



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

RE: Proposed Rule 1.10
4/23/10 Commission Meeting
Open Session Agenda Item II.A.

COMMISSION FOR THE REVISION OF THE
RULES OF PROFESSIONAL CONDUCT

TELEPHONE: (415) 538-2161

DATE: April 21, 2010
TO: Members of the Commission
FROM: Randall Difuntorum, Staff Counsel
SUBJECT: Item II.A. Proposed Rule 1.10 (Imputation of Conflicts: General Rule) - Recommendation to Consider Addition of a New Comment [10]

At the Commission's March meeting, the Commission voted unanimously to re-submit to the Board a version of proposed Rule 1.10 that would not include a screening provision. In implementing the post-meeting edits, staff observed that the intent of this new version of Rule 1.10 could be clarified by the addition of a new comment alerting lawyers to the fact that they must rely on case law to determine to what extent, if any, the use of a timely screen could be used to rebut the imputation of a conflict. Attached is an email compilation that includes the messages exchanged among the Commission officers, the Commission Consultant, and staff concerning possible language to use in a new comment. Also attached is the current draft of the Commission's proposed Rule 1.10. Based on the emails exchanged, the Chair selected the following three alternatives for a possible new comment, Comment [10], and requests that the Commission consider which of these alternatives should be used to clarify the rule.

Rule 1.10, Comment [10] ALT1:

"[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding 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 under paragraph (a) or (b) in a civil litigation or transactional context is a matter of case law."

(ALT1 is taken from Mark Tuft's email message dated April 19, 2010, see page 13 of the email compilation.)

Rule 1.10, Comment [10] ALT2:

"[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and, in determining whether the implementation of a screen will avoid the imputation of a conflict of interest under paragraph (a) or (b) in a litigation or transactional context, lawyers must rely upon the development of case law. See, e.g., *Kirk v. First American Title* (2010) __ Cal.App.4th __."

(ALT2 is taken from Paul Vapnek's email message dated April 19, 2010, see pages 12 – 13 of the email compilation.)

Rule 1.10, Comment [10] ALT3:

"[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and, whether timely implementation of a screen will avoid discipline under paragraph (a) or (b) when the issues arise out of litigation or a transactional context, is a matter of case law."

(ALT3 is taken from Harry Sondheim's email message dated April 20, 2010, see page 13 of the email compilation.)

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E-mails re Proposed Comment [10] – Revised (4/19/10)
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April 14, 2010 Difuntorum E-mail to KEM, cc Chair, Vice-Chairs & Staff:

Attached please find:

1. A clean version of proposed Rule 1.10 ALT1 Draft 5 (12/30/09). I could not find a clean version so I used your Draft 5 redline to Draft 4 to generate this clean version. Please let me know if it is accurate.
2. A new redline version temporarily named Rule 1.10 ALT1 Draft 5.1 (04/12/10) – NonScreening Revisions-RD.doc. Using the clean version described above, this new version implements the non-screening revisions listed in your 4/2/10 email message pasted below. (Please feel free to rename this new draft in accordance with whatever convention, if any, that we've used for a rule re-submitted after RAC consideration.) If this new draft is accurate, then my understanding is that this is the version that was effectively approved by the unanimous vote at the March meeting in favor of re-submitting to RAC a Commission version of Rule 1.10 that does not include the concept of screening. My one observation is that there is no "punt language" regarding the concept of screening. If such language is desirable, then I would suggest something along the lines of the following as a new Comment [10]:

"[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and lawyers must rely on case law. See *Kirk v. First American Title* (2010) __ Cal.App.4th __."

In listening to the audio recording of the March meeting, the various discussions did not appear to expressly accept or reject the concept of "punt language" in rules that omit screening. However, my understanding is that the unanimous position of the Commission is that its non-screening version of Rule 1.10 is not intended to be a vehicle for a definitive rejection of screening by the State Bar or the Supreme Court.

The Commission's proposed Rule 1.10, itself, could be silent on this point and the "legislative history" could record the open nature of the screening issue but given the many years we have all lived with the missing RPC 3-310(C)(4) that was documented in Enclosure 5 to the 1991 rule filing, I would not be confident that "legislative history" would be adequate for lawyers or the courts. Regardless of whether "punt language" is added to Rule 1.10, I think we do need to anticipate Board member questions about the Commission's intent as to the rule's silence on screening.

Attached:

RRC - 3-310 [1-10] - Rule - ALT1 - DFT6 (04-12-10)RD - Cf. to DFT5.doc

RRC - 3-310 [1-10] - Rule - ALT1 - DFT6 (04-12-10)RD - CLEAN.doc

April 15, 2010 KEM E-mail to Difuntorum, cc Chair, Vice-Chairs & Staff:

I've attached the Rule, ALT1, Draft 6.1 (4/15/10), redline, compared to Draft 6 (4/12/10)RD, the draft you sent me yesterday. I denominated your draft as "6" to track the numbering of ALT2.

