



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

June 14, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.10

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.10, as revised on May 17, 2010, and has the following concerns.

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.

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 screening in the rule could nevertheless subject a lawyer to discipline.

Accordingly, COPRAC urges the adoption of paragraph 1.10(a)(2) of the Model Rule to permit screening.

Thank you for your consideration of our comments.

Very truly yours,

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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Re: PUBLIC COMMENT ON AMENDED RULES OF PROFESSIONAL CONDUCT - Ethical Screens for Lateral Hires and "Thrust Upon" Conflicts

Dear Ms. Hollins:

These comments are submitted on behalf of Alston + Bird LLP, Duane Morris LLP, Morgan, Lewis & Bockius LLP, and Munger, Tolles & Olson LLP.

We write to urge the Board of Governors ("Board") to adopt two items not currently included in the proposed amendments to the Rules of Professional Conduct: (1) ABA Model Rule 1.10(a)(2), pertaining to the use of ethical screens for non-government lateral hires and (2) Comment 5 to ABA Model Rule 1.7, pertaining to "thrust upon" conflicts.

1. Ethical Screens for Lateral Hires

We respectfully submit that the question 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.

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Proposed Rules of Prof. Conduct, Rule. 1.10 cmt. 10 (May 17, 2010). The Board is charged with proposing changes to the standards of ethical conduct governing members of the Bar, standards that “are not intended to supersede existing law relating to members in non-disciplinary contexts.” Rules Prof. Conduct, rule 1-100, Discussion. Once approved by the California Supreme Court, the Rules will be binding on all Bar members and enforceable through attorney discipline, irrespective of how the case law on ethical screens develops. Bus & Prof. Code §§ 6076, 6077; *see Hawk v. Superior Court*, 42 Cal. App. 3d 108, 126 n. 17 (1974) (disciplinary rules “state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action . . .”). The Board should not bypass this opportunity to clarify, as an ethical matter, the circumstances in which screening a lateral hire is effective to avoid a conflict of interest.

The trend in this state and nationwide is to recognize (1) the changed circumstances in the legal industry that have necessitated the widespread use of ethical screens; (2) their benefits to clients, attorneys and law firms alike and (3) the proven effectiveness of ethical screens. Only last month, Justice Croskey, writing for the Court of Appeal, conducted the most thorough analysis of this question under California law ever and concluded that, in some circumstances, the showing that a “tainted” attorney has been effectively screened can rebut a presumption of vicarious disqualification. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 2010 WL 1346403, at * 12 (May 6, 2010).

First, as *Kirk* observed, 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. *Id.* at *13; *see, e.g., In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 586 (1991) (“In the era of large, multi-office law firms and increased attention to the business aspects of the practice of law, we must consider the ability of attorneys and their employees to change employment for personal reasons or from necessity.”). The one-size-fits-all approach to protecting client confidentiality may have seemed sensible when we were an industry of small firms. In an era of large firms, however, the assumption that *all* confidential client information will *always* be disseminated instantaneously to *all* members of a firm is no longer valid. *Kirk, supra*, at *13 (“In a situation where the ‘everyday reality’ is no longer that all attorneys in the same law firm actually ‘work together,’ there would seem to be no place for a rule of law based on the premise that they do.”).

Simultaneously, 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. *See Howard v. Babcock*, 6 Cal. 4th 409, 420 (1993) (noting that attorneys are more transient today). Dismantling barriers to mobility is good not just for lawyers seeking to make a lateral move, but also for the firms that hire them. Clients, too, benefit when law firms increase efficiency and specialization through lateral hires. But any such benefits are necessarily impeded by continued adherence to the inflexible and out-dated automatic vicarious disqualification rule. In the meantime, the chief beneficiaries of the current rule are occasional litigants who act strategically

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by seeking automatic disqualification of opposing counsel. This outdated automatic disqualification rule should be abandoned.

Finally, ethical screens have been shown to be effective to protect confidential client information. After conducting an exhaustive survey of the twenty-three states that permit some form of lateral screening, a committee of the ABA recently concluded that “properly established screens are effective to protect confidentiality” and that “[n]o reported disciplinary cases or lawsuits have demonstrated any significant problem with the efficacy of screens.” ABA Standing Committee on Ethics and Professional Responsibility, Recommendation 109 at 11, 15 (February 16, 2009) (*available at* <http://www.abanet.org/cpr/ethics/screening.html>) (“ABA Report”).

