

**McCurdy, Lauren**

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**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Wednesday, August 12, 2009 11:39 AM  
**To:** McCurdy, Lauren; Difuntorum, Randall  
**Cc:** Mark Tuft; JoElla L. Julien; Robert L. Kehr; Kevin Mohr G; Paul Vapnek; Stan Lamport; Harry Sondheim; Lee, Mimi  
**Subject:** RRC - 3-310 [1.10] - III.F. - 8/28-29/09 Meeting Materials  
**Attachments:** RRC - 3-310 [1-10] - Compare - Rule & Comment Explanation - DFT1 (08-10-08).pdf; RRC - 3-310 [1-10] - E-mails, etc. - REV (08-24-09)-EXC\_08-12-09.pdf

Greetings Lauren & Randy:

I've attached the following:

1. Rule 1.10 [3-310], Rule & Comment Comparison Chart, Draft 1 (8/10/09), in scaled PDF. The comparison is to the MR and I've included the footnotes from the most recent draft, 3.3B (8/10/09).
2. E-mail compilation excerpt for Rule 1.10, which includes the drafters' recent exchange of e-mails, in PDF. See pages 63-67 of the attached.

Comment:

1. The chart is based on Rule 1.10 [3-310], Draft 3.3B (8/10/09). Version B includes Arizona Rule 1.10(d), which permits screening in limited situations, as new paragraph (d). In the footnote, we explains that we are including Ariz. Rule 1.10(d) for discussion purposes only, though Mark and I would not oppose the inclusion of a similar provision.

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

Kevin

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<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless</p>	<p>(a)<sup>1</sup> While lawyers are associated in a firm, none of them shall knowingly<sup>2</sup> represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless <u>the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of having a material adverse effect on the representation of the client by the remaining lawyers in the firm.</u><sup>3</sup></p>	

\* Proposed Rule 1.10, Draft 3.3 (8/10/09). Redline/strikeout showing changes to the ABA Model Rule

<sup>1</sup> **RRC Action:** At the 2/29-3/1/08 meeting, the RRC voted 6-2-0 to adopt MR 1.10(a) in concept. See 2/29-3/1/08 KEM Meeting Notes, III.J., at ¶. 3.

Ellen Peck asked that her **DISSENT** from the vote be recorded. *Id.* at ¶. 3.f.

<sup>2</sup> **RRC Action:** At the 5/8-9/09 meeting, the RRC voted 7-3-1 to include the word “knowingly” in Rule 1.10. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 1A. See also discussion that preceded the vote at ¶. 1.

Dissent: Bob Kehr has requested that his **DISSENT** to the inclusion of “knowingly” in Rule 1.10(a) be recorded. He would prefer a statement of the rule along the lines of III. Rule 1.10(a), which provides:

(a) No lawyer associated with a firm shall represent a client when the lawyer **knows or reasonably should know** that another lawyer associated with that firm would be prohibited from doing so by Rules 1.7, 1.8(c) or 1.9, except as permitted by Rules 1.10(b), (c), or (d), or by Rule 1.11 or Rule 1.12. (Emphasis added).

See 8/10/09 Kehr E-mail, #1.

**RRC Action:** At the same meeting, the RRC voted 8-1-2 to include a comment to the effect that Rule 1.10 does not apply to judicial disqualification issues. See *id.*, at ¶. 1B. See Comment [9].

<sup>3</sup> **RRC Action:** At the 5/8-9/09 meeting, the RRC voted 8-2-2 to remove the brackets from the clause, “ unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of having a material adverse effect on the representation of the client by the remaining lawyers in the firm,” and put out the language for public comment w/ the issues raised by Commission members during the meeting. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 2A.

See also discussion that preceded the vote at ¶. 2 and the remainder of this footnote for a summary of the issues to be included in the public comment comparison chart.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.10 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(1) 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; or</p>	<p><del>(1)</del> <del>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; or</del></p>	
<p>(2) the prohibition is based upon Rule 1.9(a), or (b) and</p>	<p><del>(2)</del><sup>4</sup> <del>the prohibition is based upon Rule 1.9(a), or (b) and</del></p>	

**NOTE:** A subsequent vote to substitute “Rule 1.7(d)” for the clause at issue was defeated by a 5-5-2 vote. See 5/8/09 KEM Meeting Notes, III.C., at ¶. 2B.