I've also attached a clean, annotated version of Draft 6.1.

Notes & Comments:

1. Most of the changes I've made were to capture Commission decisions concerning proposed Rules 1.6, 1.7, 1.11 and the 1.8 series of rules that had been made after I revised Draft 5 on 12/30/09.
2. Many of these I would characterize as "nits" and they include the following:
 - a. Changes to Comments [3], [6] and [8].
 - b. Removal of brackets around cross-references.
3. Others are arguably more than nits but nevertheless reflect changes to other rules. These include the following:
 - a. My recommendation that we place the reference to B&P Code section 6068(e) first in paragraph (b)(2) and Comment [5] to track the defined term, "information protected by Business and Professions Code section 6068(e)".
 - b. My recommended revisions for Comment [7]. Although my intent is simply to track the changes to Rule 1.11 that the Commission has approved, my experience in the past has been that the Commission members want to finesse the language.
4. I think the Commission leadership can resolve all of the foregoing.
5. I've also added your suggested language for Comment [10]. This is the only part of the rule that might not be subject to resolution by leadership. This is a substantive change. Although the Commission voted for a rule 1.10 w/o screening, and the Board's reasoning for rejecting the rule w/ screening was before the Commission when it took that vote (i.e., that the issue should be developed through decisional law), there was no affirmative vote to include such language. Nevertheless, I believe it is an important addition to the rule. I've expressed my concerns to you before that if we have imputation w/o screening, that would put lawyers at peril of discipline to even attempt to implement a screen. If that is true, then how can we expect to see more screening cases in the future that would permit the development of the law?
 - a. Here is what I wrote to you earlier:

However, I think there's an argument against imputation in a Rule that we might need to explain to RAC. It is the fact that if imputation is in a discipline rule, then it will be a disincentive to a person risking the implementation of a screen to test the viability of non-consented screens in the court. Even if a court were to approve a screen, the person would still be in violation of the Rule if there were no provision permitting screening. Letting the screening issue play out in the courts is one of the principal reasons BOG rejected rule 1.10 in the first place. To now subject a lawyer to discipline for taking a case where another member of the firm is prohibited would almost ensure that a lawyer and/or law firm would not risk testing the waters of screening. I don't see how we will ever have a test case (you will probably recognize this is similar to my 3/18 e-mail argument in response to Stan's 3/18 e-mail as to why we need to have both screening and imputation in paragraph (e) of Rule 1.11. It's a package deal.

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See 3/30/10 KEM E-mail to Difuntorum, cc McCurdy & Lee (reporting on the March 2010 meeting).

b. I've asked some folks nationally whether they thought having an imputation rule w/o screening had an adverse effect on test cases being brought. I haven't heard back on my inquiries. Perhaps Mark can ask around at the APRL Meeting this week.

c. If it did have an adverse effect, then I would expect that the adoption of screening would have been primarily by rule in the first instance, rather than by adopting a rule that simply codified an earlier court decision in the jurisdiction. Note that 25 states adopted a screening rule w/o the benefit of a Model Rule (no state has yet adopted the Model Rule, though I understand several are considering it), so we should be able to find out what actually occurred. Perhaps Bob Creamer or Bill Freivogel, two former employees of ALAS who have had their finger on the pulse of screening would know off hand.

d. The bottom line is that I believe Comment [10] is a very important addition to the Rule but I'm not sure that including it is a decision for leadership alone.

6. If, however, we don't include it, then we have to make sure that we include in the Introduction to the Rule that the intent of the rule is to permit the courts to develop the law concerning screening and a recognition that for a test case to develop, lawyers will necessarily have to violate the rule.

Sorry for the length of this missive. As you can see, I've been rethinking the Commission's vote on a screenless Rule 1.10. I think when we present the Rule, we should apprise RAC/BOG of these concerns.

Attached:

RRC - 3-310 [1-10] - Rule - ALT1 - DFT6.1 (04-12-10) - Cf. to DFT6.doc

RRC - 3-310 [1-10] - Rule - ALT1 - DFT6.1 (04-12-10) - ANNOT.doc

April 15, 2010 Difuntorum E-mail to KEM, cc Chair, Vice-Chairs & Staff:

[Thanks Kevin. I agree with all of your revisions and comments.]

