

Proposed Rule 1.10 [n/a]

“Imputation of Conflicts: General Rule”

(Draft #7.1, 4/25/10)

Summary: This new rule addresses situations where an individual lawyer’s conflict of interest may prohibit other associated lawyers from undertaking or continuing the conflicting representation. The Commission recommends a modified version of the public comment draft, which does not include a provision that permits the implementation of a non-consensual screen to avoid the Rule’s application.

Comparison with ABA Counterpart

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

Primary Factors Considered

- Existing California Law

Rule

RPC 3-310

Statute

Case law

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

- Other Primary Factor(s)

See the introduction in the Model Rule comparison chart.

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 11
Opposed Rule as Recommended for Adoption 0
Abstain 0

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

See the Introduction.

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.10* Imputation of Conflicts: General Rule

April 2010

(Draft rule following consideration of public comment)

INTRODUCTION & EXPLANATION OF REQUEST FOR RECONSIDERATION OF DECISION NOT TO ADOPT PROPOSED RULE 1.10:

At its March 7, 2010 meeting, the Regulation and Admissions Committee of the Board of Governors voted against adoption of proposed Rule 1.10. On March 9, 2010, the Board of Governors affirmed the vote of the Board Committee. At its March 26-27, 2010 meeting, the Commission considered the Board's decision, reviewed an alternative version of proposed Rule 1.10 that did not contain a provision permitting screening of a tainted lawyer to avoid the application of the Rule, and voted unanimously to request that the Board reconsider its position on a Rule of Professional Conduct that addresses the concept of the imputation of a conflict of interest. This Introduction explains the scope of the proposed Rule and the basis for the Commission's request for reconsideration. If the Board agrees with the Commission's recommendation that an alternative version of Rule 1.10 without a screening provision be adopted, then the proposed Rule will be circulated with the Batch 6 rules for a final 30-day public comment period that will end approximately June 15, 2010.

Model Rule 1.10 addresses two concepts: (i) the imputation of a lawyer's conflict other members in the lawyer's firm on the ground that lawyer regularly share confidential information of their clients; and (ii) the availability of an "ethical screen" ("ethical wall") to rebut that presumption of shared confidences between the tainted lawyer and other persons in the firm. In the public comment draft that was circulated during fall 2009, the Commission recommended adoption of a rule that closely tracked the Model Rule, but without the ethical screening provision. After the initial public comment distribution, the Commission recommended adoption of a modified version of Model Rule 1.10 that would have permitted, in limited circumstances, the screening of a lawyer who moves from one private firm to another. However, a minority of the Commission took the position that no rule providing that an ethical wall could effectively rebut the presumption of shared confidences in context of a lawyer moving from one private firm to another should be adopted. The Board of Governors Committee on

* Proposed Rule 1.10, Draft 7.1 (4/25/10).

Regulation and Admissions considered the Commission's recommendation (including the view of the Commission minority) at its March 5, 2010 meeting and the Board Committee determined not to recommend Board adoption of any part of the proposed rule, including that part of the rule that addressed the concept of imputation of one lawyer's prohibition to other members in the firm. As to the screening provision, the Board Committee observed that the concept of ethical walls, in the context of lateral attorney movement from one private law firm to another, was an unsettled issue in California, and was best addressed on a case-by-case basis by the courts. As to the provisions concerning imputation, the Board Committee concluded that the rule of imputation is well-settled in California law and that a Rule of Professional Conduct was not necessary. As noted, the Board affirmed the Board Committee's vote not to adopt any imputation rule.