**Issues to be identified for public comment.** In his 6/6/08 Memo to the RRC, drafter Bob Kehr raised concerns about the bracketed language’s use of “materially limiting,” a phrase the Commission rejected in Rule 1.7: “1. To clarify my earlier comment that Kevin captured in fn. 3: I oppose the wording that is bracketed in paragraph (a) b/c of the “materially limited” language that is part of the MR but not in our proposed Rule 1.7. The Commission might want to consider excepting from the scope of paragraph (a) some or all of the personal interest conflicts now found in Rule 3-310(B). I’m not certain whether Kevin is saying in fn. 3 that he wants to remove all of the bracketed language or only the “materially limited language”, but I believe it should be removed in toto.” See 6/6/08 Kehr Memo, #1.

**Mark Tuft and KEM replied:** We are concerned with a rule that would not exclude any personal interest conflicts from the reach of this Rule. Although proposed Rule 1.8.13 [MR 1.8(k)] would capture many personal interest conflicts, there remain some that are governed by Rule 1.7 that would be applicable unless we include some exception. Not all personal conflicts under rule 1.7 should be imputed lawyers in the firm, which would be the result if we were to delete the clause in toto. One problem is posed by proposed Rule 1.7(d), which does not require the client’s informed consent, but simply “disclosure.”

In response to the foregoing, Bob reiterated that he does not object to keeping the clause or a similar clause that limits the scope of personal conflict imputation, so long as the “materially limiting” phrase is not used. See 3/16/09 Kehr E-mail #1.

<sup>4</sup> Drafters’ Note: The drafters do not recommend MR 1.10(a)(2) and (3). These provisions, adopted by the ABA in February 2009, broadly permit screening of lawyers who move from one private firm to another. There are 13 jurisdictions that have adopted broad screening provisions, although no jurisdiction to date has exactly adopted the ABA approach. By “broadly permits screening,” we mean that the jurisdiction’s provision permits screening of any lawyer who has acquired (or is presumed to have acquired) confidential information of the former client, regardless of the degree of involvement of that lawyer in the former client’s representation. In effect, this is equivalent to the

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<p>(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;</p>	<p><del>(i)</del> <del>the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;</del></p>	
<p>(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client</p>	<p><del>(ii)</del> <del>written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client</del></p>	

“substantial responsibility” standard in MR 1.11 and thus would place private lawyers more or less on equal footing with government lawyers. Model Rule 1.10, as revised in 2009, is one such provision. Jurisdictions that broadly permit screening are: Delaware, Illinois (both current and proposed), Kentucky, Maryland, Michigan (both current and proposed), Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee (proposed revision), Utah and Washington.

See also footnote 9, below, which describes the approach of 11 other jurisdictions that “permit screening in limited situations.”

The drafters have included one such limited screening provision, Arizona Rule 1.10(d), modified to conform to RRC style and format, for discussion purposes. At least two members of the drafting team (Mark Tuft & KEM) would favor the adoption of such a limited screening provision.

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<p>about the screening procedures; and</p>	<p><del>about the screening procedures;</del> <del>and</del></p>	
<p>(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.</p>	<p><del>(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.</del></p>	
<p>(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless</p>	<p>(b)<sup>5</sup> When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:</p>	

<sup>5</sup> **Drafters' Recommendation:** We recommend adoption of MR 1.10(b), which is consistent with California law. See *Goldberg v. Warner-Chappell* (2005) 125 Cal.App.4th 752, 23 Cal.Rptr.3d 116. See also *Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186 (7th Cir. 1979).

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<p>(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and</p>	<p>(1) the matter is the same <u>as</u><sup>6</sup> or substantially related to that in which the formerly associated lawyer represented the client; and</p>	
<p>(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.</p>	<p>(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.</p>	
<p>(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.</p>	<p>(c) A <del>disqualification prescribed by</del> <u>prohibition under</u><sup>7</sup> this <del>rule</del> <u>Rule</u> may be waived by <del>the</del> <u>each</u><sup>8</sup> affected client under the conditions stated in Rule 1.7.</p>	

<sup>6</sup> **RRC Action:** At the 5/8-9/09 meeting, addition of “as” was deemed approved. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 3. Note that this is a change to the Model Rule language.