Commission Leaders:

Please review the attached Rule 1.10 draft and the messages below and let us know if you approve the non-substantive post-meeting revisions. Regarding suggested new Comment [10], your decision is needed on whether you want to include this new comment in the draft to be submitted to RAC. If you want to include it, then perhaps a 5-day ballot can be prepared for the Commission members to resolve this singular issue. If you don't want to include it at this time, then it can be on hold until after the Final Report public comment period (but at that time it might be regarded as a substantive change requiring another public comment distribution).

Attached:

RRC - 3-310 [1-10] - Rule - ALT1 - DFT6.1 (04-12-10) - Cf. to DFT6.doc

RRC - 3-310 [1-10] - Rule - ALT1 - DFT6.1 (04-12-10) - ANNOT.doc

April 16, 2010 Difuntorum E-mail to KEM, cc Chair, Vice-Chairs & Staff:

You raise a very good point regarding a Rule 1.10 w/o any screening and the prospects of whether any lawyer would risk their license by being a test case. The only thing that might offer some solace and also might support an ethics advisor's opinion letter advising a lawyer to attempt a screen, despite the risk of discipline, is the State Bar Court's reasoning in *In the Matter of Sklar* (1993) 2 Cal. State Bar Ct. Rptr. 602.

In *Sklar*, the State Bar Court addressed a respondent's argument that his representation of a driver and passenger, without obtaining consent, did not violate former Rule 5-102(C). The respondent contended that the former rule did not expressly encompass "potential conflicts" within the concept of "conflicting interests." The respondent emphasized that it was only the subsequent revised rule that introduced the concept of potential conflicts as a prohibited representation falling within the conflicts rule.

In response, the State Bar Court described its analytical approach for ascertaining whether a lawyer should regard a situation as constituting a prohibited conflict. The Court said that it looks to civil case law on conflicts in determining conflicts for disciplinary purposes. The Court said:

"The issue before us is whether the existing case law in 1984 so construed former rule 5-102 as to make it clear that potential conflicts between clients required written consent for a single attorney to represent them in civil litigation. . . .

We therefore look to the state of the law as of 1984 involving conflicts in civil proceedings, much as the Supreme Court has itself done in analyzing this area of professional responsibility." (*Sklar* at p. 615.)

The Court then surveyed the case law existing during the relevant time period and concluded that representation of a passenger and driver was a prohibited conflict under that law. This conclusion supported a finding of culpability for the conflict's charge.

If it is accepted that OCTC and the State Bar Court will act in accordance with the *Sklar* approach, then the *Kirk* case, itself, together with any subsequent civil conflicts cases on screening will be the focal point for a lawyer's risk management decision to attempt a screen. Even if no subsequent civil cases arise (which I doubt), *Kirk* alone affords much latitude for reasonable minds to differ about the validity of a screen. Under the *Sklar* analytical approach, I think a respondent's counsel will be well armed to challenge OCTC's ability to meet the clear and convincing evidence burden of proof standard in situations where a lawyer has taken a reasonably conservative strategy in erecting a screen. Moreover, as many commentators have observed over the years, money and fees drive conflicts decisions made by law firms so that might be the impetus that leads to more screening cases. As these civil screening decisions are issued, under the *Sklar* approach to assessing conflicts in State Bar Court, the risk of discipline is likely to become more predictable.

April 16, 2010 Tuft E-mail to KEM, cc Chair, Vice-Chairs & Staff:

I am afraid I do not understand Kevin's concern with results in the revision of Comment [10]. It is not the case that imputation of a conflict of interest for purposes of civil disqualification results in a violation of rule 1.10(a). For a violation of rule 1.10(a) to occur the remaining lawyers in the firm have to have had actual knowledge of the conflict of the personally disqualified lawyer and the conflict must be based on a violation of either Rule 1.7 (where screening would not work) or Rule 1.9, which itself has a actual knowledge requirement. The Model Rule is written to minimize the risk of discipline based on a civil disqualification decision which usually serves a different purpose. See CCP section 128.5. I am not convinced that the reasoning in Sklar applies, since the issue there was whether respondent was reasonably on notice that a potential conflict required client consent based existing case law prior to the adoption of rule 3-310(C). Finally, many states have had rule 1.10(a) without a screening provision for years and development of the case law on screening in the civil context has not been thwarted.

Nevertheless, if you believe the BOG should be notified of Kevin's concern, it would be better to have a comment to the effect that Rule 1.10 does not apply in civil cases where a court has granted or denied vicarious disqualification of a law firm in a matter in which the firm sought to screen the personally disqualified lawyer. That would take care of the problem Kevin perceives.

Otherwise, we risk not having a basic imputation rule which will lead to far worse consequences for lawyers and the public.