California’s own experience with the use of ethical screens in the context of government and former government attorneys, non-attorneys and experts is consistent with these findings. *See In re Charlissee C.*, 45 Cal. 4th 145, 162 (2008); *Chambers v. Superior Court*, 121 Cal. App. 3d 893, 902-03 (1981); *In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 596 (1991); *Shadow Traffic Network v. Superior Court*, 24 Cal. App. 4th 1067, 1084-85 (1994). There is no indication that the use of ethical screens in any of the foregoing contexts has proved problematic or difficult to administer. And, as *Kirk* 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. Notably, the implementation of a screen is not conclusive on the question whether confidential client information has been improperly shared; a court still must weigh the evidence and reach that determination – something that courts are well-equipped to do. *See* ABA Report at 11 (noting that courts in screening jurisdictions “have exhibited no difficulty in reviewing and, where screening was found to have been effective, approving screening mechanisms.”).

In short, “history reveals no problems with ethical screens.” ABA Report at 11. This should come as no surprise because other ethical rules already preclude attorneys from misappropriating an adversary’s confidential information. *See* Rules Prof. Conduct, rule 3-100 (member generally shall not reveal confidential information of a client without informed consent); rule 1-120 (member shall not knowingly assist in or induce any violation of an ethics rule); *see also* Proposed Rules Prof. Conduct, rule 4.4 (lawyer must promptly notify the sender of inadvertently transmitted confidential or privileged writings); Bus. & Prof. Code Section § 6068(e)(1) (It is the duty of an attorney “...to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”). Lawyers understand that any potential “value” of improperly using confidential information is far outweighed not just by their own ethical standards but by the potential for case-ending and career-ending sanctions to punish such misuse. At the same time, an automatic vicarious disqualification regime imposes significant burdens on the modern legal profession without clear benefits to clients, lawyers or the public. Now more than ever, members need clarity as to the ethical propriety of the use of screens. We urge the Board to reconsider its present position and adopt the approach to ethical screens set forth in ABA Model Rule 1.10(a)(2).

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2. “Thrust Upon” or “Unforeseeable” Conflicts

We also urge the Board to adopt Comment 5 to the ABA Model Rule 1.7, regarding “thrust upon” or “unforeseeable” conflicts. Comment 5 provides guidance for attorneys who are faced with conflicts that arise during the course of a representation and that were unforeseeable at the outset.

Thrust upon conflicts often are discussed in the case of changing corporate ownership, e.g., the firm’s client’s adversary is acquired by another client of the firm during litigation, but they also arise in far more pedestrian, everyday occurrences. One of the instances in which we worry the most about unforeseeable conflicts is in the context of third-party discovery. For example, assume the firm represents Client A in litigation. The firm obviously has a duty to represent Client A zealously. Suppose that, during the representation of Client A, the firm discovers that Corporation B may have documents in its possession that absolve Client A of liability, but the firm also represents Corporation B in other, unrelated matters. What should the firm do? If Corporation B refuses to waive the conflict, must the firm withdraw from the representation of Client A? May it? May the firm withdraw from the representation of Corporation B? If it does so, can Corporation B disqualify the firm in its representation of Client A? (Note that it is not clear that “conflict counsel” is a viable option in this scenario: If a lawyer advises a client to obtain other, non-conflicted counsel to obtain third party discovery from its current client, such advice may, standing alone, present duty-of-loyalty issues.)

The adoption of Comment 5 would provide some guidance as to how the firm should handle this and other thrust-upon, unforeseeable conflicts by providing that the attorney *may* have the option of withdrawing from one of the representations to avoid the conflict of interest. Because Comment 5 provides that the lawyer must maintain and protect the confidences of the client from whose representation the lawyer has withdrawn, there are no confidentiality issues. The comment essentially adopts the “thrust upon defense” established by case law from other jurisdictions. Under that case law, when a conflict arises through no fault of the attorney, the attorney may withdraw from one representation so as to convert the current client into a former client and avoid compromising the duty of loyalty. *See Gould, Inc. v. Mitsui Min. & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio, 1999). Most courts that have considered this issue have found the “thrust upon defense” to be a fair balancing of the need to maintain inviolate the duties of confidentiality and loyalty on the one hand and, on the other, the reality that often, even with the best procedures in place, unanticipated conflicts may arise throughout the course of a representation, and that reality should not undermine lawyers’ ability to represent their clients throughout a matter. *See, e.g., Installation Software Techs., Inc. v. Wise Solutions, Inc.*, 2004 U.S. Dist. LEXIS 3388, 2004 WL 524829 (N.D. Ill. Mar. 5, 2004) (denying a motion to disqualify after weighing the factors set forth in *Gould, supra*); *Carlyle Towers Condominium Assoc., Inc. v. Crossland Savings, FSB*, 944 F. Supp. 341 (D.N.J. 1996) (same); *Hawthorne Partners v. AT&T Techs., Inc.*, 1993 U.S. Dist. LEXIS 2575, 1993 WL 63003 (N.D. Ill. Mar. 2, 1993) (denying a motion to disqualify in a case involving a thrust upon conflict on the condition that the firm withdraw from one of the representations).

