Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)

While lawyers are associated in a law firm,* a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

Comment

A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another lawyer associated in the law firm* without complying with Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This Rule does not apply to Rule 1.8.10 since the prohibition in that Rule is personal and is not applied to associated lawyers.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.8.11
(No Current Rule)
Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association ("ABA") counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations. The conflicts of interest Model Rules include four rules that correspond directly to the provisions of current rule 3-310: Model 1.7 (current client conflicts) [rule 3-310(B) and (C); 1.8(f) (third party payments) [rule 3-310(F)]; 1.8(g) (aggregate settlements) [rule 3-310(D)]; and 1.9 (Duties To Former Clients) [rule 3-310(E)]. and Model Rules 1.10 (general rule of imputation and ethical screening in private firm context), 1.11 (conflicts involving government lawyers), and 1.12 (conflicts involving former judges, third party neutrals and their staffs).

As part of its study of conflicts of interest rules, the Commission also evaluated Model Rule 1.8, which compiles in a single rule 10 unrelated conflicts of interest concepts. In addition, where applicable the Commission has studied the current California rules that correspond to each of the conflicts concepts in Model Rule 1.8. The Model Rule 1.8 provisions and their California counterparts are:

Model Rule	California Rule Counterpart [new number]
1.8(a)	3-300 (Business Transactions With Client) [1.8.1]
1.8(b)	No California Rule Counterpart [but see proposed Rule 1.8.2]
1.8(c)	4-400 (Gifts From Clients) [1.8.3]
1.8(d)	No California Rule (none recommended)
1.8(e)	4-210 (Payment of Client's Personal or Business Expenses) [1.8.5]
1.8(f)	3-310)(F) (Third Party Payments) [1.8.6]
1.8(g)	3-310(D) (Aggregate Settlements) [1.8.7]
1.8(h)	3-400 (Limiting Liability to a Client) [1.8.8]
1.8(i)	No California Rule (none recommended)
	4-300 (Purchasing Client Property at a Foreclosure) [1.8.9]
1.8(j)	3-120 (Sex with Client) [1.8.10]

The result of the Commission's evaluation is a three-fold recommendation that the State Bar adopt, and the Supreme Court approve:

(1) 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 California 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).

(2) the rejection of the Model Rule 1.8 framework pursuant to which 10 unrelated conflicts of interest concepts are compiled in a single rule. Instead, the Commission has recommended that those concepts, most of which are already found in the current California Rules of Professional Conduct as separately numbered rules, be carried forward as separate rules with their own rule number that corresponds to the counterpart concept in Model Rule 1.8. For example, the proposed rule corresponding to Model Rule 1.8(a) is numbered 1.8.1 [current rule 3-300]; the rule corresponding to Model Rule 1.8(c) is numbered 1.8.3 [current rule 4-400], and so forth. Each of these rules is addressed in separate executive summaries.

(3) proposed Rule 1.8.11 (imputation of prohibitions in the 1.8 series of rules), which would incorporate into a rule of professional conduct the imputation within a law firm of conflicts of interest that arise from the 1.8 series of rules. Because conflicts that these rules are intended to prevent are not necessarily cured by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts.

Proposed rule 1.8.11 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. ***Recommendation of the ABA Model Rule Conflicts of Interest Framework***. The rationale underlying the Commission's recommendation of the ABA's multiple-rule approach is its conclusion that 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 California Rules of Court (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 for how the different conflicts of interest principles are organized within the Rules.[1]

2. ***Recommendation that the Model Rule 1.8 compilation framework approach be rejected in favor of separately numbered rules as in the current California Rules***. The Commission recommends that California not follow the Model Rules' approach of amalgamating in a single rule, numbered 1.8, all personal conflicts rules, regardless of their relationship, that do not fit neatly within the current client, former client, or government lawyer situations addressed in Model Rules 1.7, 1.9 and 1.11, respectively. Instead, to facilitate indexing and make these various provisions easier for lawyers to locate and use by reference to a table of contents, the Commission recommends that the rules in the 1.8 series, which are unrelated to one another

[1] Every other jurisdiction besides California has adopted the aforementioned ABA conflicts rules' framework.

except to the extent they involve potential conflict of interest situations, be given separate numbers. Thus, the counterpart to Model Rule 1.8(a) is 1.8.1, that of Model Rule 1.8(b) is 1.8.2, that of Model Rule 1.8(c) is 1.8.3, and so forth. The correspondence of the decimal number in the proposed 1.8 series rules to the letter in the model rule counterpart should achieve the uniformity of a national standard that facilitates comparisons with the rule counterparts in the different jurisdictions without sacrificing the ease of access that independently numbered and indexed rules provide. Aside from this ease of access rationale, the Commission also determined that the different concepts reflected in the rules, each of which imposes important duties critical to the maintenance of an effective lawyer-client relationship founded in trust, deserved the prominence of a separate, standalone rule.