April 16, 2010 Sondheim E-mail to Difuntorum, cc Chair, Vice-Chairs & Staff:

I have no problem with submitting Comment [10] for a 5 day ballot, but I would change the second sentence to read: "and lawyers must rely upon its development in case law." [citing Kirk]

April 16, 2010 Lee E-mail to Sondheim & KEM, cc Vapnek, Tuft & Staff:

Please review the 5-day ballot for Rule 1.10, Comment [10]. Upon approval, I will circulate this link to the rest of the Commission. If I hear back from you on or before Saturday, I will send out the 5-day ballot over the weekend.

http://fs16.formsite.com/SB_RRC/5day_110/index.html

April 16, 2010 KEM E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Mark, I'm confused. How can the other lawyers in the firm not have knowledge that there is a tainted lawyer in their midst if there is a screen in place, thereby satisfying the "knowingly" requirement of Rule 1.10. Isn't it a required component of a screen that the other lawyers in the firm be notified of its existence and that they are not to work with the lawyer? By definition, when a lawyer is screened, all other lawyers in the firm have knowledge. And they will be subject to discipline under a Rule 1.10 that has no screening provision.

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Rule 1.10(a) provides that a non-tainted lawyer in a firm "shall not knowingly represent a client when any one of them practicing alone [i.e., the tainted lawyer] would be prohibited from doing so." Assuming there is no screening provision in that rule or any other Rule of Professional Conduct, I read that to mean that a lawyer who is aware that there is a tainted lawyer in the firm (and the lawyer would know by virtue of the screen that the Rule prohibits him or her from representing the client) cannot represent the client, whether there is a screen or no screen. Sure, a law firm might decide it's worth the risk, but the lawyer will be subject to discipline under the Rule.

All that I am saying is that, as written, lawyers who accept a representation when a tainted lawyer is in the firm can be disciplined under a screenless Rule 1.10, even if a screen is implemented. Their knowledge of the fact that there is a tainted lawyer in their midst cannot be rebutted by the screen. I'm not saying they WILL be disciplined, but repeatedly over the last 8 years members of the Commission have argued successfully to change the language of the Model Rules because you can't trust OCTC to exercise appropriate discretion and the Model Rule language is not sufficiently specific and leaves too many openings for a prosecutor to go after lawyers the rule was never intended to target. I've also heard that these Rules are intended to be rules of reason, but it appears that a clear majority of the Commission takes the former position and believes that you can't trust OCTC to exercise discretion and so we have to draft the rules in a way that will preclude them from seeking to impose discipline in situations where we do not think it is appropriate.

You state that "many states have had rule 1.10(a) without a screening provision for years and development of the case law on screening in the civil context has not been thwarted." Do you know that for a fact? I don't. When the ABA moved to add screening to MR 1.10, they listed 25 states that permitted screening by rule but only two states that arguably permitted it by case law. The question I have asked some folks (e.g., Bill Frievoegel, Arden Olson) is whether the statement you have made is accurate, i.e., is it true that having an imputation rule has not precluded the development of case law. My specific question was intended to learn how screening has been implemented in other jurisdictions. Has a rule always been preceded by the development of the case law (in which case my concerns are, how shall we say, academic)? Or has screening typically become the law by rule, even without case law development. I don't know the answer. There was an imputation rule in the ABA Model Code (DR 5-105(D)), and there has been one since the inception of the Model Rules, so we should be able to answer that question.

This may all appear to be an academic exercise and I would not have raised the issue but for the fact that members of RAC expressed their preference that the law of screening be developed through the case law. It struck me that the case law could freely develop if there is no imputation rule (as now), but that its development might be inhibited if there were an imputation rule that subject the other lawyers in the firm to discipline. If the existence of an imputation rule has not inhibited case law development of screening in other jurisdictions, then we can so advise RAC and nothing further needs to be done with the Rule. However, if most jurisdictions or a substantial number of jurisdictions have implemented screening by rule even without it being developed in the case law, then we need to advise RAC that adopting a screenless Rule 1.10 might inhibit the development of screening by case law.

As for your proposal of having a comment to the effect that "Rule 1.10 does not apply in civil cases where a court has granted or denied vicarious disqualification of a law firm in a matter in which the firm sought to screen the personally disqualified lawyer," what about law firms that

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want to implement a screen in a transactional matter? And should lawyers be exempted when it is shown that the screen that was implemented was patently ineffective? I'm not sure such a comment would be appropriate.

April 16, 2010 KEM E-mail to Lee, cc Chair, Vice-Chairs & Staff:

It looks good to me.