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Under Comment 5's guidance, lawyers and law firms would be able to balance situations such as the one described above. For example, they may be able to explain to Corporation B that, unless it accedes to the discovery requests, the law firm may have to withdraw, or it could explain to Client A that pursuing the discovery might result in the client having to obtain new counsel. The "correct" course of action in these circumstances likely would depend upon many factors, but the comment would provide the lawyers (and thus the clients) with options and guidance. While there is an understandable reluctance to allow a lawyer to "drop" one client in favor of another, that concern is outweighed here by the fact that a lawyer faced with such a conflict simply has no good options absent an ability to withdraw from one representation, if necessary. Moreover, if the Rules provide the withdrawal option, that may itself influence clients not to act strategically in determining whether to grant the requested consent.

While we understand the Board's tentative desire to wait until more courts are confronted with this issue, we believe this is an area where the Board should provide leadership. As the law currently stands, lawyers have very little guidance as to an appropriate course of action in the above-described circumstance, and every instance in which such a conflict arises is dealt with on an *ad hoc* basis. But law firms and clients benefit from settled, clear rules, and, therefore, this is an area in which the Board should comment. The one court located in California that has addressed the issue has suggested that the thrust upon defense is "probably not good law in California." See *GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc.*, 8 F. Supp. 2d 1182, 1187-8 (N.D.Cal. 1998), *vacated by, mandamus den'd*, 192 F.3d 1304 (9th Cir. 1999). This ruling is not binding on California courts. The ruling nonetheless creates difficulty for California lawyers trying to determine the best course of action when facing a thrust upon conflict. Furthermore, the currently uncertainty affects clients. Without guidance from the Board, it is quite possible that a client could spend hundreds of thousands of dollars (or more, in lengthy, complex litigation) on legal representation only to have its counsel compromised because the attorneys are unsure of a safe course of action.

The Bar of the City of New York (where many firms that work on engagements similar to ours are located) has provided a detailed analysis of thrust-upon conflicts and has established a balancing test for its attorneys to use when faced with these unforeseeable conflicts. See Association of the Bar of the City of New York, Opinion 200-5 (June 2005) (advising that a lawyer faced with a thrust-upon conflict should apply a balancing test to decide whether withdrawal is appropriate, guided by the "overriding factor" of the prejudice the withdrawal or continued representation will cause the parties, including whether representation of one client over the other would give an unfair advantage to a client"); see also District of Columbia, Opinion 292 (June 15, 1999).

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In light of the tremendous uncertainty in this area, we submit that the adoption of Comment 5 is appropriate and necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "S. N. Senator", with a long, sweeping horizontal stroke at the end.

Stuart N. Senator

cc: George Niespolo, Duane Morris LLP
Jonathan Gordon, Alston + Bird LLP
Brett Schuman, Morgan, Lewis & Bockius LLP



**THE STATE BAR OF
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June 15, 2010

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re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,¹ we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.² We hope you find our thoughts helpful.

SUMMARY

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

¹ OCTC refers the Commission to its previous comments and recommendations.

² We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).³

GENERAL COMMENTS

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.⁴

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.⁵ The 1974 rules were 13 pages; contained 25 rules; and 6 comments.⁶ The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

³ Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

⁴ See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

⁵ The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

⁶ The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.⁷

⁷ There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

Rule 1.10. Imputation of Conflicts of Interest: General Rule.

1. OCTC is concerned with the use of the term “knowingly” in subparagraph (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.
2. Again, there are too many comments and many are too long and seem more appropriate for treatises, law review articles, and ethics opinions. OCTC is concerned that Comment 1 simply states that whether two 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. OCTC suggests either Comment 3 be clarified or stricken. 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. Comment 9 needs more clarification or should be stricken.