The Rule that the Commission now proposes for adoption by the Board is the public comment version, revised and updated to conform to changes the Board has approved in other rules since the public comment version was circulated. Although the Commission is still closely-divided on whether proposed Rule 1.10 should include a provision that explicitly permits an ethical screen in limited situations to avoid imputation of a tainted lawyer's conflicts to other lawyers and employees in a firm, the Commission is unanimous in its recommendation that the Board reconsider its decision not to adopt any version of Rule 1.10 and instead adopt the public comment version of the Rule, as revised, that would codify imputation in a Rule of Professional Conduct but not expressly provide for screening. As noted below in the section titled "Variations in Other Jurisdictions," every jurisdiction has adopted the imputation aspect of Model Rule 1.10, with approximately half adopting a provision that expressly permits screening. The Commission is concerned that, although the doctrine of imputation might be well-settled in California case law, with the adoption of set of Rules that adheres to the Model Rule format and numbering system, the absence of a rule of professional conduct that addresses the concept would cause confusion among lawyers, particularly those from other jurisdictions. Inclusion of an imputation rule would make the concept, now hidden in California case law, more accessible to a larger number of lawyers. The rule will provide broader exposure to California's adherence to the concept and can only increase client protection by putting lawyers on notice of their obligations.

Commentary to the Rule. The Comment to the Rule is based on the Comment to Model Rule 1.10, but the Commission made some substantive additions and deletions. The additions, in part, identify California's emphasis on the duty of confidentiality as it relates to imputation of conflicts. The deletions, in part, implement the Commission's view that the Rule is intended as a disciplinary rule rather than a rule that establishes a standard of civil disqualification. Comments [9] and [10], which have no counterpart in the Model Rule, clarify that the Rule is not determinative of disqualification motions. The Commission determined that these comments are necessary to permit the development of case law on the issue of screening as envisioned by the Board. See Explanation of Changes to the Comment.

Variations in Other Jurisdictions. Every jurisdiction has adopted some version of Model Rule 1.10. Approximately half of the jurisdictions have adopted a provision that explicitly permits screening to rebut the presumption of shared confidences among members and employees of a firm. Thirteen jurisdictions have adopted a provision that broadly permits screening (Delaware, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah and Washington). “Broadly permits screening” means that the jurisdiction’s provision permits screening of any lawyer who has acquired (or is presumed to have acquired) confidential information of the former client, regardless of the degree of involvement of that lawyer in the former client’s representation. Another eleven jurisdictions permit screening in limited situations (Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, and Wisconsin). “Permits screening in limited situations” means that a jurisdiction’s provision permits screening only of a lawyer who did not “substantially participate,” or was not “substantially involved,” did not have a “substantial role,” did not have “primary responsibility,” etc., in the former client’s matter, or when any confidential information that the lawyer might have obtained is deemed not material to the current representation (e.g., Mass.) or “is not likely to be significant” (e.g., Minn.) See Selected State Variations, below.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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</p>	<p>(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 <u>the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.</u></p>	<p>Paragraph (a) is nearly identical to the introduction to paragraph (a) and subparagraph (a)(1) of Model Rule 1.10. Because the Commission is not recommending a screening provision as is found in Model Rule 1.10(a)(2), there is no reason for a separate subparagraph (a)(1). The only other change is the substitution of "prohibited" for "disqualified" to reflect that this Rule is primarily intended as a rule of discipline.</p>
<p>(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or</p>	<p>(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or</p>	<p>See Explanation of Changes for paragraph (a).</p>
<p>(2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and</p>	<p>(2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and</p>	<p>In deference to the Board's decision not to adopt a counterpart to Model Rule 1.10, in part to permit the development of the law concerning ethical screens through court decisions, the Commission does not recommend adoption of Model Rule 1.10(a)(2) or its subparagraphs. These provisions, adopted by the ABA in February 2009, broadly permits screening of lawyers who move from one private firm to another.</p>

