

McCurdy, Lauren

RE: Rule 1.10 [3-310]
2/26&27/10 Commission Meeting
Open Session Agenda Item V.D.

From: Kevin Mohr [kemohr@charter.net]
Sent: Thursday, February 11, 2010 7:17 AM
To: Mark Tuft; JoElla L. Julien; Robert L. Kehr; Paul Vapnek
Cc: Harry Sondheim; Stan Lamport; Dominique Snyder; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G
Subject: Re: RRC - 1.10 [3-310] - V.D. - Rule, ALT2, Draft 6.1 (2/11/10)
Attachments: RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - DFT3 (02-10-10).doc; RRC - 3-310 [1-10] - Rule - ALT2 - DFT6.1 (02-11-10) - Cf. to DFT5.doc

Greetings again:

I note that in revising ALT2 of proposed Rule 1.10, I did not make changes in paragraph (a)(1) and Comment [3] to pick up the changed language in proposed Rule 1.7 ("materially limiting" vs. "having a material adverse effect on"). The attached draft 6.1 (2/11/10) includes those changes. For ease of reference, I've highlighted the further changes to the attached draft.

I've also attached a revised Public Comment Chart, Draft 3 (2/10/10), that incorporates the changes to the RRC Responses that were approved at the January 2010 meeting. Again, the changes to the previous draft of the chart [Draft 2.1 (1/7/10)] are highlighted in yellow.

I realize you likely will not have time to review and comment on the attached before the submission dead of 11 a.m. today. Again, my apologies for our delay in getting this to you.

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

Kevin

Kevin Mohr wrote:

Greetings Drafters and other who have expressed an interest in this Rule:

I've attached Rule 1.10, ALT2, Draft 6 (2/10/10), redline, compared to Draft 5 (12/30/09), the draft considered at the 1/22-23/10 meeting. In Word.

Mark and I discussed this Rule this afternoon. Our apologies for being late circulating this but there are only so many hours in the day. At any rate, I wasn't able to get to this until this evening and have made an attempt to craft language that implements the RRC's 9-0-2 vote to have "the drafting team consider additional provisions in the subpart (paragraph (a)) to ensure that the law firm has the burden and the client is not financially disadvantaged by challenging the screen."

The three concepts Mark and I decided to include in the rule were the following:

1. At the initial implementation of the screen, the client should have the right, at the law firm's expense, to retain independent counsel to assess the effectiveness of the screen (compliance with the Rule). See revision to paragraph (a)(2)(iii).

2. In the event the client successfully challenges the screen, the law firm must pay the client's fees and costs.
3. The fact that the law firm is responsible for the expenses described in 1 and 2 should not be viewed as the client's exclusive remedy; the client should still be able to pursue any claims or remedies available by law.

The language I've used in the attached is based on the foregoing concepts. Mark and I roughed out some language over the phone and I tried to flesh it out. The language in the attached still has a ways to go.

Finally, neither Mark nor I have decided whether we support the revised provisions.

If you can give us any comments by tomorrow morning at 11, that would be great. However, Lauren needs to send out the agenda package by noon tomorrow and we'd like this Rule to part of the hard copy.

As usual, please let me know if you have any questions. In the mean time, I'll update the Public Comment chart but will hold off on the Dashboard, Introduction and Rule & Comment Comparison Chart until after the meeting.

Thanks,

Kevin

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Rule 1.10 Imputation Of Conflicts Of Interest: General Rule¹

- (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
- (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of **having a materially adverse effect limiting²** ~~on~~ the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the prohibited lawyer's association with a prior firm, and
 - (i) the prohibited lawyer did not substantially participate in the prior representation;
 - (ii) the prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (iii) 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 notice shall include a description of the screening procedures employed; a statement of the law firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; an agreement that the client has the right, at the law firm's expense, to retain an independent lawyer of the client's choice to review and assess the screening procedures that have been implemented, that the client will be given a reasonable opportunity to retain the independent lawyer and the independent lawyer will be given reasonable access to complete the review and assessment;³ and an agreement by the firm to respond

¹ **RRC Action:** At the 1/22-23/10 meeting, the RRC voted 6-4-1 to recommend adoption of Rule 1.10, version ALT2 (limited screening), without prejudice to making further amendments. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 8. See also footnote 3 and accompanying text.