<sup>7</sup> **RRC Action:** At the 5/8-9/09 meeting, the RRC voted 10-1-0 to substitute “prohibition under” for “disqualification prescribed by”. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 6A.

<sup>8</sup> **RRC Action:** At the 5/8-9/09 meeting, the RRC voted 9-1-1 to substitute “each” for “the”. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 5A.

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	<p>(d)<sup>9</sup> <u>When a lawyer becomes associated with a law firm, no lawyer associated in the law firm shall knowingly represent a person in a matter in which that lawyer is prohibited under Rule 1.9 unless:</u></p>	
	<p>(1) <u>the matter does not involve a proceeding before a tribunal in which the personally prohibited lawyer had a substantial role;</u></p>	
	<p>(2) <u>the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and</u></p>	

<sup>9</sup> **Drafters' Note:** The drafters have inserted *for discussion purposes* Arizona Rule 1.10(d), modified to conform to RRC style and format. Arizona is one of 11 jurisdictions that permit screening in limited situations of lawyers who move from one private firm to another. "Permits screening in limited situations" means that the jurisdictions provision permits screening only of a lawyer who did not "substantially participate," or was not "substantially involved," did not have a "substantial role," did not have "primary responsibility," etc., in the former client's matter or when any confidential information that the lawyer might have obtained is deemed not material to the current representation (e.g., Mass.) or "is not likely to be significant" (e.g., Minn.) Jurisdictions that permit screening in limited situations are: Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Tennessee (current rule only); and Wisconsin.

At least two members of the drafting team (Mark Tuft & KEM) would favor the adoption of such a limited screening provision.

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	<p align="center">(3) <u>written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule.</u></p>	
<p>(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.</p>	<p>(de)<sup>10</sup> The <del>disqualification</del><u>imputation of a conflict of interest to</u> lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.</p>	

<sup>10</sup> **RRC Action/Drafters' Recommendation:** At the 5/8-9/09 meeting, the drafters were directed to revise paragraph (d) to remove the reference to "disqualification." See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 7.b. The drafters recommend this change.

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<p><b>Definition of “Firm”</b></p> <p>[1] For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] – [4].</p>	<p><b>Definition of “Firm”</b></p> <p>[1] <del>For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c).</del><sup>11</sup>Whether two or more lawyers constitute a firm <del>within</del><sup>for</sup> purposes of this definition<sup>12</sup> can depend on the specific facts. See Rule <del>4.0</del><sup>1.0.1(c)</sup>, Comments [2] - [4].]</p>	
	<p><b>NOTE:</b> There are two versions of Comment [2] for consideration:</p>	

<sup>11</sup> **RRC Action:** At the 5/8-9/09 meeting, the RRC voted 9-1-1 to delete Comment [1] except for the last sentence and the cross-reference to Rule 1.0.1 and the comments thereto. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 8A.

**Note:** Mark Tuft objects to its deletion and recommends that the following sentence be substituted for the deleted first sentence of Comment [1]: “ The term ‘firm’ for purposes of this rule is defined in Rule 1.0(c).”

<sup>12</sup> **Drafters’ Note:** The phrase “for purposes of this Rule” has been substituted for “wthin this definition” for clarity, the predicate for this sentence – the definition of law firm in the first sentence – having been deleted.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p><b>Principles of Imputed Disqualification</b></p> <p>[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves</p>	<p><b>Principles of Imputed <del>Disqualification</del>Conflicts of Interest</b></p> <p>[2] <a href="#">[Alternative #1]</a><sup>13</sup> The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)<del>(1)</del> operates only among the lawyers currently associated in a</p>	

<sup>13</sup> **Drafters' Note:** Alternative #1 is the Model Rule comment.

**Drafters' Disagreement:** Bob Kehr prefers Alternative #2, see 8/10/09 Kehr E-mail, #2, but if the Commission were to choose Alternative #1, he would delete the second sentence of comment [2], as "it only muses over the logic behind the principle that is fully stated in the first sentence." 6/10/08 Kehr Memo, #5.

