

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Thursday, October 01, 2009 8:17 AM
To: McCurdy, Lauren; Kurt Melchior
Cc: Difuntorum, Randall; Lee, Mimi; Kevin Mohr G
Subject: RRC - 3-320 [1.8.11] - III.EE - October 16-17, 2009 Meeting Materials
Attachments: RRC - 3-320 [1-8-11] - Compare - Introduction - DFT2 (10-01-09)KM-KEM.doc; RRC - 3-320 [1-8-11] - Dash, Intro, Rule, Comment, Pub - COMBO - DFT2 (09-30-09)KM-KEM.pdf; RRC - 3-320 [1-8-11] - Compare - Rule & Comment Explanation - DFT2 (10-01-09)KM-KEM.doc; RRC - 3-320 [1-8-11] - Public Comment Chart - By Commenter - DFT2 (09-29-09)RD-KEM.doc; RRC - 3-320 [1-8-11] - Dashboard - ADOPT - DFT2 (09-30-09)KM-KEM.doc

Greetings Lauren:

To make your job a little easier, I've attached all the materials you need for 1.8.12 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

Kurt: Please note that I've made some revisions to your drafts to conform to the style we've been using in our charts. I've made changes to the Dashboard & Rule/Comment Chart, and added an Introduction. My changes were intended primarily to address the question you asked about why we deleted the Discussion to current rule 3-320.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (9/30/09)-KM-KEM.
2. Introduction, Draft 2 (10/1/09)-KM-KEM.
3. Rule & Comment Chart, Draft 2 (10/1/09)-KM-KEM.
4. Public Comment Chart, Draft 2 (9/29/09)-RD-KEM. Just resorted alphabetically.

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

Kevin

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Proposed Rule 1.8.11 [3-320] “Relationship with Other Party’s Lawyer”

(Draft #5, 8/31/09)

Summary: Proposed Rule 1.8.11 has no counterpart in the Model Rules. It carries forward current California rule 3-320 and requires a lawyer to advise the client in writing if a spouse, other close relative, or other close associate of the lawyer is the opposing party’s lawyer. The Commission determined that this is an appropriate public protection device and should be retained, with several modifications. See Introduction.

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input checked="" type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input checked="" type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- X** Existing California Law

Rules	RPC 3-320.
Statute	
Case law	

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Public Comment Distribution

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by consensus

Minority/Position Included on Model Rule Comparison Chart: Yes No

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.11* Relationship with Other Party's Lawyer

October 2009

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.8.11 has no counterpart in the Model Rules. It carries forward current California rule 3-320 and requires a lawyer to advise the client in writing if a spouse, other close relative, or other close associate of the lawyer is the opposing party's lawyer. The Commission determined that this is an appropriate public protection device and should be retained, with several modifications. These include the addition of a standard of knowledge – the lawyer must know that the person with whom the lawyer has one of the identified relationships is involved in the matter – and the deletion from the scope of the Rule clients of the lawyer. See Explanation of Changes for the Rule for a detailed explanation of these changes.

A Note on the Rule Number. Rather than follow the Model Rules, which place a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each such concept its own separate rule number.

* Proposed Rule 1.8.11, Draft #5 (8/31/09).

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.8.11 Relationship with Other Party's Lawyer</p>	<p align="center"><u>Explanation of Changes to the California Rule 3-320</u></p>
	<p>A memberlawyer shall not represent a client in a matter in which another party'sif the lawyer isknows that the lawyer representing another person involved in the matter, or a lawyer who is associated with that lawyer in a law firm, is the lawyer's spouse, parent, child, or sibling of the member, lives with the memberlawyer, is a client of the member, or has an intimate personal relationship with the memberlawyer, unless the memberlawyer informs the client in writing of the relationship.</p>	<p>Proposed Rule 1.8.11 carries forward the substance of current rule 3-320, but makes two substantive changes. First, unlike the current rule, proposed Rule 1.8.11 includes a standard of knowledge – that the rule applies only where the lawyer is aware of the relationship. Second, the prohibition relating to when the “person involved” is a client of the lawyer has been removed. The Commission made this change because (i) as in the current rule, conflicts that arise under this Rule are personal and not imputed to other lawyers in the firm (see proposed Rule 1.8.13); and (ii) the Commission determined that there can be situations when the prohibition on a lawyer’s representation based on a lawyer-client relationship should be extended to the other lawyers in the firm. By removing “lawyer-client relationships” from the Rule, they become regulated under proposed Rule 1.7; imputation under proposed Rule 1.7 is governed by Rule 1.10, which requires imputation of personal interest conflicts under certain circumstances.</p> <p>The remaining changes are syntactical, except that the term “member” has been changed to “lawyer.”</p>

* Redline/strikeout showing changes to the current California rule as there is no ABA Model Rule counterpart.