² **Drafters' Note:** Substitution of "material limitation" for "material adverse effect" to conform to the corresponding change in proposed Rule 1.7, subject to further consideration of that Rule at the February 2010 meeting.

³ This provision has been added to address concerns raised about whether the lawyer or client should have the burden of demonstrating the effectiveness of the screen and which would be liable for the cost of reviewing the screen. At the 1/22-23/10 meeting, the RRC voted 9-0-2 to have Drafting team consider additional provisions in the subpart (paragraph (a)) to ensure that the law firm has the burden and the client is not financially disadvantaged by challenging the screen. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 8A.

RRC – Rule 1.10 [3-310]
Rule – ALT2 – Draft 6.1 (2/10/10) – COMPARED TO DFT5 (12/30/09)
February 26-27, 2010 Meeting; Agenda Item V.D.

promptly to any written inquiries or objections by the former client about the screening procedures; ~~and~~

(iv) 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; and

(v) the law firm shall pay the client's reasonable attorney fees and costs if the client successfully challenges before a tribunal the effectiveness of the screen or the accuracy of a certification of compliance. The remedy provided by this paragraph (a)(2)(v) is not exclusive and does not affect any other rights or remedies to which the client might be entitled under the law for a violation of this Rule.⁴

(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 Rule 1.6, Business and Professions Code section 60608(e), and Rule 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

⁴ This provision has been added as an adjunct to the revisions to paragraph (a)(2)(iii). In an effort to avoid frivolous motions, subparagraph (v) provides that the firm must reimburse the client for the costs of a disqualification motion only if the client prevails. The client, on the other hand, would not be subject to being assessed cost and fees if the law firm prevails. The second sentence has been added to make clear that this provision is not intended to create an exclusive remedy for a violation of the Rule. The client should still be entitled to whatever rights and remedies are available to it by law.

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)(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).

[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 materially adverse effect~~^{limit⁵} on 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

⁵ See footnote 2. Other changes made to the Comment to restore the Model Rule language.

RRC – Rule 1.10 [3-310]
Rule – ALT2 – Draft 6.1 (2/10/10) – COMPARED TO DFT5 (12/30/09)
February 26-27, 2010 Meeting; Agenda Item V.D.

lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c), and Business and Professions Code section 6068(e).

[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, [Comments [27] – [28],] 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 [33]. For a definition of informed consent, see Rule [1.0.1(e)].

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike paragraph (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in subparagraphs (a)(2)(ii)-(iv) be followed. However, the screening procedures afforded under subparagraphs (a)(2)(ii)-(iv) are available only in situations where the prohibition has arisen out of the prohibited lawyer's association with a prior law firm. Thus, a screen would not be available to rebut the presumption of shared confidences within a law firm if the prohibition arises from the law firm's representation of the former client. In addition, the screening procedures are available only if the prohibited lawyer did not substantially participate in the prior representation. Whether a lawyer has substantially participated in the prior representation will depend upon the specific facts. Substantial participation is not necessarily limited to a lawyer's participation in the management and direction of the matter at the policy-making level, but may also mean responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions. 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. ~~See *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, with respect to disqualification motions involving public defenders and other offices that provide legal services to indigent criminal defendants.~~ See Comment [13].⁶

[8] Paragraph (a)(2)(ii) 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 prohibited.

[9] The notice required by paragraph (a)(2)(iii) generally should include a description of the

⁶ Consultant's Note: In the previous draft of ALT2, the drafters recommended that the citation to Rhaburn be placed in Comment [7]. However, at the 1/22-23/10 meeting, the RRC voted to place the cross-reference in Comment [9] of ALT1; Comment [9] of ALT1 was the verbatim counterpart to Comment [13] to ALT2. Because the last sentence of Comment [7] covers the same territory as Comment [13], I've added this internal cross-reference to Comment [13], which the Commission approved at its 1/22-23/10 meeting. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 2B.