* Proposed Rule 1.10, Draft 7.1 (4/25/10). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;</p>	<p>(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;</p>	<p>See Explanation of Changes for paragraph (a)(2).</p>
<p>(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and</p>	<p>(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and</p>	<p>See Explanation of Changes for paragraph (a)(2).</p>
<p>(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.</p>	<p>(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.</p>	<p>See Explanation of Changes for paragraph (a)(2).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Commission’s Proposed Rule*</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(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</p>	<p>(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</p>	<p>Paragraph (b) is identical to Model Rule 1.10(b), which is consistent with California law. See <i>Goldberg v. Warner-Chappell</i> (2005) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116. See also <i>Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.</i>, 607 F.2d 186 (7th Cir. 1979).</p>
<p>(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and</p>	<p>(1) the matter is the same <u>as</u> or substantially related to that in which the formerly associated lawyer represented the client; and</p>	<p>Subparagraph (a)(1) is identical to Model Rule 1.10(a)(1), except for the addition of the word “as.” No change in meaning is intended.</p>
<p>(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.</p>	<p>(2) any lawyer remaining in the firm has information protected by <u>Business and Professions Code section 6068(e) and</u> Rules 1.6 and 1.9(c) that is material to the matter.</p>	<p>Subparagraph (a)(2) is nearly identical to Model Rule 1.10(a)(2), but a reference to B&P Code § 6068(e), which states a lawyer’s duty of confidentiality, has been added because the term “information protected by Business and Professions Code section 6068(e)” is a defined term in the Rules. See proposed Rule 1.0.1(e-2).</p>
<p>(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.</p>	<p>(c) A disqualification prescribed by <u>prohibition under</u> this rule <u>Rule</u> may be waived by the <u>each</u> affected client under the conditions stated in Rule 1.7.</p>	<p>Paragraph (c) is identical to Model Rule 1.10(c), except that the phrase “prohibition under” has been substituted for “disqualification prescribed by” because the Rule is intended as a disciplinary rule, not as a civil standard.</p> <p>The word “each” has been substituted for “the” to make clear that both affected clients of the firm must waive any prohibitions under the Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.</p>	<p>(d) The disqualification<u>imputation of a conflict of interest to</u> lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.</p>	<p>Paragraph (d) is identical to Model Rule 1.10(d), except that the phrase “imputation of a conflict of interest to” has been substituted for “disqualification of” because the Rule is intended as a disciplinary rule, not as a civil standard.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Commission’s Proposed Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Definition of “Firm”</p> <p>[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] – [4].</p>	<p>Definition of “Firm”</p> <p>[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within<u>for purposes of this definition</u>Rule can depend on the specific facts. See Rule 4-0<u>1.0.1(c)</u>, Comments [2] - [4].</p>	<p>Comment [1] is based on Model Rule 1.10, cmt. [1]. The deleted language is redundant because it already appears in the global definition of “‘firm’ or ‘law firm’,” which the Commission intends to include in the global definition section.</p> <p>The phrase “for purposes of this Rule” has been substituted for “within this definition” for clarity, the predicate for this sentence – the definition of law firm in the first sentence – having been deleted.</p> <p><u>Minority.</u> A minority of the Commission believes there is insufficient reason for proposed Comment [1] to diverge from the Model Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Principles of Imputed Disqualification</p> <p>[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).</p>	<p>Principles of Imputed Disqualification Conflicts of Interest</p> <p>[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle <u>duties</u> of loyalty <u>and confidentiality owed</u> to the client as it applies <u>they apply</u> 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 <u>the duties of</u> loyalty <u>and confidentiality owed</u> to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty <u>and confidentiality</u> owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).</p>	<p>The heading has been changed to reflect that the Rule is intended as a disciplinary rule, not as a rule creating a civil standard of disqualification.</p> <p>Comment [2] is based on Model Rule 1.10, cmt. [2], except that the concept of the duty of confidentiality has been added because of that duty's importance as an underlying rationale for an imputation rule.</p>
<p>[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 disqualified. On the other hand, if an opposing party in a case</p>	<p>[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 disqualified <u>prohibited from further representation</u>.</p>	<p>Comment [3] is based on Model Rule 1.10, cmt. [3], but "prohibited from further representation" and "prohibition" have been substituted for variants of "disqualified" to reflect that this Rule is intended primarily as a rule of discipline.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest:</p> <p align="center">General Rule</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest:</p> <p align="center">General Rule</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.</p>	<p>On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification<u>prohibition</u> of the lawyer would be imputed to all others in the firm.</p>	
