13 (Agenda Item III.AA)

The assignment deadline for these rules is the same as the earlier assignments -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 3-600 [1-13] - Public Comment Complete - REV (06-14-10).pdf
RRC – 3-310 [1-10] - Public Comment Complete - REV (06-14-10).pdf
RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc
RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc

June 15, 2010 Difuntorum E-mail to Drafters (Tuft, Julien, Kehr, Vapnek & KEM), cc Staff:

More comments keep arriving. More supplemental assignments are being prepared. Since time is short, here's another heads-up. Three prominent law firms have joined in a comment advocating that Rule 1.10 provide for the use of ethical screens for lateral hires in non-governmental settings. This can be regarded as "asked and answered" given the recent Board action but I wanted you to have a heads-up.

Attached:

RRC - 3-310 [1-10] - 06-14-10 Senator (Munger) Letter re Screening.pdf

June 15, 2010 Tuft E-mail to Drafters, cc Staff:

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I personally am not satisfied with the response because it refers the Board's actions and does not respond on the merits. Although the Board rejected our propose rule with limited screening and recently approved the rule without screening, I personally believe the Commission should go on record that there should be an imputation rule with limited screening. I opposed the rule that was initially sent to the Board because it contained unworkable restrictions on limited screening that, in my opinion, had not been properly vetted by the Commission. I also oppose unlimited screening as reflected in the current version of Model Rule 1.10(a)(2) and advocated by COPRAC. The Supreme Court is entitled to our views on this important issue as well as COPRAC's and a response to COPRAC and the other commenters that the Board has rejected screening is not sufficient.

I urge us to take a position on the policy issue that COPRAC and others have raised whether California should provide for screening in a rule of professional conduct rather than through the piecemeal case-by-case approach and, if so, whether non-consensual screening should be limited to lateral attorneys who are not substantially involved in the matter and who are not "switching sides." The Board's action on the proposed rule has not precluded COPRAC from expressing its views and the Court at a minimum should have the benefit of our position on the merits.

Attached:

RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2 (6-15-10).doc

June 15, 2010 Vapnek E-mail to Drafters, cc Staff:

I agree with Mark that we (the Commission) should go on record as supporting some form of screening in this rule, and I expressed that view at our last meeting. The Supreme Court should know what we recommended even if the Board disagrees with us.

June 16, 2010 KEM E-mail to Drafters, cc Staff:

I've attached Draft 2.1 (6/15/10) of the public comment chart, which adds the comments of Senator et al. and OCTC re Rule 1.10, and provides responses. For Senator, I simply copied and pasted the response to COPRAC. For OCTC, I copied and pasted the previous responses of the Commission to OCTC points, which had been made before. All are highlighted in yellow.

As to whether the Commission should vote screening up or down, there is precedent for diverging from the BOG in the vote the Commission took on modifications to fee agreements. Notwithstanding the revisions that the Commission drafted to address BOG concerns, the vote was against the provisions the BOG eventually adopted.

Please let me know if you have any questions.

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I agree with Kevin's additions to the chart.

June 16, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark,

Additional comments in opposition or recommending modifications have been received for the following rules. The Google site is also up-to-date
<http://sites.google.com/site/commentsrrc/byrule> .

- 1.0 (Agenda Item III.A) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.4.1 (Agenda Item III.F) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.11 (Agenda Item III.V) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.10 (Agenda Item III.X) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.13 (Agenda Item III.AA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.1 (Agenda Item III.KK) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.3 (Agenda Item III.MM) – 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 4.3 (Agenda Item III.WW) - OCTC (sent with Randy's 6/15/10 e-mail)
- 4.4 (Agenda Item III.YY) – Co-Lead w/Martinez – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- MR 4.4(a) (Agenda Item III.XX – NRFA) – Co-Lead w/Martinez – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

**RRC – Rule 1.10 [3-310]
E-mails, etc. – Revised (6/21/2010)**

5.1 (Agenda Item III.ZZ) – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)

5.2 (Agenda Item III.AAA) - OCTC (sent with Randy's 6/15/10 e-mail)

5.3 (Agenda Item III.BBB) - OCTC (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

June 16, 2010 Tuft E-mail to Drafters, cc Staff:

I do not recommend any changes to rule 1.10 in response to OCTC comments.