RRC – Rule 1.10 [3-310]
Rule – ALT2 – Draft 6.1 (2/10/10) – COMPARED TO DFT5 (12/30/09)
February 26-27, 2010 Meeting; Agenda Item V.D.

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 evaluate and comment upon the effectiveness of the screening procedures. Paragraph (a)(2)(iii) also requires the law firm to agree to pay the expense for the retention, at the client's option, of an independent lawyer to review and assess the procedures that have been implemented in order to ascertain the effectiveness of the screen and the law firm's compliance with this Rule. The agreement also requires that the law firm provide the independent lawyer with reasonable access to law firm personnel to assess the screen's effectiveness.⁷

[9A] Paragraph (a)(2)(v) provides that in the event the client successfully challenges before a tribunal the law firm's implementation of a screen or accuracy of the firm's certification of compliance, the law firm will be liable for the client's costs and attorney fees of the challenge. This remedy is not limited to a disqualification motion in litigation between the law firm's client and the former client. Paragraph (a)(2)(v) would also be applicable if the client were to seek injunctive or declaratory relief in an independent action to remove the law firm from representing adverse interests in a transactional matter. The law firm, on the other hand, would not be entitled to its attorney fees or costs if it prevails. In addition, paragraph (a)(2)(v) does not preclude the former client from pursuing any other right or remedy to which it is entitled by law.

[10] The certifications required by paragraph (a)(2)(iv) are intended to 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.

[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 prohibited lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rules [1.8.1] through Rule [1.8.12], Rule [1.8.13], and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[13] This Rule ~~is not intended to~~does not⁸ limit or alter the power of a court of this State

⁷ The last two sentences have of Comment [9] have been added to clarify the scope of the law firm's responsibility to provide the client with an opportunity to retain and independent lawyer and provide the lawyer with access to evaluate the effectiveness of the screen.

⁸ RRC Action: Revision of Comment [13] to substitute "does not" for "is not intended to" was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 5.a.

RRC – Rule 1.10 [3-310]
Rule – ALT2 – Draft 6.1 (2/10/10) – COMPARED TO DFT5 (12/30/09)
February 26-27, 2010 Meeting; Agenda Item V.D.

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](#).⁹

⁹ [RRC Action: At the 1/22-23/10 meeting, revising Comment \[13\] as indicated to include citations to In re Charlisse and Rhaburn, but without a description as in the previous draft, was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 2B.](#)

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

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
8	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.
3	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 lawyers. These COPRAC members favor a	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 has strong policies concerning client loyalty and

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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.	confidentiality. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(2).
6	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.
7	Office of Chief Trial Counsel ("OCTC"), State Bar of California			1.10(b)	1. Paragraph (b) leaves out a reference to § 6068(e). In addition, there is no guidance on what	The Commission has added a reference to section 6068(e). The Commission did not make a change. Comment

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

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [1]	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.”	[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.
				Cmt.[3]	2. OCTC is unsure of Comment [3]’s purpose and recommends striking or clarifying it.	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.
				Cmt. [4]	It is not clear why Comment [4], which addresses non-lawyer personnel, is included. The Rules do not regulate such persons.	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.”
				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

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

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						that the Rule, which in effect has codified the court-created doctrine of imputation, is not intended to override a court's inherent authority to monitor and control the conduct of persons before it." Nevertheless, the Commission has made some clarifying changes to the Comment and added references to California case law.
2	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. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(2).
1	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 controversial non-consensual screening provisions of Model Rule 1.10(a)(2).</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. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(1).

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

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	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. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(2).
5	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. However, the Commission has concluded that a provision permitting non-consensual screening in limited situations in the private law firm context, is appropriate and has added subparagraph (a)(2).

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From: Kevin Mohr [kemohr@charter.net]
Sent: Thursday, February 11, 2010 12:47 PM
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Subject: Re: RRC - 3-310 1-10 - Rule - ALT2 - DFT6.2 (02-11-10) - Cf to DFT5.doc
Attachments: RRC - 3-310 [1-10] - Rule - ALT2 - DFT6.2 (02-11-10) - Cf to DFT5.doc

Lauren:

If it's not too late, would you please substitute Mark's revised draft 6.2 (2/11/10), attached, for the draft I sent you earlier this morning in the agenda package. Thanks,

Kevin

Mark Tuft wrote:

<<RRC - 3-310 1-10 - Rule - ALT2 - DFT6 1 (02-11-10) - Cf to DFT5.doc>>

I may made several editorial changes to Kevin's draft for your consideration.