<p>[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.</p>	<p>[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 <u>by others in the law firm</u> if the lawyer is prohibited from acting because of events <u>that occurred</u> before the person became a lawyer, for example, work that the person did while a law student. Such persons<u>In both situations</u>, however, ordinarily<u>such persons</u> 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 4-0<u>1.0.1</u>(k) and 5.3. <u>See also Comment [9].</u></p>	<p>Comment [4] is based on Model Rule 1.10, cmt. [4]. Language has been added to the second sentence for clarity.</p> <p><u>Minority.</u> A minority of the Commission believes that the second sentence misstates California law, at least where the lawyer acted in a fiduciary capacity in the previous employment.</p> <p>The substitution of “in both situations” for “such persons” is intended to clarify that screening should be implemented in the event of either situation described in the first two sentences.</p> <p>The word “ordinarily” has been deleted because it is unclear under what circumstances such a person who was substantially involved in the matter on the other side should be permitted to participate in the matter.</p> <p>The reference to Rule 1.0.1 is to the number the Commission has assigned to the proposed terminology section.</p> <p>The reference to Comment [9] has been included to direct lawyers to that Comment, which addresses the relation of this Rule to disqualification motions.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).</p>	<p>[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present<u>current</u> 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).</p>	<p>Comment [5] is identical to Model Rule 1.10, cmt. [5], except that the word “current” is substituted for “present” to conform to the usage throughout the Rules, and a citation to B&P Code § 6068(e) has been added. See Explanation of Changes for subparagraph (b)(2).</p>
<p>[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).</p>	<p>[6] Rule 1.10(c) removes imputation with the informed consent of the<u>each</u> 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) <u>and Comments [14A] to [17A]</u>, and that each affected client or former client has given informed <u>written</u> consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 4-0<u>1.0.1</u>(e).</p>	<p>Comment [6] is based on Model Rule 1.10, cmt. [6]. The changes to the Model Rule comment either reflect (i) the revisions the Commission has made in the black letter of this Rule (i.e., “each” for “the” in paragraph (c), and requiring “informed written consent” instead of the Model Rule’s “informed consent, confirmed in writing”); or (ii) the changes the Commission has recommended for the basic conflicts rules, proposed Rule 1.7.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.</p>	<p>[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.</p>	<p>Comments [7] through [10] of Model Rule 1.10 all relate to Model Rule 1.10(a)(2), which broadly permits screening and which the Commission has recommended not be adopted. See Explanation of Changes for paragraph (a)(2).</p>
<p>[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p>	<p>[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p>	<p>See Explanation of Changes for Comment [7].</p>
<p>[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to</p>	<p>[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to</p>	<p>See Explanation of Changes for Comment [7].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>evaluate and comment upon the effectiveness of the screening procedures.</p>	<p>evaluate and comment upon the effectiveness of the screening procedures.</p>	
<p>[10]The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.</p>	<p>[10]The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.</p>	<p>See Explanation of Changes for Comment [7].</p>
<p>[11]Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.</p>	<p>[11] Where a lawyer has joined a private firm <u>or a government agency</u> after having represented the government <u>or another government agency</u>, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where<u>Where</u> a lawyer represents the<u>has become employed by a</u> government <u>agency</u> after having served clients in private practice, <u>or other</u> nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer <u>imputation is governed by Rule 1.11(e).</u></p>	<p>Comment [11] is based on Model Rule 1.10, cmt. [11], but has been revised to track the recommended changes to proposed Rule 1.11, which diverges substantially from Model Rule 1.11, the subject of this Comment.</p>
<p>[12]Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated</p>	<p>[12] Where a lawyer is prohibited from engaging in certain transactions under <u>Rules 1.8.1 through Rule 1.8.9</u>, paragraph (k) of that <u>Rule 1.8.11</u>, and not this Rule, determines whether that prohibition</p>	<p>Comment [12] is based on Model Rule 1.10, cmt. [12]. Any changes to the comment merely reflect the rule numbering convention the Commission has adopted for the 1.8 series of rules.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.10 Imputation Of Conflicts Of Interest: General Rule Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>in a firm with the personally prohibited lawyer.</p>	<p>also applies to other lawyers associated in a firm with the personally prohibited lawyer.</p>	
	<p><u>Rule Not Determinative of Disqualification Motions</u></p> <p><u>[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 Charlisse C. (2008) 45 Cal.4th 145; Rhaburn v. Superior Court (2006) 140 Cal.App.4th 1566.</u></p>	<p>Comment [13] has no counterpart in the Model Rules. It 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. Citations to relevant California authority have been added.</p>
	<p><u>[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.</u></p>	<p>Comment [10] has no counterpart in the Model Rules. It has been added to effectuate the Board's intent that the law of screening be developed through court decisions. The Comment is intended to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because this Rule does not expressly provide for screening.</p>