June 20, 2010 Kehr E-mail to RRC:

Here are my comments on this proposed Rule:

1. OCTC says that the “knowingly” standard in paragraph (a) is inconsistent with Comment [4] to Rule 1.7 (now located at Comment [3]), which says that ignorance caused by a failure to have proper conflicts checking procedures will not excuse a lawyer's conflict. The RRC Response at p. 50 of the agenda materials only is that this is the standard everywhere else. (‘Faith, I ran when I saw others run. I Henry IV, Act I, Scene 4) I think that OCTC is entitled to a better answer. There is an interplay between Rules 1.7 and 1.10 that is not explained and is not obvious. For example, while what now is Comment [3] to Rule 1.7 applies to a sole practitioner, does it apply to a lawyer in a law firm other than with the lawyer's individual conflicts, or is it Rule 1.10 that applies exclusively to a lawyer's duties within a law firm? If so, Comment [3] to Rule 1.7 would seem to be written incorrectly b/c its language presumes its application to a lawyer whose conflicts are caused by the conflicts of other firm lawyers. There is no other reason that I can see for it to refer to the size of the law firm. And why is there no version of Comment [3] in Rule 1.10?
2. I wonder why paragraph (a) speaks of a lawyer's personal interests but not a lawyer's personal relationships. Personal relationships are the subject of rule 3-310(B)((1) – (3)

and might be part of the proposed Rule 1.7 b/c of its Comments [8], [11], [26], and [29A]. However, it appears to have been excluded from Rule 1.10.

3. In the third line of Comment [9] (at the 2nd unnumbered page following agenda p. 53), I think that “matter” should be pluralized.

June 21, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [4-4(a)] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-310X [5-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-310X [5-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 3-320 [1-8-11] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)MLT-KEM.doc
RRC - 3-200 [3-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT3.1 (06-12-10)KEM.doc
RRC - 3-410 [1-4-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-19-10).doc
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.3 (06-17-10)MLT-KEM.doc
RRC - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc
RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT2.4 (06-19-10)MLT-RM-RD-KEM.doc

June 22, 2010 Tuft E-mail to RRC:

1. I do not believe Rule 1.10(a) is inconsistent with Rule 1.7 Cmt. [3]. Rule 1.7 imposes a duty on the lawyer to determine whether the lawyer has conflict by adopting appropriate procedures for the type and size of firm and practice. The lawyer cannot claim ignorance by failing to have conflict checking procedures. This is a responsibility we all have regardless of where or with whom we practice. The "knowing" standard in Rule 1.10(a) applies to other lawyers associated in practice with the tainted lawyer. OCTC has overlooked Rule 5.1 which requires partners and managers to have reasonable policies and procedures designed to detect and resolve conflicts of interests and the duties of supervisory lawyers. Solo practitioners often hire contract and temporary lawyers. Cmt [3] is not incorrect and is not inconsistent with Rule 1.10.

2. Rule 1.7(a)(2) refers to the personal interests of the lawyer and not personal relationships.

June 22, 2010 Julien E-mail to Drafters, Chair, Vice-Chairs & Staff:

This issue on screening is still bothersome to me. I think I am agreeing with Mark because all I know is that if I have a confidential relationship (and I say "IF" advisedly, i.e., 1.14 rule) with an attorney, I want it just that--confidential. This rule does not seem to provide me that protection. Am I misreading the rule in its simplest terms???

I anxiously await more clarity on this at the meeting.