Mark Tuft & KEM prefer Alternative #1 and disagree with the deletion of the sentence. Imputation is grounded in loyalty; the issue of loyalty played a central role in the recent screening debate in the ABA. They believe it is important to keep this sentence. Mark explains:

- a. I do not see any reason for not retaining the language in Model Rule Comment [2]. Putting aside Bob's objection to the second sentence on "musing" grounds, the first, third and fourth sentences are informative and useful to understanding the scope and structure of the rule. Without them, lawyers will wonder how the rule differs in structure from the Model Rule.
- b. The second sentence in the Model Rule comment is important to understanding that imputation is based on the concept of loyalty owed by each lawyer in the firm to the clients of the firm. I would keep the sentence but recommend deleting the word "vicariously" on line 45.
- c. The last two sentences in the Model Rule comment are particularly important. There is often confusion as to whether paragraph (a) or paragraph (b) applies. These sentences clarify that paragraph (a) applies to lawyers **currently** practicing together without regard to whether there has been any sharing of confidential information and why a strict imputation rule applies. The comment states in clear terms that paragraph (b) applies when a lawyer leaves the firm. See 8/19/09 Tuft E-mail, #4.a.-c.

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<p>from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).</p>	<p>firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10<del>(a)(2) and 1.10</del>(b).</p>	
	<p><a href="#">[2] <b>Alternative #2</b></a><sup>14</sup> Paragraph (a) sets forth the basic rule concerning when a lawyer's conflict of interest is deemed to be shared by all other lawyers in the lawyer's law firm. Paragraph (a) addresses imputation in three distinct situations. Imputation serves different purposes in these situations.</p>	
	<p><a href="#">[2a]</a>The first situation Paragraph (a) addresses involves conflicts governed by Rule 1.7(a), which prevents a lawyer from undertaking a representation that is directly adverse to a client, without that client's informed written consent. Under paragraph (a) of this Rule, all of the lawyers in the law firm are</p>	

<sup>14</sup> **Drafters' Note:** At the 5/8-9/09 meeting, the Chair gave Stan Lampert an opportunity to propose revised language for Comment [2]. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 9.a.(3). Proposed Comments [2] – [2c] reflect Stan's efforts.

As noted in the previous footnote, Bob Kehr prefers Alternative #2. Mark Tuft and KEM prefer Alternative #1. Mark explains his concerns with Alternative #2:

d. I share some of Kevin's reservations about Stan's detailed explanation of loyalty in the context of imputing current and former client conflicts and wonder whether such an exacting explanation is necessary and would be workable in actual practice. Loyalty to a former client is a narrow concept and Stan's proposed paragraph 2(b) reads too broadly for me. I assume Stan's third and fourth sentences relate to rule 1.9(a) and not 1.9(b). Even so, I am not convinced that the duty of loyalty owed by the lawyer who formerly represented a client is imputed to another lawyer in the firm who represents a client with materially adverse interests in a substantially related matter that does not required attacking the first lawyer's prior work. I would prefer that we hew closely to the Model Rule comment and explain loyalty to a former client in relation to rule 1.9(a). See 8/10/09 Tuft E-mail, #4.d.

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	<p>subject to the <a href="#">same prohibition in that situation</a>. <a href="#">Rule 1.7(a) protects a client's trust and confidence in the lawyer client relationship by preventing the client's lawyer from assuming a role on behalf of another client that would be inherently antagonistic to the lawyer client relationship and thereby inherently undermine the client's ability to repose trust in the relationship</a>. The duty is imputed to others in the law firm because a representation by another lawyer in the firm that is directly adverse to the client likely would be equally destructive to the lawyer-client relationship.</p>	
	<p><a href="#">[2b]The second situation Paragraph (a) addresses involves conflicts governed by Rule 1.9, which concerns a lawyer's duties to a former client. Under paragraph (a) of this Rule, all of the lawyers in the law firm are subject to the same prohibition. Rule 1.9 involves two primary duties. First, Rule 1.9 concerns a lawyer's limited duty of loyalty to a former client, which is imputed to other lawyers in a law firm for the same reasons the duty of loyalty addressed in Rule 1.7(a) is imputed to other lawyers in the law firm. See Rule 1.9(a) and comments [x] to [x]. Second, Rule 1.9 involves a lawyer's duties not to reveal or use a former client's confidential information in a manner that is contrary to the client's interests. See Rule 1.9(a)-(c) and Comments [x] to [x]. In this context, the information possessed by one of the lawyer's in the law firm is deemed be possessed by all other lawyers in the law firm. The</a></p>	