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Rule 1.10 Imputation Of Conflicts Of Interest: General Rule¹

- (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
- (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of **having a materially adverse effect limiting²** ~~on~~ the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the prohibited lawyer's association with a prior firm, and
 - (i) the prohibited lawyer did not substantially participate in the prior representation;
 - (ii) the prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (iii) 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 notice shall include a description of the screening procedures employed; a statement of the law firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; an agreement that the client has the right, at the law firm's expense, to retain an independent lawyer of the client's choice to review and assess the screening procedures that have been implemented, that the client will be given a reasonable opportunity to retain the independent lawyer and the independent lawyer will be given reasonable access to information that is reasonably necessary to enable the independent lawyer to complete the review and assessment;³ and an agreement by the firm

¹ RRC Action: At the 1/22-23/10 meeting, the RRC voted 6-4-1 to recommend adoption of Rule 1.10, version ALT2 (limited screening), without prejudice to making further amendments. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 8. See also footnote 3 and accompanying text.

² Drafters' Note: Substitution of "material limitation" for "material adverse effect" to conform to the corresponding change in proposed Rule 1.7, subject to further consideration of that Rule at the February 2010 meeting.

³ This provision has been added to address concerns raised about whether the lawyer or client should have the burden of demonstrating the effectiveness of the screen and which would be liable for the cost of reviewing the screen. At the 1/22-23/10 meeting, the RRC voted 9-0-2 to have Drafting team consider additional provisions in the subpart (paragraph (a)) to ensure that the law firm has the burden and the client is not financially disadvantaged by challenging the screen. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 8A.

RRC – Rule 1.10 [3-310]
Rule – ALT2 – Draft 6.2 (2/11/10) – COMPARED TO DFT5 (12/30/09)
February 26-27, 2010 Meeting; Agenda Item V.D.

to respond promptly to any written inquiries or objections by the former client about the screening procedures; ~~and~~

(iv) 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; and

(v) the law firm shall pay the client's reasonable attorney fees and costs if the client successfully challenges before a tribunal the effectiveness of the screen or the accuracy of a certification of compliance. The remedy provided by this paragraph (a)(2)(v) is not exclusive and does not affect any other legal rights and ~~or remedies to which the client may have~~ ~~might be entitled~~ under the law for a violation of this Rule.⁴

(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 Rule 1.6, Business and Professions Code section 60608(e), and Rule 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

⁴ This provision has been added as an adjunct to the revisions to paragraph (a)(2)(iii). In an effort to avoid frivolous motions, subparagraph (v) provides that the firm must reimburse the client for the costs of a disqualification motion only if the client prevails. The client, on the other hand, would not be subject to being assessed cost and fees if the law firm prevails. The second sentence has been added to make clear that this provision is not intended to create an exclusive remedy for a violation of the Rule. The client should still be entitled to whatever rights and remedies are available to it by law.

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)(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).

[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 materially adverse effect~~^{limit⁵} on 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

⁵ See footnote 2. Other changes made to the Comment to restore the Model Rule language.

RRC – Rule 1.10 [3-310]
Rule – ALT2 – Draft 6.2 (2/11/10) – COMPARED TO DFT5 (12/30/09)
February 26-27, 2010 Meeting; Agenda Item V.D.

lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c), and Business and Professions Code section 6068(e).

[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, [Comments [27] – [28],] 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 [33]. For a definition of informed consent, see Rule [1.0.1(e)].