<p align="center"><u>ABA Model Rule</u> No Comparable ABA Model Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.11 Relationship with Other Party's Lawyer Comment</p>	<p align="center"><u>Explanation of Changes to the California Rule 3-320</u></p>
	<p>Rule 3-320 is not intended to apply to circumstances in which a member fails to advise the client of a relationship with another member who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter.</p>	<p>The Commission recommends deleting the Discussion to current rule 3-320. The Discussion addresses imputation under current rule 3-320. The Commission recommends that imputation of personal interest as are regulated under proposed Rule 1.8.11 be addressed globally in proposed Rule 1.8.13.</p>
	<p>[1] This Rule is not limited to litigation matters.</p>	<p>The Commission has added Comment [1] to clarify that the Rule is not limited to litigation matters and would apply to transactional matters as well.</p>

**Rule 1.8.11 Relationship with Other Party's Lawyer .
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC (Dennis Maio)	M			<p>Client should not only be "informed" of the existence of a relationship with another party's lawyer, but also should be told of the potential consequences of such a relationship. As such, the final phrase of rule should state: "...unless the lawyer provides written disclosure of the relationship to the client and obtains the client's informed written consent."</p> <p>Comments should clarify that disclosure is intended to refer to the definition of disclosure contained in Rule 1.7.</p>	<p>Commission did not make the requested revision, in part, because the "informed written consent" standard is not being recommended for this rule. The Commission does not believe this rule addresses situations that categorically require the high standard of "informed written consent."</p> <p>Commission did not make the requested revision, in part, because the Rule 1.7 standard is not being recommended for this rule.</p>
5	Orange County Bar Associatio (Trudy C. Levindofske)	M			<p>If Commission intends to carry forward concept of "disclosure" set forth in 3-310(A) then that term should be used in this rule rather than the term "inform."</p> <p>Amend Comment [2] to read: "This Rule is not intended to require a lawyer to disclose his or her relationship with lawyers who are not connected to the matter, but who happen to practice with law firms that are involved in the matter."</p>	<p>Commission did not make the requested revision, in part, because the existing rules use the different terms "inform" and "disclose."</p> <p>Commission did not make the requested revision, in part, because the addition is not necessary given the limited terms of the rule itself.</p>
4	San Diego County Bar Association (Ross Simmons)	A			None	No response necessary.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.8.11 Relationship with Other Party's Lawyer .
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	San Francisco, Bar Association of (Philip Humphreys)	A			Add a Comment [3], which would recommend that a client be advised of a relationship with a member of an opposing law firm, as contrasted with a relationship with a member of a law firm representing a party that is not adverse to the client.	Commission did not make the requested revision, in part, because the desired clarification might cause confusion.
1	Santa Clara County Bar Association (Christine Burdick)	M			Change the title of the rule to "Relationship With Lawyer of Other Person Represented in a Matter." This is consistent with the proposal changing "party" to "another person involved in the matter."	Commission did not make the requested revision, in part, because the combination of the short rule title and longer description in the rule text may help some lawyers recognize that there is an emphasis on identifying a particular "matter" when applying the rule .

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CONSULTANT'S NOTE: *The following e-mails, from 8/6/09 through 8/24/09, were exchanged in relation to proposed Rule 1.8.13 [1.8(k)], but a key issue concerning those e-mails was a proposed amendment of Rule 1.8.11. Therefore, these e-mails have been included in this e-mail compilation.*

In addition, at the 8/28-29/09 meeting, the RRC voted 6-4-2 to revise Rule 1.8.11 as proposed in the 8/6/09 KEM E-mail. See 8/28-29/09 KEM Meeting Notes, III.G., at ¶. 1A.