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	<p><a href="#">duty of confidentiality exists to promote candor in a lawyer client relationship by assuring that the client can communicate to a lawyer without fear that the information would be used or disclosed against the client's interests. The imputed conflict rule exists because it is difficult for a former client to know whether confidential information is being shared inside the law firm. The absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, that information communicated in a lawyer client relationship will not be used against the former client's interests.</a></p>	
	<p><a href="#">[2c] The third situation paragraph (a) addresses involves conflicts governed by Rule 1.7(d), which concerns a lawyer's personal interest in the subject matter of the representation, which may affect a lawyer's exercise of independent judgment and loyalty to the client's interests in the representation. Rule 1.7(d) address conflicts of interest that would affect a lawyer's ability to represent a client's interests competently. Paragraph (a) recognizes that one lawyer's personal interest does not necessarily affect the ability of other lawyers in a law firm to represent a client competently. The lawyer's personal interest conflict is imputed to other lawyers in the law firm only when there is a significant risk that the lawyer's personal interest would have a</a></p>	

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest:</b></p> <p align="center"><b>General Rule</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest:</b></p> <p align="center"><b>General Rule</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">material adverse effect on the representation of the client by the remaining lawyers in the firm.</a></p>	
<p>[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.</p>	<p>[3]<sup>15</sup> 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 <del>materially limit</del><a href="#">have a material adverse effect on</a><sup>16</sup> the representation by others in the firm, the firm should not be <del>disqualified</del><a href="#">prohibited from further representation</a>.<sup>17</sup> On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and <a href="#">the fact of that lawyer's ownership would have a material adverse effect on the representation of the firm's client by</a> others in the firm <del>would be materially limited in pursuing the matter</del> because of loyalty to that lawyer, the personal</p>	

<sup>15</sup> **Drafters' Recommendation:** Given the vote on paragraph (a), see footnote 3, above, the drafters recommend the adoption of Comment [3], as revised.

<sup>16</sup> **Drafters' Note:** We have substituted the same language we substituted for "materially limit" in paragraph (a).

<sup>17</sup> **Drafters' Disagreement:** See footnote 15. Bob Kehr would remove the first two sentences of Comment [3]: " a. The first [topic] is the possibility of a non-conflict, that is, something that is not a conflict under Rule 1.7, might be imputed to another lawyer in the firm. Of course not, and I think that even discussing this in Rules that don't include the material limitation concept is both unnecessary and might lend some support to assertions of positional conflicts and other situations that are not within the meaning of "direct conflicts" as described in the Rule 1.7 Comment. I would remove the first two sentences." See 6/10/08 Kehr Memo, #7.a.

Mark Tuft and KEM disagree. This comment gets to the heart of the issue that some, but not all, personal conflict interests should be imputed to the firm.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><del>disqualification</del> <u>prohibition</u> of the lawyer would be imputed to all others in the firm.<sup>18</sup></p>	
<p>[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from</p>	<p>[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation <u>by others in the law firm</u> if the lawyer is prohibited from acting because of events <u>that occurred</u><sup>19</sup> before the person became a lawyer, for example, work that the person did while a law student.<sup>20</sup> <del>Such persons</del><u>In</u></p>	

<sup>18</sup> See footnote 15. Bob Kehr would remove the last sentence of Comment [3]: “ b. The second [topic], contained in the final sentence of Comment [3], is another “materially limited” discussion that I think has no place in our Rules and should be removed. See 6/10/08 Kehr Memo, #7.b.

The Drafters disagree. See footnote 17, above.

**Possible Further Drafting:** At the 5/8-9/09 meeting, the Chair suggested that Jerry Sapiro could submit examples that he believes would provide better guidance to lawyers on imputed disqualification as a result of personal interest conflicts. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 10.d.

<sup>19</sup> **Drafters' Note:** Clarifying change.

<sup>20</sup> **Drafters' Recommendation:** Retain the preceding sentence pending the Commission's recommendation as to private firm – to – private firm screening.

**Explanation:** Bob Kehr believes this sentence contradicts California law, at least where the prior position was fiduciary in nature. See 6/10/08 Kehr Memo, #9. See also *Allen v. Academic Games League of America, Inc.*, 831 F.Supp. 785 (C.D.Cal. 1993).

Mark Tuft & KEM: We've revised the second sentence of MR 1.10, cmt. [4], to clarify that, although the lawyer (former law student) is personally disqualified, his or her DQ is not imputed to the other firm lawyers so long as he or she is screened (again, a point picked up in the last sentence).