April 16, 2010 KEM E-mail to Difuntorum, cc Chair, Vice-Chairs & Staff:

The *Sklar* approach is indeed interesting. If I understand correctly, under *Sklar* the OCTC would have to show that under California case law, the implementation of an ethical screen clearly was prohibited as an attempt to rebut the presumption of shared confidences that would result from the imputation required by a screenless Rule 1.10. I still like the idea of having a Comment [10]. There is the same problem that the government lawyers raised concerning 4.2, i.e., determining what the law permits. That is where Comment [10] comes in; it provides an added assurance. I realize that many if not most Commission members will take Mark's position that it is not a particular concern that California have a screenless Rule 1.10, but I think Comment [10] is important. We'll see how it fares in the 10-day ballot.

A question I have is whether the Commission should have the benefit of our e-mail exchange in voting on Comment [10]. Harry, what do you think?

After reading the BNA article on *Kirk* by Joan Rogers that you sent me, the opinion can be viewed either as a decision that has opened the door to broad screening or as a narrow decision that should be limited to its facts, i.e., a 1.18 situation. I think the more accurate interpretation lies somewhere in the middle, i.e., that a lawyer who was not substantially involved in a matter can move to the opponent's firm and be screened, even if that lawyer had acquired confidential information during the representation. In short, I think *Kirk* favors the limited screening approach that the Commission recommended be adopted. However, even under *Kirk*, a firm would be prohibited from trying to implement a screen to isolate a lawyer who has switched firms in the middle of a representation in which the lawyer had substantially participated. I think OCTC would be able to make the clear and convincing showing in that case.

April 17, 2010 Tuft E-mail to KEM, cc Chair, Vice-Chairs & Staff:¹

I am here in New Orleans with Bill and others and will inquire of your concern. I assume you are concerned about imputation of a 1.9 conflict not a 1.7 conflict. Assuming your concern warrants a change to Comment 10, why doesn't my suggestion suffice?

April 17, 2010 KEM E-mail to Tuft, cc Chair, Vice-Chairs & Staff:

Yes, that's correct. Only 1.9. Nonconsented screens simply won't work w/ 1.7.

¹ Response to **April 16, 2010 KEM E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

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I think Randy's Comment [10] works better because it is not dependent upon a lawyer having implemented a screen in a litigation scenario:

[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and lawyers must rely upon its development in case law. See, e.g., *Kirk v. First American Title* (2010) __ Cal.App.4th __.

Randy's Comment [10] would provide a defense in a discipline case even if the screen were implemented the context of a transaction. I don't think your proposed Comment [10] would do the same, as it provides as a prerequisite to its application that "a court has granted or denied vicarious disqualification of a law firm in a matter in which the firm sought to screen the personally disqualified lawyer."

Maybe a combination of your respective comments would better clarify the issue:

[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and, in determining whether it is permissible to implement a screen to avoid the imputation of a conflict of interest under paragraph (a) or (b) in a litigation or transactional context, lawyers must rely upon [-its-] the development [-in-] of case law. See, e.g., *Kirk v. First American Title* (2010) __ Cal.App.4th __.

QUESTION FOR HARRY: Do you think the Commission should have the benefit of our e-mail exchange (including Randy's e-mail re Sklar) on this issue?

If possible, please reply today. Mimi is monitoring our exchange and, if you approve the posting of proposed Rule 1.10, she will send a message to the Commission with a link to the form site to begin the 5-day ballot on Comment [10].

April 17, 2010 Tuft E-mail to KEM, cc Chair, Vice-Chairs & Staff:²

I talked with Bill and Lucian about your concern and encouraged Bill to respond to your email. There are two separate issues here. Bill and Lucian do not believe there is a increased risk of discipline by having rules 1.9 and 1.10 without a screening provision where the law of screening is developed in the civil law. However, they do agree that the approval of these rules by the Supreme Court without allowing for limited screening could have an effect on the development of the civil law and how courts and law firm view screening as a means of avoiding imputation. They both agree that we should definitely have rule 1.10 despite this concern.

Now that I have a better understanding of the issue, I think the comment should state that rule 1.10 does not prohibit lawyers or law firms from defending a motion or other proceeding to disqualify lawyers associated in practice with a personally disqualified lawyer by the employment of a screen regardless of the outcome of the motion or proceeding. See Rule 1.0.1 (..).

² Response to **April 16, 2010 KEM E-mail to Difuntorum, cc Chair, Vice-Chairs & Staff:**

April 17, 2010 Freivogel E-mail to KEM:

Kevin, thank you for taking the time to write your thoughtful message. I agree that the Arizona would be a good, modest beginning.

With regard to your question, I discussed it with Mark Tuft this morning (at the APRL meeting in New Orleans). As to discipline, I find it inconceivable, but not impossible, that some Bar prosecutor would go after a law firm that attempted (and failed) to set up a screen. I have been in this work for more than 20 years and am not aware of a single Bar prosecution that arose out of a failed screen, and there have been plenty of failed screens. A prosecution is more likely if the firm acted deceitfully while setting up the screen.