Rule 1.10: Imputation Of Conflicts Of Interest: General Rule

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

- (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 ~~having a material adverse effect~~ 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 ~~have a material adverse effect on~~ 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 ~~the fact of that lawyer's ownership would have a material adverse effect on the representation of the firm's client by~~ 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 ~~[2714A] -to [2817A],}~~ 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 ~~[3322]~~. 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. ~~Under Rule 1.11(d), where~~ Where a lawyer ~~represents the~~ has become employed by a government agency after having served clients in private practice, or other nongovernmental employment ~~or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually prohibited lawyer~~ 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 ~~{1.8.12}~~ 1.8.9, Rule ~~{1.8.13}~~ 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] ~~Nothing in this~~ This Rule ~~shall be construed as limiting~~ does not limit or ~~altering~~ 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) ~~and~~; Penal Code section 1424; *In re Charlisse C.* (2008) 45 Cal.4th 145; *Rhaburn 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.

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 Charlissee C.* (2008) 45 Cal.4th 145; *Rhburn 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.

Rule 1.10 Imputation of Conflicts: General Rule. [Sorted by Commenter]						TOTAL = 8 Agree = 1 Disagree = 4 Modify = 2 NI = 1
No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	California Public Defenders Association ("CPDA"); Sheela, Bart	M		1.10(b)(2)	Comments [5] and [6] to proposed Rule 1.9 are contrary to California law in failing to recognize that imputed conflicts of interest must be analyzed differently between criminal and civil cases, especially when clients are represented by public defenders or other indigent defense counsel. Compare <i>Rhaburn v. Superior Court</i> (2006) 140 Cal.App.4 th 1566, 1575. Because proposed Rule 1.10, cmt. [5] incorporates Rule 1.9 and Rule 1.10(b)(1) applies the same disqualification rules when the former client was represented by a lawyer who is no longer with the firm, Rule 1.10(b)(2) and Comment [5] need to be revised accordingly.	As explained in the commenter chart accompanying Rule 1.9, the Commission believes that Comments [5] and [6] to proposed Rule 1.9 are consistent with California law, and it therefore did not make the requested Rule 1.9 change. Because the CPDA observation about Rule 1.10 involves the cross-reference to Rule 1.9, and because there is no change to Rule 1.9, the Commission has made no change to the Rule 1.9 reference. The Commission, however, has concluded that a cross-reference to <i>Rhaburn</i> in the Comment to Rule 1.10 is warranted and has made that change. See Comment [13].
2	COPRAC	D			A majority of COPRAC members believes that California should not adopt a rule requiring imputation of conflicts of interest. The predominant view is that this issue is adequately addressed by case law in California and should not be the subject of discipline. Assuming that an imputation rule is adopted, a slight majority of COPRAC members favor significantly broader screening for private	The Commission disagrees that a rule concerning imputation of conflicts should not be adopted. The principles concerning imputation that are currently found in California case law are not readily accessible. Moreover, every jurisdiction has adopted a version of Model Rule 1.10. Inclusion of Rule 1.10 will enhance compliance with the law. The Commission disagrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is appropriate in California, which