**KEM Note to Drafters:** Even if *Allen v. Academic Games* is silent on screening, the RRC should carefully consider sanctioning screening as a means to rebut the presumption of shared confidences when the confidential information was acquired as a law student. In light of the ABA MacCrate Report and the more recent Carnegie Report on Legal Education, both of which emphasized the importance of skills training in the law school curriculum, we will see more and more students in the future having externship

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.</p>	<p><a href="#">both situations</a>,<sup>21</sup> however, <del>ordinarily</del><sup>22</sup> <a href="#">such persons</a> 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.<sup>23</sup> See Rules <del>1.0</del><a href="#">1.0.1(k)</a> and 5.3. <a href="#">See also Comment [9]</a>.<sup>24</sup></p>	
<p>[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer</p>	<p>[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer</p>	

placements in firms and in-house law departments as part of their legal education. This is in addition to clinics operated by law schools, judicial externships, externship placements in government law offices, and simulation courses in the law school). The latter situations all presumably would not run afoul of an imputation rule because of the “government lawyer” nexus. However, placements in private firms and corporate law departments would.

<sup>21</sup> **Drafters’ Note:** Clarification that the third sentence of the Comment applies to both situations described in the first two sentences.

<sup>22</sup> **Drafters’ Recommendation:** Delete “ordinarily”. It is not certain to us under what circumstances should such a person be permitted to become personally involved? Only when they were “personally and substantially” involved?

<sup>23</sup> **Drafters’ Disagreement:** Jerry notes that the screen must be adequate. See 2/26/08 Sapiro E-mail, #6. Bob suggests this sentence should be considered after the Commission has considered the efficacy of screening. 6/10/08 Kehr Memo, #10.

Mark Tuft & KEM do not think consideration of this sentence must await consideration of the efficacy of screening for lawyers moving between private law firms. This sentence is a correct statement of the law on treating DQ’s of non-lawyer employees of a firm. See *In re Complex Asbestosis Litigation*, 232 Cal.App.3d 572, 592-93 (1991); *Allen v. Academic Games*, *supra*.

<sup>24</sup> **Drafters’ Note:** This is a reference to a new comment Nace Ruvolo requested and which the Commission approved by an 8-1-2 vote. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 1B.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).</p>	<p>represented the client. However, the law firm may not represent a person with interests adverse to those of a <del>present</del>current client of the firm, which would violate Rule 1.7.<sup>25</sup> Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).</p>	
<p>[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For</p>	<p>[6] Rule 1.10(c) removes imputation with the informed consent of <del>the</del>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(<del>b</del>), <u>[Comments [27] – [28]]</u>,<sup>26</sup> and that each affected client or former client has given informed <u>written</u> consent to the representation, <del>confirmed in writing</del>. 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</p>	

<sup>25</sup> **Drafters' Note/Recommendation:** We've restored the Model Rule language. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 12(b)(1).

**Possible Further Drafting:** At the 5/8-9/09 meeting, Stan Lampert offered to draft a revised third sentence for Comment [5]. See 5/8-9/09 KEM Meeting Notes, III.C., at ¶. 12.b.(2).

<sup>26</sup> **Drafters' Note:** The reference in MR 1.10, comment [6], is to MR 1.7(b) ["material limitation," a standard the Commission has rejected]. The reference to comments [27] and [28] in the public comment draft is to the comments concerning "Prohibited Representations," the closest approximation we have to MR 1.7(b). We have placed them in brackets, subject to the final decisions of the Commission on MR 1.7.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>a definition of informed consent, see Rule 1.0(e).</p>	<p>Rule 1.7, Comment [2233]. For a definition of informed consent, see Rule 4.0[1.0.1(e)].<sup>27</sup></p>	
<p>[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.</p>	<p><del>[7]<sup>28</sup> Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.</del></p>	
<p>[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent</p>	<p><del>[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent</del></p>	

<sup>27</sup> **Drafters' Note:** The reference is to MR 1.0(e), which provides:

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

<sup>28</sup> **Drafters' Note:** These comments all relate MR 1.10(a)(2) and (3), which broadly permit screening and which we have recommended the Commission not adopt. However, if the Commission agrees to include a provision similar to paragraph (d), which permits screening in limited situations, some of the substance of these paragraphs might be mined.