As to adoption of an imputation rule without a screening exception, I think it is probable that no appellate court would have the appetite to approve a screen and that there would be no non-consensual private firm-to-private firm screening until the supreme court decided to amend Rule 1.10 to add a screening provision. A number of federal courts have adopted screening without a specific rule to support it. I can think of a few state courts that did so. The Ohio Supreme Court did so in Kala, when Ohio had the old Code. An Indiana appellate court did it in Gerald, while Indiana had the original versions of Rules 1.9 and 1.10. (Indiana is in the Seventh Circuit, which has a strong screening tradition.) These cases are cited at my Web site at "Changing Firms . . . "

Another approach to your situation is to propose Rule 1.10 minus screening. Then, in a year or two, propose an amendment. California has been anti-screening with no problems other than the inconvenience when attempting to bring in a lateral. Nobody died.

My wife and I are about to catch a train back to Chicago. I will be around my office Monday and Tuesday if you want to discuss.

April 17, 2010 Sondheim E-mail to Difuntorum & KEM, cc Tuft, Vapnek & Staff:

I am satisfied with Comment 10 as amended by me without the exchange of e-mails. As I have said before in other situations, "what harm can it do" to have Comment 10? The exchange of e-mails leads to other issues which, while interesting, need not be the basis for approving or disapproving Comment 10. Irrespective of how these other issues may be resolved, Comment 10 would serve a useful purpose.

April 17, 2010 Sondheim E-mail to Lee, cc Vice-Chairs & Staff:

It looks fine to me. However, has Randy reviewed it? Also, in light of an exchange of e-mails between Kevin and Mark which has not yet been resolved and, in my view, need not be resolved for purposes of this ballot, I want to get Mark's views on sending out the ballot. In any event it seems to me that whether to hold a meeting this coming weekend is not dependent upon the outcome of the vote on this comment. Whatever the outcome may be, is what will be done without the need for further discussion.

April 17, 2010 Difuntorum E-mail to Lee, cc Chair, Vice-Chairs & Staff:

While this seemed ready to go on Friday, Mark & Kevin have exchanged messages regarding possible changes to the Cmt.(10) language. So let's wait until Monday to start this ballot. Thanks for monitoring this matter and making yourself available to move this forward on a weekend.

April 18, 2010 Freivogel E-mail to Tuft & KEM re 1.10 & Discipline (Savin):

Guys, I learned about the attached case while in New Orleans. I know nothing else about it and am trying to find out. I have no idea whether a screen was involved; I doubt it. But, I have been running around saying that reported decisions of discipline for conflicts are virtually non-existent. Well, here is one. I still believe that Bar prosecutors are too busy to go after screens that were created without deception and did not harm anyone. The Wyeth and Airgas cases, discussed in the attached paper, involved screens set up in the case of a current-client conflict, and the courts denied disqualification. One could argue that those were violations of Rule 1.7(a)(1) and are still subject to prosecution.

Attached:

RRC - [1-10] - In re Savin (Minn. 04-07-10).pdf

RRC - [1-7][1-9][1-10][1-11][1-12] - Freivogel, History of Conflicts (2010).doc

April 18, 2010 Freivogel E-mail to Tuft & KEM re 1.10 & Discipline (Savin):

Here is more information about the one-page opinion I sent you. If you don't feel like reading the petition and stipulation, the lawyer represented a party who was about to have his property condemned for a baseball stadium. His partners were bond counsel and assisting the county (condemnor) in obtaining legislation approving the purchase of the land, among other things. The firm had told the county that while it represented the land owner, it would not be adverse to the county. This smells of deceit.

Attached:

RRC - [1-10] - In re Savin - Stipulation (Minn. 03-22-10).pdf

RRC - [1-10] - In re Savin - Petition (Minn. 03-19-10).pdf

April 18, 2010 Tuft E-mail to Difuntorum, Sondheim, Lee & KEM, cc Vapnek & McCurdy:

I just got back from New Orleans and have had no further exchange with Kevin since my last email of this morning. If the suggestion I made for Comment [10] is not acceptable with the group, then go with Kevin's tomorrow and send out the ballot.

April 19, 2010 Rogers E-mail to KEM re 1.10 & Kirk v. American Title:

Thank you for this nice note about my wordy article. As you surely discovered when you read it, I consulted all the sources you suggested—you really pointed me in the right direction. Although

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you've already seen the article, here is a copy, which I meant to send you last week—but forgot since your name wasn't actually in the article.