3. ***Recommendation of separate imputation rule for the 1.8 series of rules***. As noted, because the conflicts that these rules are intended to prevent cannot be cured by either the client's consent or by the erection of an ethical screen within a law firm, the Commission is recommending this special imputation rule for such conflicts. Prior to 2002, imputation of conflicts arising under Model Rule 1.8 were handled by reference to Model Rule 1.10. However, the ABA Ethics 2000 Commission determined that the Model Rule 1.8 conflicts were better addressed in a separate imputation provision that would apply solely to that rule. The ABA Commission reasoned that Rule 1.10, which in 2002 provided exceptions to the general rule of imputation for (i) personal interest conflicts (see current Model Rule 1.10(a)(1)), or (ii) where the client has waived the conflict (see current Model Rule 1.10(c)), should not apply to conflicts arising under Model Rule 1.8. The Ethics 2000 Reporter explained the change:

> 1. Treat imputation under Rule 1.8 rather than 1.10
>
> The [Ethics 2000] Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under paragraph (k) [counterpart to proposed Rule 1.8.11], an associated lawyer may not necessarily proceed with the informed consent of the client (as the lawyer could under Rule 1.10); moreover, there is no exception here (as there is in Rule 1.10) for personal-interest conflicts of the individually disqualified lawyer.

See Ethics 2000 Reporter's Explanation of Changes, Model Rule 1.8, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule18rem.html

The first Commission also considered whether to recommend adoption of an imputation rule to be applied to the 1.8 series of Rules. Similar to the Ethics 2000 Commission, the first Commission concluded that a separate imputation rule was warranted.

Text of Rule 1.8.11. Proposed rule 1.8.11 carries forward the rule proposed by the first Commission. The first Commission made no substantive changes to the Model Rule. Rather, all of the changes were made to conform the Model Rule to the structure of the 1.8 rules series, each Model Rule paragraph being a separate, standalone rule. Proposed rule 1.8.11, however, would be a substantive change to the current California rules and a change in a lawyer's duties as there is no counterpart in the current rules.[2]

---

[2] Compare rule 3-310(B) and the accompanying sixth Discussion paragraph which provides that: "Paragraph (B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or

Comment. The Commission recommends including a single comment to the rule. After a lead-in sentence, the comment provides an important example of how rule 1.8.11 would be applied when the rule 1.8.1 prohibition on entering into a business transaction with a client is triggered. Explaining how a rule is applied is an appropriate subject for a comment and the Commission concluded the specific example was highly relevant to an understanding of the rule. The last sentence of the comment distinguishes the one exception to the rule, proposed rule 1.8.10, because that rule is personal to the lawyer involved.

National Background – Adoption of Model Rule 1.8(k)

Aside from California, every jurisdiction except five have adopted some version of Model Rule 1.8(k). The five jurisdictions are Georgia, Michigan, Mississippi, New York and Texas. Of those five jurisdictions, four have either not completed their review of the Ethics 2000 changes to the Model Rules (Georgia and Texas) or have made only piecemeal changes to their Rules since the ABA adopted the Ethics 2000 revisions (Michigan and Mississippi).

---

had a relationship with another party or witness or has or had an interest in the subject matter of the representation."

Rule ~~1.8(k) Conflict Of Interest: Current Clients: Specific~~1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
(Redline Comparison of the Proposed Rule to ABA Model Rule)

~~(k)~~ While lawyers are associated in a law firm,* a prohibition in ~~the foregoing paragraphs (a)~~Rules 1.8.1 through ~~(i)~~1.8.9 that applies to any one of them shall apply to all of them.

Comment

~~*Imputation of Prohibitions*~~

~~[20] Under paragraph (k), a~~A prohibition on conduct by an individual lawyer in ~~paragraphs (a)~~Rules 1.8.1 through ~~(i)~~1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another ~~member of~~lawyer associated in the law firm* without complying with ~~paragraph (a)~~Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. ~~The~~ This Rule does not apply to Rule 1.8.10 since the prohibition ~~set forth in paragraph (j)~~in that Rule is personal and is not applied to associated lawyers.