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

RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - DFT5.1 (05-13-10)RD-KEM-LM.doc

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

TOTAL = 8
Agree = 1
Disagree = 4
Modify = 2
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					lawyers. These COPRAC members favor a screening regimen similar to that set forth in current ABA Model Rule 1.10. There is a significant difference of opinion, however, and no consensus among COPRAC members, regarding whether certain specific provisions from the ABA Model Rule should be included, particularly the specific notification and certification requirements.	has strong policies concerning client loyalty and confidentiality. The proposed rule reflects the Board of Governor's view that non-consensual screening, as a policy, is unsettled and should be developed in case law rather than a rule.
3	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	D			The Committee believes that Proposed Rule 1.10 concerns itself primarily with issues of disqualification of attorneys in court proceedings. PREC believes that issues relating to disqualification of attorneys in court proceedings is within the jurisdiction of the courts, and is not a proper matter to be included in rules of ethics that are intended to establish rules for the imposition of attorney discipline. Accordingly, PREC recommends that Rule 1.10 not be adopted.	The Commission disagrees that a rule concerning imputation of conflicts should not be adopted. Proposed Rule 1.10(a) expresses a fundamental duty of professional responsibility and is not simply a disqualification rule. Further, the principles concerning imputation that are currently found in California case law are not readily accessible. Moreover, every jurisdiction has adopted a version of Model Rule 1.10. This Rule would make a significant change in the California Rules. However, the Commission has concluded that this change is warranted, and that there are situations in which a lawyer could be disciplined for knowingly undertaking a representation based on a conflict that emanates from another firm lawyer. Also, the inclusion of Rule 1.10(a) will further lawyer compliance and enhance client trust in lawyers and the legal system.

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

TOTAL = 8
Agree = 1
Disagree = 4
Modify = 2
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Office of Chief Trial Counsel ("OCTC"), State Bar of California	NI		1.10(b)	<p>1. Paragraph (b) leaves out a reference to § 6068(e).</p> <p>Cmt. [1] In addition, there is no guidance on what constitutes a law firm for purposes of the Rule. Comment [1] simply states that whether two lawyers constitute a law firm "can depend on the specific facts."</p> <p>Cmt.[3] 2. OCTC is unsure of Comment [3]'s purpose and recommends striking or clarifying it.</p> <p>Cmt. [4] It is not clear why Comment [4], which addresses non-lawyer personnel, is included. The Rules do not regulate such persons.</p>	<p>The Commission has added a reference to section 6068(e).</p> <p>The Commission did not make a change. Comment [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.</p> <p>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.</p> <p>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."</p>

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

TOTAL = 8
Agree = 1
Disagree = 4
Modify = 2
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [9]	Comment [9] is confusing to OCTC and should be clarified or stricken.	The Commission has not made the requested change to Comment [9] (now Comment [13]). As noted in the 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.
5	Orange County Bar Association	D			<p>The OCBA is opposed to any formal requirement for informed written consent from clients to implement an ethical screen to avoid disqualification.</p> <p>The OCBA favors a rule that allows non-consensual screening to avoid disqualification conflicts. The concerns over client confidentiality can be satisfied by adoption of the elements of permissive screening, which are stated in ABA Model Rule 1.10(a)(2) and its subparagraphs.</p>	The Commission disagrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is appropriate in California, which has strong policies concerning client loyalty and confidentiality. The proposed rule reflects the Board of Governor’s view that non-consensual screening, as a policy, is unsettled and should be developed in case law rather than a rule.
6	Sall, Robert K.	A			<p>The commenter is opposed to allowing non-consensual screening of any kind for conflicted lawyers to avoid conflicts.</p> <p>The Commenter strongly supports the Commission’s decision to reject the</p>	The Commission agrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is inappropriate in California, which has strong policies concerning client loyalty and confidentiality. The proposed rule reflects the Board of Governor’s view that non-consensual screening,