Even though half of the other states have a screening provision, and two-thirds of them have Rule 1.18, all the bigger firms everywhere are very interested in what happens in California in the conflicts arena, especially screening. So my heartfelt thanks to you for suggesting sources.

I'm still smiling about what King George wrote in his journal on July 4, 1776, and our mutual love of the future pluperfect. It will be good to talk in May!

April 19, 2010 Arden Olson E-mail to KEM re 1.10:

I have been a little swamped, sorry. My intention was to review this question over the weekend while at the APRL meeting, which to some extent occurred.

I do not have the information you are inviting. My reaction to the question is that discipline and case law, in general, pose two different questions. Most of the cases (other than review of discipline, which almost always focus on the Rules) deal with screening in the disqualification context. The circumstances under which a court will exercise inherent power to police whom may appear before it often turns on different considerations than those affecting discipline, and there are some cases posing the possibility that a court would permit (even order) lawyers to continue as counsel in a case by blessing or requiring a screen without any justification in the rules. Those cases raise the specter that a lawyer could be disciplined for doing that which a court permits. That will be a hard case when it arises, and I'll be interested to see how state regulatory bodies react when, for example, a federal court permits a screen in a non-screening case.

I therefore don't really understand the notion of judicially creating the right to screen from the standpoint of discipline. I will watch your process with interest (being a California-admitted lawyer myself), and if I can offer anything useful to the process will be happy to help.

April 19, 2010 Difuntorum E-mail to Sondheim, Vapnek, Tuft, cc Staff:

Based on the messages below, I believe leadership should choose one of the three possible versions of a new Comment [10] for a ballot. Kevin and I talked and we both favor Version #2 as a compromise version. We think Version #1 goes too far in potentially arming a respondent with an argument that even if disqualified no discipline can be brought in any circumstance. Please let us know which version to use for the ballot. Thanks. -Randy D.

VERSION #1

(This is Mark's version from his 4/17/10 email message. The cite to "(k)" was substituted for Mark's blank placeholder.)

[10] Rule 1.10 does not prohibit lawyers or law firms from defending a motion or other proceeding to disqualify lawyers associated in practice with a personally disqualified lawyer by the employment of a screen regardless of the outcome of the motion or proceeding. See Rule 1.0.1 (k).

VERSION #2

(This is the version from Kevin's 4/17/10 email message that the modifies the original proposed comment in an effort to address some of Mark's concerns.)

[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and, in determining whether it is permissible to implement a screen to avoid the imputation of a conflict of interest under paragraph (a) or (b) in a litigation or transactional context, lawyers must rely upon the development of case law. See, e.g., *Kirk v. First American Title* (2010) __ Cal.App.4th __.

VERSION #3

(This is the version used in the draft 5-day ballot distributed by Mimi. This is the version which includes Harry's edit to Randy's original draft. In the course of the emails exchanged over the weekend, Harry stated his approval for this version.)

[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and lawyers must rely upon its development in case law. See, e.g., *Kirk v. First American Title* (2010) __ Cal.App.4th __.

April 19, 2010 Tuft E-mail to Chair, Vice-Chairs & Staff:

I continue to believe version 1 is preferable to versions 2 or 3. The comment cannot be fairly read to prohibit discipline in every civil case in which disqualification has been ordered. Instead, it makes clear that the rule, which is silent on screening, does not prohibit screens from being used in civil actions or proceedings to disqualify a firm even if the screen is not successful. In other words, more is required than the fact a screen was used to warrant discipline under this rule.

I doubt the Supreme Court will be comfortable with a comment in a rule of professional conduct that says that screening is an open and unsettled issue in the law. The comment will have to be amended as the law becomes settled.

April 19, 2010 Vapnek E-mail to Chair, Vice-Chairs & Staff:

I have been following the discussions and extensive exchanges of emails and have also reviewed all three variations of Comment 10, but I am not completely satisfied with any of them. I know it is late, but I want to suggest a further variation of version 2 for consideration:

[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and, in determining whether the implementation of a screen will avoid the imputation of a conflict of interest under paragraph (a) or (b) in a litigation or transactional context, lawyers must rely upon the development of case law. See, e.g., *Kirk v. First American Title* (2010) __ Cal.App.4th __.

The changes I have made include deletion of the concept of permission from the second sentence; "permissible" by what or by whom?? There is no ban on screens in any of our rules, thus we should not be introducing the idea that screening may be forbidden. Really, the issue is whether a court will uphold a screen (a la Kirk) or say it won't work, wasn't timely, etc. I just do not see this as a disciplinary offense.

Any thoughts??