August 6, 2009 KEM E-mail to Drafters (Tuft, Kehr, Melchior, Snyder & KEM), cc Chair, Difuntorum, McCurdy & Lee:

I've attached the following, both in PDF:

1. Rule 1.8.13 [3-310], Intro, Rule & Comment comparison charts, combined, Draft 1.1 (8/5/09).
2. My 5/8-9/09 meeting notes.

Notes:

1. At the 5/8-9/09 meeting, Harry noted the rule had been approved over Mark's objection that these conflicts should be addressed in Rule 1.7 as is done by the ABA, and thus imputation governed by Rule 1.10. Harry then directed that the drafters prepare a comparison chart, w/ Mark's dissent included. That is what I have done. I took my best shot at explaining why California differs from the Model Rule with respect to these kinds of conflicts. I'm not sure I agree w/ what I have written. I've been in a minority in believing this is an area where the ABA might have gotten it right.
2. I do have an alternative suggestion that might remove the need for a dissent. I believe both camps are on the drafting team. How about if we were to remove from Rule 1.8.11 the phrase "is client of the lawyer" so that Rule 1.8.11 would provide:

A lawyer shall not represent a client in a matter if the lawyer knows that the lawyer representing another person involved in the matter, or a lawyer who is associated with that lawyer in a law firm, is the lawyer's spouse, parent, child, or sibling, lives with the lawyer, ~~is a client of the lawyer~~, or has an intimate personal relationship with the lawyer, unless the lawyer informs the client in writing of the relationship.

From Mark's 5/28/09 e-mail, he appears to be concerned primarily w/ the situation where a lawyer in the law firm is in a lawyer-client relationship w/ the opposing lawyer. If we remove that phrase, then those kinds of situations would be governed by Rule 1.7 (where I think they should be) and Rule 1.8.11 would be limited to the close personal or familial relationship situations, which perhaps should not be imputed other members in the firm. Would that satisfy Mark? Bob? Dom? Kurt? I apologize if I've misread your positions, but it seems to me that this might be a compromise to move this forward. On the other hand, it's going out for public comment and we may receive guidance on which position the Commission should take.

Please let me know if you have any questions.

August 6, 2009 KEM E-mail to Tuft:

I just sent you and the other drafters 1.8.13.

On Rule 1.10, I've been in touch w/ Stan and he's promised me some language for Comments [2] and [5] later today. Once I have that language, I'll drop it in the rule and circulate it to the drafters.

Please let me know if you have any questions.

August 6, 2009 Tuft E-mail to KEM:

I am going to work off of what you send me. Thanks. The materials are due by next Wednesday, right?

August 6, 2009 KEM E-mail to Tuft:

Next Wednesday is the deadline. I'm trying to get as much out of the way now because I'm also preparing for my classes this fall. KEM

August 10, 2009 Tuft E-mail to Drafters, cc Chair & Staff:

I offer the following comments to the Comparison Chart and draft 1.1 of this rule:

1. Kevin's suggested change to Rule 1.8.11 would provide better public protection where the lawyer is being represented or is representing opposing counsel in a matter where the interests of the lawyers' clients are directly adverse. However, I am having trouble understanding how this conflict situation (which is much more frequent today than it was in 1989) is treated under our current version of rule 1.7. It would seem that the representation of opposing counsel would itself have to be directly adverse to the matter in which the lawyers are representing adverse parties for rule 1.7(a) to apply or the lawyer who is represented would have to be "affected substantially" by resolution of the matter under rule 1.7(d)(3). If that is correct, coverage under our rule would be extremely narrow compared to the rule in the other jurisdictions. Thus, I do not think Kevin's proposed solution goes far enough. I am willing to listen to other drafters on this issue.

2. I disagree with the statement in the second and third sentences of the second paragraph in the Introduction that Model Rule 1.7(a)(2) covers all types of relationship conflicts and that only those that present a significant risk of materially limiting the representation are imputed to other lawyers in the firm under Rule 1.10. Rule 1.7(a)(2) is limited to situations when there is a significant risk that the affected lawyer's representation will be materially limited by responsibilities (not relationships) that the lawyer owes to others. As Comment [8] points out, a lawyer laboring under this type of conflict is in a situation that "in effect forecloses alternatives that would otherwise be available to the client" and, thus, requires disclosure and client consent.