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

TOTAL = 8
Agree = 1
Disagree = 4
Modify = 2
NI = 1

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					controversial non-consensual screening provisions of Model Rule 1.10(a)(2).	as a policy, is unsettled and should be developed in case law rather than a rule.
7	San Diego County Bar Association Legal Ethics Committee	M			The Commission has rejected the broad screening provisions adopted by the ABA in February 2009. We think the ABA is right and the Commission. Even with screening, lawyers remain bound by agency rules and disciplinary rules forbidding improper use or disclosure of confidential information.	The Commission disagrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is appropriate in California, which has strong policies concerning client loyalty and confidentiality. The proposed rule reflects the Board of Governor's view that non-consensual screening, as a policy, is unsettled and should be developed in case law rather than a rule.
8	Santa Clara County Bar Association	D			The SCCBA recommends that the February 2009 amended version of ABA Model Rule 1.10 be adopted. The amended version adds provisions allowing for the limited screening of attorneys moving from one firm to another. The amendments set out the specifics of such screening.	The Commission disagrees that the broad non-consensual screening regimen permitted in Model Rule 1.10(a)(2) is appropriate in California, which has strong policies concerning client loyalty and confidentiality. The proposed rule reflects the Board of Governor's view that non-consensual screening, as a policy, is unsettled and should be developed in case law rather than a rule.

Rule 1.10: Imputation of Conflicts of Interest: General Rule

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona: Rule 1.10(d) permits screening of a personally disqualified lateral lawyer if the “matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role,” the lawyer gets no part of the fee, and “written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.”

California has no provision comparable to ABA Model Rule 1.10.

District of Columbia adds Rule 1.10(a)(2), which notes that imputation does not apply “if the representation is permitted by Rules 1.11, 1.12, or 1.18.” The D.C. rule also contains a Rule 1.10(e) that creates a partial exception to imputation when a lawyer assists “the Office of the Attorney General of the District of Columbia in providing legal services to that agency.”

Illinois: In the rules effective January 1, 2010, the screening provision in Rule 1.10 is substantially similar to the Model Rule, except that Illinois has not adopted the additional requirements contained in Model Rule 1.10(a)(2)(ii) and (iii).

Massachusetts: Rule 1.10(d) provides for screening a “personally disqualified lawyer” if he or she “had neither substantial involvement nor substantial material information relating to the matter . . . and is apportioned no part of the fee therefrom.” Rule 1.10(e) describes an appropriate screening process, including a requirement in Rule 1.10(e)(4) that the former client receives an affidavit of the personally disqualified lawyer and the firm describing the screening procedures and attesting that:

(i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm; (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer’s personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. . . .

In any matter not before a tribunal, “the firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.”

Michigan: The screening provision in Rule 1.10(b) is substantially similar to the Model Rule, except that Michigan has fewer disclosure requirements than Model Rule 1.10(a)(2)(ii) and omits all of the requirements contained in Model Rule 1.10(a)(2)(iii).

Minnesota includes the following screening provision in its version of Rule 1.10. It is based largely on §124 of the Restatement of the Law Governing Lawyers:

(b) When a lawyer becomes associated with a firm, and the lawyer is prohibited from representing a client pursuant to Rule 1.9(b), other lawyers in the firm may represent that client if there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because:

(1) any confidential information communicated to the lawyer is unlikely to be significant in the subsequent matter;

(2) the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent

involvement by that lawyer in the representation; and

(3) timely and adequate notice of the screening has been provided to all affected clients.

Nebraska adds Rules 1.9(d)-(f) to govern conflicts arising from the past work of law clerks, paralegals, secretaries, messengers, and any other “support person,” but Rule 1.9(e) does not impute support person conflicts to other lawyers at the firm if the former client consents or if the conflicted support person is screened to protect the former client’s confidential information.