**NOTE:** Arizona has not included any comments that explain its paragraph (d), concerning screening. Other states, however, have and, like the Model Rule comments, might be mined for language.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</p>	<p><del>agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.</del></p>	
<p>[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.</p>	<p><del>[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.</del></p>	
<p>[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.</p>	<p><del>[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.</del></p>	

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[11]Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.</p>	<p>[147]<sup>29</sup> 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.<sup>30</sup> 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 <del>disqualified</del><u>prohibited</u> lawyer.</p>	
<p>[12]Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that</p>	<p>[128] Where a lawyer is prohibited from engaging in certain transactions under <u>Rules [1.8.1]<sup>31</sup> through Rule 1.8[1.8.12], paragraph (k) of that Rule [1.8.13]</u>,</p>	

<sup>29</sup> **Drafters' Recommendation:** As explained in his report on Rule 1.11 (government lawyer conflicts), Jerry Sapiro has recommended that comment [7] be deleted. The Drafters recommend that this issue be preserved for discussion, pending resolution in Rule 1.11 concerning the movement of a lawyer from private practice to government employment.

The drafters agree with Jerry that the second sentence of Comment [7] (and also MR 1.11(d)) contradicts California law, which states that when a lawyer moves from a private firm to a government firm, not only is the migrating lawyer personally disqualified, but that lawyer's DQ is imputed to all other lawyers in the government office absent screening (unless, of course, the migrating lawyer is the head of the government office). See *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 135 P.3d 20, 43 Cal.Rptr.3d 771; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 18 Cal.Rptr.3d 403. Although MR 1.11(d) provides for the personal disqualification of the lawyer migrating from private practice to government employment, that lawyer's DQ is not imputed to other lawyers in the government office.

This sentence should be revised to track whatever the Commission should decide to do with MR 1.11(d), and be retained.

<sup>30</sup> **Drafters' Disagreement:** Bob Kehr's has proposed revising the first sentence of Comment [7] as follows: "This Rule does not apply when a lawyer has joined a private firm after having represented the government. See Rule 1.11(b) and (c)."

Mark Tuft and KEM would keep the ABA language.

<sup>31</sup> **Drafters' Note:** These numbers have been placed in brackets pending the Commission's final decision on the numbering for the 1.8 series of Rules.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.2 Imputation Of Conflicts Of Interest: General Rule Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.</p>	<p>and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.</p>	
	<p><a href="#">[9] Nothing in this Rule shall be construed as limiting or altering the power of a court of this State to control in the furtherance of justice the conduct of lawyers and other persons connected in any manner with judicial proceedings before it. See Code Civ. P. section 128(a)(5).</a><sup>32</sup></p>	

<sup>32</sup> **RRC Action:** At the 5/8-9/09 meeting, the RRC voted 8-1-2 to include a comment to the effect that Rule 1.10 does not apply to judicial disqualification issues. See 5/8-9/09 KEM Meeting Notes, at ¶. 1B.

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**May 28, 2009 KEM E-mail to Drafters (Tuft, Julien, Kehr, Vapnek, KEM), Melchior, Sapiro, Lampport, Ruvolo, Peck, cc Chair & Staff:**

Greetings:

I'm sending this e-mail to you because you're on one of the drafting teams for which screening is an issue.

As I noted in the e-mails I sent earlier this morning, I've attached the following, all in Word:

1. Chart of MR 1.10 Adoptions, revised 5/26/09. The chart includes the screening provisions from each jurisdiction that has adopted some form of non-consensual screening for private

lawyers. In addition, at the end of the chart, I've attached the rules from several states that have diverged substantially from either the blackletter or the comment to the Model Rule.

2. Document including clean and redline versions of every screening provision that a jurisdiction has adopted, revised 5/24/09. The redline comparisons are either to the 1983 or 2002 version of MR 1.10. See below.
3. Chart in four columns with side-by-side comparisons of the 2002 and 2009 versions of MR 1.10, Delaware Rule 1.10 (w/ a screening provision that broadly permits screening) and Arizona Rule 1.10 (w/ a screening provision that permits screening in limited situations). See below.