Conflicts of interest based on a personal interest of the prohibited lawyer under Rule 1.7(a)(2) are not imputed to other lawyers in the firm under Rule 1.10(a) unless the conflict presents a significant risk of materially limiting the representation of the client by the other lawyers in the firm. An example of where this occurs is when a partner or lead counsel is represented by opposing counsel in a matter that is of critical importance to that lawyer. Other lawyers working

on the matter are requested or chose not to pursue a certain course of action as a result of that relationship. The situation does not have to rise to the level of "incompetence" for there to be a conflict of interest. Comment [1] to the Model Rule 1.7 clarifies that client loyalty and independent judgment are the interests sought to be protected by the rule. Imputation under rule 1.10 applies this protection to the remaining lawyers in the firm who know of the prohibited lawyer's conflict and there is a significant risk their representation of the client will be materially limited as a result.

3. The final sentence in the Introduction before the "minority" statement is incomplete in my copy.

4. I do not believe the final sentence in proposed Comment [1] is correct. Representing opposing counsel as a client of the firm is not necessarily a "personal relationship conflict." Nevertheless, if the will of Commission is to keep this sentence, there should be an explanation included in the third column about this important change from the Model Rule.

August 10, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

Here are my comments using the paragraph numbers in Mark's message:

1. I agree with Mark's conclusion that 1.8.11 should not be changed. If there were but world enough and time, we might arrive at some other arrangement, but the train is leaving so I would leave it as it is.
2. I don't understand why the points on which Mark has commented need to be raised in explaining how our 1.8.13 differs from MR 1.8(k). There are only two differences between the two. One is that we have two 1.8 paragraphs for which there are no MR counterparts. These are our 1.8.11 and 1.8.12. The second is that while MR 1.8(k) has no imputation only for the sexual conduct Rule – 1.8(j) – we have no imputation also for our 1.8.11, which involves a lawyer's relationship with another party's lawyer. I think this is all we need to say to explain how our Rule differs from MR 1.8(k).
3. I do not understand the minority statement as I don't see a MR counterpart to 1.8.11. I understand that there was one in the 1983 version of the MRs, which then was 1.8(i), but I don't recall there being any in the current MRs. Also, the minority report discusses imputation under 1.10, and I don't understand how that explains 1.8.13. Please no more e-mails. Let's hold this for discussion at the next meeting.
4. I think that Mark is correct that a Rule 1.8.11 conflict is not necessarily based on a personal relationship, but I nevertheless support the sentence that he criticizes. My reason is that I understand that sentence to mean only that, by not recommending imputation under 1.8.11, we decided that conflicts under that Rule should be treated be treated as personal to the individual lawyer.

I apologize if I've overlooked anything, but I'm out of time on this Rule.

August 11, 2009 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Lee:

I've attached the following for inclusion in the agenda mailing for Item III.G.:

1. Rule 1.8.13 [3-310], Draft 1.1 (8/5/09), Introduction and Rule/Comment Comment Chart, in a single, scaled PDF file. The Comparisons are based on Draft 2 (6/27/09) of the Rule.
2. E-mail compilation dated 8/24/09 excerpt. This includes whatever e-mails the drafters have exchanged since the May 2009 meeting when this Rule was last considered. Members should pay particular attention to Mark's 8/10/09 and Bob's 8/10/09 e-mails, which identify drafter disagreements.

Please let me know if you have any questions.

August 11, 2009 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Lee:

I've attached the following for inclusion in the agenda mailing for Item III.G.:

1. Rule 1.8.13 [3-310], Draft 1.1 (8/5/09), Introduction and Rule/Comment Comment Chart, in a single, scaled PDF file. The Comparisons are based on Draft 2 (6/27/09) of the Rule.
2. E-mail compilation dated 8/24/09 excerpt. This includes whatever e-mails the drafters have exchanged since the May 2009 meeting when this Rule was last considered. Members should pay particular attention to Mark's 8/10/09 and Bob's 8/10/09 e-mails, which identify drafter disagreements.

Please let me know if you have any questions.

August 24, 2009 Sapiro E-mail to RRC List:

I join with Mark in his dissent.