New Jersey adds Rule 1.10(c), which permits screening of a conflicted lawyer who becomes associated with a firm unless that lawyer had “primary responsibility” for the matter. Rule 1.10(f) provides as follows:

Any law firm that enters a screening arrangement, as provided by this Rule, shall establish appropriate written procedures to insure that: (1) all attorneys and other personnel in the law firm screen the personally disqualified attorney from any participation in the matter, (2) the screened attorney acknowledges the obligation to remain screened and takes action to insure the same, and (3) the screened attorney is apportioned no part of the fee therefrom.

Pursuant to Rule 1.7, public entities may not waive conflicts or agree to screening. And New Jersey Rule 1.9(c)

reinforces Rule 1.10(c) by providing that “neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.”

New York: In the rules effective April 1, 2009, Rule 1.10(c), which is simply the logical extension of Rule 1.9(b), specifies that a newly hired attorney does not create an imputed conflict of interest as long as that attorney had not acquired “any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.” In effect, then, the New York rules do not permit non-consensual screening of lateral lawyers from private practice (i.e., screening to avoid imputation without need for consent from the lateral lawyer’s former client). The former New York Code did not do so either, but the New York Court of Appeals, in *Kassis v. TIAA*, 717 N.E.2d 674 (N.Y. 1999), ruled that screening would be allowed if the lateral lawyer’s information with regard to the matter is “unlikely to be significant or material.” It remains to be seen whether the new rules were intended to “overrule” *Kassis* and whether, if they were, they can.

New York adds Rule 1.10(e)-(g), which contains detailed recordkeeping requirements for new engagements. These additional requirements are described in more depth in Comments 9 and 9A-9G.

Finally, New York adds Rule 1.10(h), which provides as follows: “A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full

disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.”

North Carolina: The screening provision in Rule 1.10(c) is substantially similar to the Model Rule, except that North Carolina omits the requirements contained in Model Rule 1.10(a)(2)(iii) and has fewer disclosure requirements than Model Rule 1.10(a)(2)(ii).

Ohio: Rule 1.10 permits screening of a lateral lawyer, but only if the lawyer did not have a “substantial role” in the matter.

Oregon has a screening procedure in Rule 1.10(c) that requires lawyers to submit affidavits confirming compliance with the screen.

Pennsylvania: The screening provision in Rule 1.10(b) is substantially similar to the Model Rule, except that Pennsylvania omits the requirements contained in Model Rule 1.10(a)(2)(iii) and has fewer disclosure requirements than Model Rule 1.10(a)(2)(ii).

South Carolina: Rule 1.10 tracks ABA Model Rule 1.10 verbatim but adds the following limited screening provision in Rule 1.10(e):

(e) A lawyer representing a client of a public defender office, legal services association, or similar program serving indigent clients shall not be disqualified under this Rule because of the program’s representation of another client in the same or a substantially related matter if:

(1) the lawyer is screened in a timely manner from access to confidential information relating to and from any participation in the representation of the other client; and

(2) the lawyer retains authority over the objectives of the representation pursuant to Rule 5.4(c).

Tennessee: Rule 1.10 includes the following screening provisions:

(c) Except with respect to paragraph (d) below, if a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may nonetheless represent the person if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:

(1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by Rule 1.9(c); and

(3) promptly implement screening procedures to effectively prevent the flow of information about

the matter between the personally disqualified lawyer and the other lawyers in the firm; and

(4) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

(d) The procedures set forth in paragraph (c) may not be used to avoid imputed disqualification of the firm, if

(1) the disqualified lawyer was substantially involved in the representation of a former client; and

(2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and

(3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.

Texas: Rule 1.09 provides:

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10 [concerning government lawyers], when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

Wisconsin: Rule 1.10(a)(2) permits law firms to avoid imputation of a lateral lawyer's Rule 1.9 conflict if "(i) the personally disqualified lawyer performed no more than minor and isolated services in the disqualifying representation and did so only at a firm with which the lawyer is no longer associated"; (ii) the personally disqualified lawyer is timely

screened and is apportioned no part of the fee from the matter; and (iii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with this rule.