April 19, 2010 Tuft E-mail to Chair, Vice-Chairs & Staff:

In the interest of compromise, I would be willing to go with a version of what Paul has proposed with the following changes

[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding 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 under paragraph (a) or (b) in a civil litigation or transactional context is a matter of case law.

Screening is simply not going to remain an open issue throughout the life of the rules and I would not cite the Kirk case any more than I would cite *Speedee Oil* or *Hendricksen*.

April 20, 2010 Sondheim to Vice-Chairs & Staff:

I have reviewed all the suggested alternatives for comment 10 and propose the following:

"[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and, whether timely implementation of a screen will avoid discipline under paragraph (a) or (b) when the issues arise out of litigation or a transactional context, is a matter of case law."

As you can see I have adopted some of the language from Mark and Paul and also made some changes. Since this rule is a disciplinary rule, the emphasis should be on discipline, not disqualification. It seems to me that the placement of "in a litigation or transactional context" in their drafts relates the imputation to whether there would be disqualification in litigation or a transactional context.

I also believe it is important to advise lawyers that this issue is unsettled and therefore retained this concept from Paul's draft rather than delete it as Mark proposed.

Let me therefore suggest the following as to comment 10: The Commission should be notified that we will hold a teleconference on Friday between 11 a.m and 12:30 p.m. and should be provided with Mark's latest proposal, Paul's proposal and my latest proposal. I have eliminated the 3 versions from Kevin because version 1 has been replaced by Mark's latest proposal, version 3 has been replaced by my latest proposal and the essence of version 2 is set forth in all three proposals.

* * * * *

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 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)² 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

¹ **Note on this Draft:** This draft was created after the Board rejected the Commission’s proposed Rule 1.10, which the Commission had denominated “ALT2”. This draft incorporates the changes that were unrelated to screening and were approved at the Commission’s 2/26-27/10 meeting and made to ALT2 after the Commission had voted to recommend adoption of a rule permitting limiting screening during its January 2010 meeting. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶¶. 8 & 8A.

² **Drafters’ Note:** Because “information protected by Business and Professions Code section 6068(e)” is a defined term, the cross-reference to the section and rules have been rearranged in this paragraph, as they have been elsewhere in the Rule.

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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 matter³ 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)⁴ 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, Comments [14A] to [17A], and that each affected client or former client has given informed

³ **Drafters' Note:** This change had been made to ALT2 following the January 2010 meeting to conform the language to the Model Rule.

⁴ See footnote 2.

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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).⁵

[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).⁶

[8] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through Rule 1.8.9, Rule 1.8.11,⁷ 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 Motions⁸

[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 1566.⁹

ALT1

[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding 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 under paragraph (a) or (b) in a civil litigation or transactional context is a matter of case law.¹⁰

⁵ **Drafters' Note:** Changes made to reflect changes to proposed Rule 1.7.

⁶ **Drafters' Note:** These changes are necessitated by the changes to Model Rule 1.11 that were approved by the Commission, i.e., to require imputation of government offices when a tainted lawyer has moved to government employment from private practice. See 11/6-7/09 KEM Meeting Notes, III.D., at ¶. 2A; 12/11-12/09 KEM Meeting Notes, III.E; and 3/26-27/10 KEM Meeting Notes, III.C.

⁷ **Drafters' Note:** Changes made to reflect renumbering of the 1.8 series of Rules following consideration of MR 1.8(d) and 1.8(i), both of the which the Commission has recommended not be adopted.

⁸ **KEM:** I've added this title because we use the same title in the Comment to proposed Rule 1.11 and both Comment [9] and proposed Comment [10] fit within that rubric.

⁹ **Drafters' Note:** These changes were made pursuant to Commission decision. See 1/22-23/10 KEM Meeting Notes, III.F., at ¶. 2B.

¹⁰ ALT1 is taken from Mark Tuft's email message dated April 19, 2010, see page 13 of the email compilation.

ALT2

[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and, in determining whether the implementation of a screen will avoid the imputation of a conflict of interest under paragraph (a) or (b) in a litigation or transactional context, lawyers must rely upon the development of case law. See, e.g., *Kirk v. First American Title* (2010) __ Cal.App.4th ____.¹¹

ALT3

[10] Rule 1.10 leaves open the issue of whether use of a timely screen is an option for avoiding the imputation of a conflict of interest under paragraph (a) or (b). This subject is an unsettled issue in California and, whether timely implementation of a screen will avoid discipline under paragraph (a) or (b) when the issues arise out of litigation or a transactional context, is a matter of case law.¹²

¹¹ ALT1 is taken from Paul Vapnek's email message dated April 19, 2010, see pages 12 – 13 of the email compilation.

¹² ALT3 is taken from Harry Sondheim's email message dated April 20, 2010, see page 13 of the email compilation.