August 24, 2009 Tuft E-mail to RRC List:

1. The comparison chart should be to ABA Rule 1.8(k) rather than 1.8(b).
2. To clarify my position with respect to Kevin's suggested change to Rule 1.8.11, I pointed out that Kevin's proposed solution provides better public protection than how the rule is presently drafted and adopting it would mitigate to some degree the concerns I have raised about there being no imputation at all under rule 1.10. Although, I do not believe Kevin's solution goes far enough for the reasons stated in my August 10, 2009 email to the co-drafters, Kevin's proposed change is certainly an improvement. If the Commission does not agree with my concerns, Kevin's suggested change would be better than doing nothing at all.

August 27, 2009 McCurdy E-mail to Melchior, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead drafter assignments.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. III.EE. Rule 1.8.11 Relationship with Other Party's Lawyer [3-320] (Post Public Comment Draft #4 dated 5/16/08) Codrafters: Julien, Voogd
Assignment: (1) a chart comparing proposed Rule 1.8.11 to RPC 3-320; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

**2. III.FF. Rule 1.8.12 Purchasing Property at a Foreclosure Sale [4-300]
(Post Public Comment Draft #2.2 dated 6/27/08) Codrafters: Foy, Lamport**

Assignment: (1) a chart comparing proposed Rule 1.8.12 to RPC 4-300; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

**1. IV.I. Possible Rule re: A-C Privilege Waiver (no counterpart rules)
Codrafters: Sapiro, Tuft, Voogd**

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

**2. IV.J. Possible Rule re: Advice of Counsel (see Oregon Rule 8.6)
Codrafters: Ruvolo, Sapiro**

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

September 18, 2009 McCurdy E-mail to Drafters (Melchior, Voogd & Julien), cc RRC:

Kurt & Codrafters (Tony and JoElla):

This message provides the assignment background materials for Rule 1.8.11 on the October agenda. **The assignment deadline is Wednesday, September 30, 2009.**

As previously indicated, the materials provided are templates or drafts. Please don't hesitate to ask for further assistance or additional materials.

Attachments:

- Dashboard, Draft Template (9/18/09)
- Introduction, Template (9/18/09)
- Rule & Comment Chart, Template (9/18/09)KEM
- Public Comment Chart, Draft 1 (9/18/09)

September 19, 2009 KEM E-mail to Drafters, cc RRC:

I've attached a revised rule & comment comparison chart template for Rule 1.8.11. The chart that was sent yesterday did not reflect the August 2009 meeting vote in conjunction w/ Rule 1.8.13 to delete the phrase "is a client of the lawyer" from the proposed Rule. See 8/28-29/09 KEM Meeting Notes, III.G., at para. 1A. Please use the attached template, which reflects that change.

September 30, 2009 Melchior E-mail to RRC:

I lost this on my desktop until just now and apologize for not getting it to the drafting team earlier.

However, this seems simple and noncontroversial, and therefore (with apologies to co-drafters Joella and Tony) I have made the relevant entries in the attachments and am forwarding them beyond the drafters because of the impending deadline. I am not sending the public comments as there was nothing to add.

One point I could not resolve from the materials provided to me: why did we drop the comment to the current rule which says that the rule only applies to the lawyer him- or herself and not to relations by other colleagues' relatives? I can see arguments both ways; but we have just silence. Kevin?

October 1, 2009 KEM E-mail to Melchior, cc RRC:

To answer the question you raise in the last paragraph of your e-mail, I believe that the concept in current rule 3-320, Discussion, is covered by our proposed Rule 1.8.13, which addresses imputation of personal interest conflicts. That rule, which is currently out for public comment, provides:

Rule 1.8.13 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12

While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through Rule 1.8.9, and 1.8.12 that applies to any one of them shall apply to all of them.

Comment

[1] A prohibition on conduct by an individual lawyer in Rules 1.8.1 through 1.8.9, and 1.8.12 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 Rules 1.8.10 and 1.8.11 since the prohibition in those Rules is personal and is not applied to associated lawyers.

Please let me know if you have any questions.

October 1, 2009 KEM E-mail to McCurdy & Melchior, cc Difuntorum & Lee:

Greetings Lauren:

To make your job a little easier, I've attached all the materials you need for 1.8.12 in a single, scaled PDF file. The ingredients of the attached file are also attached, in Word.