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike paragraph (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in subparagraphs (a)(2)(ii)-(iv) be followed. However, the screening procedures afforded under subparagraphs (a)(2)(ii)-(iv) are available only in situations where the prohibition has arisen out of the prohibited lawyer's association with a prior law firm. Thus, a screen would not be available to rebut the presumption of shared confidences within a law firm if the prohibition arises from the law firm's representation of the former client. In addition, the screening procedures are available only if the prohibited lawyer did not substantially participate in the prior representation. Whether a lawyer has substantially participated in the prior representation will depend upon the specific facts. Substantial participation is not necessarily limited to a lawyer's participation in the management and direction of the matter at the policy-making level, but may also mean responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions. 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. ~~See *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, with respect to disqualification motions involving public defenders and other offices that provide legal services to indigent criminal defendants.~~ See Comment [13].⁶

[8] Paragraph (a)(2)(ii) 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 prohibited.

[9] The notice required by paragraph (a)(2)(iii) generally should include a description of the

⁶ Consultant's Note: In the previous draft of ALT2, the drafters recommended that the citation to Rhaburn be placed in Comment [7]. However, at the 1/22-23/10 meeting, the RRC voted to place the cross-reference in Comment [9] of ALT1; Comment [9] of ALT1 was the verbatim counterpart to Comment [13] to ALT2. Because the last sentence of Comment [7] covers the same territory as Comment [13], I've added this internal cross-reference to Comment [13], which the Commission approved at its 1/22-23/10 meeting. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 2B.

RRC – Rule 1.10 [3-310]
Rule – ALT2 – Draft 6.2 (2/11/10) – COMPARED TO DFT5 (12/30/09)
February 26-27, 2010 Meeting; Agenda Item V.D.

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 evaluate and comment upon the effectiveness of the screening procedures. Paragraph (a)(2)(iii) also requires the law firm to agree to pay the expense for the retention, at the client's option, of an independent lawyer to review and assess the procedures that have been implemented in order to ascertain the effectiveness of the screen and the law firm's compliance with this Rule. The agreement also requires that the law firm provide the independent lawyer with reasonable access to information relating to the law firm's internal procedures and to law firm personnel to assess the screen's effectiveness.⁷

[9A] Paragraph (a)(2)(v) provides that in the event the client succeeds in challenging ~~successfully challenges~~ before a tribunal any of the provisions or procedures for implementing the ~~law firm's implementation of a~~ law firm's screen or the accuracy of the firm's certification of compliance, the law firm will be responsible ~~be liable~~ for the client's reasonable ~~costs and attorney fees and costs incurred in the proceeding. -of the challenge.~~ This remedy is not limited to a disqualification motion in litigation between the law firm's client and the former client but may also include other proceedings, such as an action for declaratory or injunctive relief. ~~Paragraph (a)(2)(v) would also be applicable if the client were to seek injunctive or declaratory relief in an independent action to remove the law firm from representing adverse interests in a transactional matter. The law firm~~ ~~The law firm, on the other hand,~~ would not be entitled to its attorney fees or costs under Paragraph (a)(2)(v) if Tribunal determines that the client is not entitled to any relief. ~~it prevails.~~ In addition, paragraph (a)(2)(v) does not preclude the ~~former~~ client from pursuing any other right or remedy to which the client ~~it~~ is entitled by law.

[10] The certifications required by paragraph (a)(2)(iv) are intended to 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.

[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 prohibited lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rules [1.8.1] through Rule [1.8.12], Rule [1.8.13], and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally

⁷ The last two sentences have of Comment [9] have been added to clarify the scope of the law firm's responsibility to provide the client with an opportunity to retain and independent lawyer and provide the lawyer with access to evaluate the effectiveness of the screen.

RRC – Rule 1.10 [3-310]
Rule – ALT2 – Draft 6.2 (2/11/10) – COMPARED TO DFT5 (12/30/09)
February 26-27, 2010 Meeting; Agenda Item V.D.

prohibited lawyer.

[13] This Rule ~~is not intended to~~does not⁸ 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); ~~and~~ Penal Code section 1424; *In re Charlisse C.* (2008) 45 Cal. 4th 145; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566.⁹

⁸ RRC Action: Revision of Comment [13] to substitute “does not” for “is not intended to” was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 5.a.

⁹ RRC Action: At the 1/22-23/10 meeting, revising Comment [13] as indicated to include citations to *In re Charlisse* and *Rhaburn*, but without a description as in the previous draft, was deemed approved. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 2B.