**Rule 1.10 Imputation of Conflicts: General Rule.
[Sorted by Commenter]**

TOTAL = 3 Agree = 0
Disagree = 0
Modify = 3
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes		<p>COPRAC supports the implementation of screening in California through the Rules of Professional Conduct, and accordingly urges the adoption of paragraph 1.10(a)(2) of the Model Rule. COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties.</p> <p>In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Even if case law develops to permit screening as a method to avoid disqualification, the absence of</p>	<p>The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board rejected the proposed rule. The Board subsequently approved the proposed rule without any provision for screening. \</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.10 Imputation of Conflicts: General Rule.
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TOTAL = 3 Agree = 0
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					screening in the rule could nevertheless subject a lawyer to discipline.	
3	Office of Chief Trial Counsel ("OCTC")	M		1.10(a)	<p>1. Commenter is concerned with the use of the term "knowingly" in paragraph (a). This appears to sanction the lack of conflict procedures regarding clients of other members of the firm and is inconsistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." The same should apply here. Although negligence is not a basis for discipline, gross negligence or recklessness is. Thus, what conflict procedures, if any, exist should be an important factor in determining if the attorney violated this rule and should be disciplined. Also, by using the term "knowingly," the Commission may inadvertently affect disqualification rulings in civil and criminal cases.</p> <p>2. As it has noted with respect to other rules, the commenter believes there are too many comments and many are too long and seem more appropriate for treatises, law review articles, and ethics opinions.</p>	<p>1. The Commission disagrees with the commenter and has retained the "knowingly" standard in the rule and comment. As in other jurisdictions that have adopted imputation as a disciplinary standard, the Commission's position is that the Model Rule's standard should be adopted. Although a lawyer without actual knowledge could be properly disqualified in a civil action, the lawyer would not be subject to discipline. California should not depart from this approach, which is taken in every jurisdiction.</p> <p>2. The Commission disagrees. The comments provide useful guidance to lawyers and courts on the application of the Rule.</p>
				Comment	Comment [1] simply states that whether two	The Commission did not make a change. Comment

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Modify = 3
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				[1]	or more lawyers constitute a firm depends on specific facts. However, neither the rule nor Comment [1] provides guidance as to what constitutes a law firm.	[1] provides a cross-reference to proposed Rule 1.0.1(c) – which defines “law firm” – and cmts. [2]-[4] thereto. The Commission does not believe that it is possible to define in advance how the term “law firm” will be applied in all situations. For example, there might be facts under which two independent law firms work so closely together that they should be considered a single law firm for purposes of imputation.
				Comment [3]	Comment [3] should be clarified or stricken.	The Commission has made no change. Comment [3] is derived nearly verbatim from Model Rule 1.10. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment “deals with the elimination of imputation of a lawyer’s ‘personal-interest’ conflicts to others in the firm because there is no risk to loyal and effective representation of the client. The Comment also provides illustrations of when this exception to imputation might and might not apply.” See also proposed Rule 1.7.
				Comment [4]	Comment [4] discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people.	The Commission has retained this Comment, which is based on Model Rule 1.10, cmt. [4]. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment reflects current case law and “is intended to give guidance to lawyers about important practical questions.”
				Comment [9]	Comment [9] needs more clarification or should be stricken	The Commission has not made the requested change to Comment [9]. As noted in the

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						Explanation of Changes to proposed Rule 1.10, the comment "has been added to signal that the Rule, which in effect has codified the court-created doctrine of imputation, is not intended to override a court's inherent authority to monitor and control the conduct of persons before it." Nevertheless, the Commission has made some clarifying changes to the Comment and added references to California case law.
2	Senator, Stuart N. (Alston & Baird LLP, Duane Morris LLP, Morgan Lewis & Bockius LLP, and Munger Tolles & Olson LLP)	M	Yes	Model Rule 1.10(a)(2)	<p>Whether it is ethically proper to use a screen for non-government lateral hires to avoid an imputation of a conflict of interest is squarely before the Board, and the proposal to defer this question as "a matter of case law" should be revisited.</p> <p>Trends in the legal profession over the past three decades, including massive growth in the size of law firms and a dramatic spike in attorney mobility, have undermined the rationale for automatic vicarious disqualification. Because lawyer mobility is now an embedded feature of the legal profession, in marked contrast to the situation a generation ago, the automatic vicarious disqualification rule imposes far greater constraints on the industry today.</p> <p>Ethical screens have been shown to be effective to protect confidential client</p>	The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board rejected the proposed rule. The Board subsequently approved the proposed rule without any provision for screening.

**Rule 1.10 Imputation of Conflicts: General Rule.
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					<p>information. As the court in <i>Kirk v. First American Title Ins. Co.</i> put it, "[t]here is no legitimate reason to believe that the same screening could not work in the context of private attorneys in a private firm." Kirk, supra, at * 16.</p> <p>The commenter urges the Board of Governors to reconsider its present position and adopt the approach to ethical screens set forth in ABA Model Rule 1.10(a)(2).</p>	