Kurt: Please note that I've made some revisions to your drafts to conform to the style we've been using in our charts (e.g., we refer to the Commission in the third person and not "we"). I've made such changes only to the Intro & Rule/Comment Chart. I've attached a redline PDF of those charts so you can see what I did.

In addition to the combination PDF file, here is what I've attached, all in Word:

1. Dashboard, Draft 2 (9/29/09)-KM-KEM. Just some formatting changes; no change to substance.
2. Introduction, Draft 2 (9/29/09)-KM-KEM.
3. Rule & Comment Chart, Draft 2 (9/29/09)-KM-KEM.
4. Public Comment Chart, Draft 2.1 (9/29/09)-KM-KEM. Just resorted alphabetically.

Finally, there's a second combo PDF file in redline that shows the changes I've made to Kurt's drafts.

Please let me know if you have any questions.

October 3, 2009 Kehr E-mail to RRC:

I vote to send these materials to the Board.

October 7, 2009 Sapiro E-mail to RRC:

1. In the first paragraph of the Introduction, next to the last line, I recommend that we change the order of words. I would change “. . . deletion from the scope of the Rule clients of the lawyer” to “. . . deletion of clients of the lawyer from the scope of the Rule.”
2. I agree with the explanation of changes at page 1 of 2. However, proposed Rule 1.7 does not apply (see 1.7 Comment [24]) to the situation of a lawyer who has a client who is in the opposing law firm. It (wrongly) refers to Rule 1.8.12. Changing new Rule 1.8.11 to delete the situation of a lawyer who has a client who is in the opposing law firm, without putting that subject in another rule such as 1.7, incorrectly suggests that we have concluded that that relationship does not give rise to a potential or actual conflict of interest.
3. I therefore reluctantly vote “no” on forwarding this rule to the Board, so we can correct the gap mentioned in the preceding paragraph. If we change Rule 1.7 Comment [24], this rule should go to the Board, but I fear that will require changing the black letter of 1.7, and not just its Comment.

October 8, 2009 Sondheim E-mail to Melchior, cc Staff:

This rule is a consent item. If there are not 3 no votes, do you believe I should exercise my discretion and allow the Commission to consider the concern expressed by Jerry in the second paragraph of his e-mail.

October 10, 2009 Tuft E-mail to RRC List:

My Comments on proposed Rule 1.8.11.

1. **Rule 1.8.11 should be included in Rule 1.7(d):** This has clearly become an orphan of a conflicts rule. How do we explain that lawyers face discipline under proposed Rule 1.7(d) by failing to provide "written disclosure" of the most remote relationship with a party or witness that has no possibility on impairing the lawyer's judgment or loyalty while under Rule 1.8.11 the lawyer need only notify the client in writing that opposing counsel is the lawyer's spouse, daughter or significant other? What conflicts rule applies when opposing counsel is the executor or trustee of the lawyer's estate or is the landlord or holds the mortgage on the lawyer's house? I assume, perhaps optimistically, that rule 1.7(d) will be revised to apply when opposing counsel is a client of the lawyer (a not infrequent occurrence in today's practice). But what happens when the lawyer is the client of opposing counsel? These conflicts should be treated under the basic conflicts rule, which the majority has fashioned as rule 1.7(d).
2. **"Dashboard" It is not accurate to say this rule is "not controversial."** COPRAC recommends "written disclosure" and informed consent. Orange County recommends

carrying forward the concept of "disclosure" in rule 3-310(A). Depending on what we do with opposing lawyers who are clients, the rule will have some degree of controversy.

3. **Minority Position: If the rule remains unchanged, I wish to submit the following minority position:**

The counterpart in the Model Rules to proposed Rule 1.8.11 is Model Rule 17(a)(2), a rule that is followed in virtually every other jurisdiction. Proposed Rule 1.8.11 has no counterpart in any other jurisdiction. The comments to the Model Rule and ethics opinions applying the rule confirm that Rule 1.7(a)(2) provides substantially greater public protection than the rule proposed by the majority. For example, under the Model Rule, "a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent." Model Rule 1.7, Cmt. [11]. Rule 1.8.11 only requires written notice of the relationship and nothing more. There is no requirement for written disclosure of the reasonably foreseeable adverse consequences on the client's representation no matter how significant. Nor is there any requirement for client consent if there is a significant risk that the relationship will materially limit the lawyer's duty of loyalty and independent judgment. Model Rule 1.7(a)(2) applies in other situations not covered by the proposed rule, including where a lawyer has discussions with opposing counsel regarding possible employment [Model Rule 1.7, cmt. [10] and when opposing counsel have an attorney client relationship that poses a significant risk to the duties owed to their respective clients. See ABA Formal Opinion 97-406. Relationships among opposing counsel have become more frequent in recent years and there need for greater public protection than what offered by the proposed rule.

4. **Explanation of Changes to the Proposed Rule:** Unless we revise Rule 1.7(d) to cover lawyer-client relationships between opposing counsel, what support is there for the last sentence in the first paragraph?

Also, replace "as" with "conflicts" in the last sentence on page 89.

October 11, 2009 Martinez E-mail to RRC:

This rule is unreadable. It is unclear which "lawyer" is being referred to in its various uses of the word, and we have made things more difficult by adding a "lawyer associated with that lawyer." I vote against sending this to the Board. The problem I believe is how the Rule is structured. I recommend we go back to the drawing board and restructure the rule so that it reads something along the lines of :

"In representing a client in a matter, a lawyer shall disclose to the client in writing that the lawyer or a lawyer in the lawyer's firm has any of the following relationships with a lawyer representing another person in the matter:

- a) a spousal, parental, or sibling relationship;
- b) a cohabitational relationship; or
- c) an intimate personal relationship."

My intent here is not to change the content of the Rule, only to improve readability. We can also state in a comment, or the Rule itself: "This Rule shall apply only where the lawyer knows of the relationship."

October 11, 2009 Kehr E-mail to Martinez (forwarded to RRC by Kehr on 10/12):

I think I see your concerns. Would they be alleviated if, beginning with the comma in the fifth line, were to say:

“... ,is the first lawyer’s spouse, parent, child or sibling, or lives with or has an intimate personal relationship with the first lawyer, unless the first lawyer informs the client in writing of the relationship.”

October 12, 2009 Martinez E-mail to Kehr (forwarded to RRC by Kehr on 10/12):

I don't think so because it's unclear who the "first" lawyer is. The rules shouldn't be written like real estate contracts. Something is wrong if a lawyer has to read a rule 10 times to (hopefully) understand it.

October 12, 2009 Melchior E-mail to Sondheim, cc Difuntorum & KEM:

I think this is the subject of your question to me last night. If not, please resend the 10/2 message which I cannot find.

1. I have read Jerry's point three times and checked it against the text, but it is still not clear to me, which may be my fault. I think that comment 24 to rule 1.7 (p. 224) properly refers the reader to the rule about relationships between lawyers, though Jerry is correct that the reference should be to 1.8.11, not 12.8.12.
2. But 1.8.11 refers to relationships between the lawyer and another party's lawyer. As I understand Jerry's point, he thinks we should also require disclosure if the lawyer represents that lawyer, or a lawyer in the opposing party's law firm. To me, that is a different issue.
3. Obviously, a lawyer will have difficulty when representing the very lawyer who is opposing him in another matter -- from the separate perspectives of doing good jobs for the non-layer client and for the opposing-lawyer client. Our draft follows present rule 3-320, which does not address that relationship but a less intense one: that of relatives, etc.
4. Should we forbid such representations as I have identified? Those situations seem most unlikely to me, though I can conceive versions where something like this could occur. I would prefer to let the courts resolve such things, presumably by ruling that these were nonwaivable conflicts, though I can see no harm in requiring disclosure: it is something the client should know. But Jerry goes a step further and would require disclosure where a lawyer somewhere in the opposing firm is represented by the lawyer's own firm. (But how would the lawyer be alerted to the fact, if it happened, that someone part of a group being newly represented in, say, a securities case, is a partner of opposing lawyer X, thus requiring disclosure after the current client's case started?)

5. I think that we should discuss the issue, though I fear that on quick consideration we might come up with a rule which addresses a complex situation more simplistically than it may warrant.

October 12, 2009 Melchior E-mail to RRC List:

Rule 1.8.11: I am nonplussed by the comment that this rule does not apply just to litigation matters. Isn't that true everywhere except in plainly litigation-related items? Why single it out here? And does mentioning it here (and in like places) create the implication that where not so stated, that is not the case?