Comments (based on footnotes 1 & 2 to item #1, above):

1. Different Versions of Model Rule 1.10. There are three versions of Model Rule 1.10: (i) The 1983 version, (ii) the 2002 version that was approved by the ABA House of Delegates, which rejected the Ethics 2000 Commission's recommendation of limited screening; and (iii) the 2009 version that implemented a provision [paragraph (b)] that broadly permits screening and added comments [7]-[10] to the Rule. I am not aware of any state that has adopted the 2009 version of the Model Rule. Many states (nearly 25) have already revised either the 1983 version of the MR or the 2002 version of the MR to permit screening.

a. A "Yes" in Column 2 to the Chart means simply that the State has reviewed the E2K recommendations and adopted or recommended adoption of a post-E2K rule. It does not mean that the state has adopted or rejected screening.

b. A "Yes in Column 3, however, means that a state has adopted some form of screening, either broadly permitting it or permitting it only in limited situations. A "No" in Column 3 means that the state either rejected the 2002 version of the Model Rule (e.g., D.C., N.Y.) or has not yet made a final decision on whether to adopt it (e.g., Hawaii, Illinois).

c. Column 4 contains the blackletter of any screening provision and some observations.

2. A Note on Terminology Used: Throughout this Chart, I refer to screening provisions that "broadly permit screening" or those that "permit screening in limited situations.

a. Broadly permits screening. "Broadly permits screening" means that the jurisdiction's provision permits screening of any lawyer who has acquired (or is presumed to have acquired) confidential information of the former client, regardless of the degree of involvement of that lawyer in the former client's representation. In effect, this is equivalent to the substantial responsibility standard in MR 1.11 and thus would place private lawyers more or less on equal footing with government lawyers. Model Rule 1.10, as revised in 2009, is one such provision. Jurisdictions (13) that broadly permit screening are: Delaware, Illinois (both current and proposed), Kentucky, Maryland, Michigan (both current and proposed), Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee (proposed revision), Utah and Washington.

b. Permits screening in limited situations. "Permits screening in limited situations" means that the jurisdictions provision permits screening only of a lawyer who did not

“substantially participate,” or was not “substantially involved,” did not have a “substantial role,” did not have “primary responsibility,” etc., in the former client’s matter or when any confidential information that the lawyer might have obtained is deemed not material to the current representation (e.g., Mass.) or “is not likely to be significant” (e.g., Minn.) Jurisdictions (11) that permit screening in limited situations are: Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Tennessee (current rule only); and Wisconsin.

c. South Carolina permits very limited screening for a lawyer who represents “a client of a public defender office, legal services association, or similar program serving indigent clients ....” See S.C. Rule 1.10(e). Although public defenders are typically thought to be covered under Rules that apply to government lawyers, at least one jurisdiction has held otherwise. See *Richard B. v. State*, 71 P.3d 811 (Alaska (2003)).

d. Screening by Case Law. Finally, I’m aware of two states that permit screening by case law: Connecticut and Georgia. See *Laprise v. Paul*, 2007 WL 4636533 (Conn. Super. 2007) (screening an implied exception to Rule 1.10); *Georgia Baptist Health Care System, Inc. v. Hanafi*, 253 Ga. App. 540 (Ga.App. 2002).

Please let me know if you have any questions.

**June 13, 2009 Kehr E-mail to KEM, cc Chair & Difuntorum:**

Kevin: A question triggered by reading your May 2009 meeting notes ---

The MRs refer to a former client as a “former client” but a current client only as a “client”, making the limitation latent. It is my recollection that we have decided to add “current” where appropriate so that the meaning is more immediately and reliably apparent to readers of our Rules. Your notes on Rule 1.9(c) don’t use “current”. Does my memory fail?

**June 20, 2009 KEM E-mail to Kehr, cc Chair & Difuntorum:**

Please accept my apologies for not responding sooner. I was out of town when you e-mail arrived and have spent the better part of the last week dealing with issues at school. To be honest, this slipped through the cracks.

1. I won't go so far as to say that your memory fails, but I don't recall that the Commission "decided" to include "current" as a modifier of client, even under the conditions you outlined below. The suggestion has been made in a few e-mails but the Commission has not voted on it.

2.. I've search my notes for Rules 1.9, 1.18 and 1.8.2, where I thought it was most likely we would have discussed the issue.

a. In my notes for 1.8.2 [MR 1.8(b)], the Commission approved putting "current" in the title (as is true of the title for MR 1.8, but voted against even using "current" as a modifier in the comment. See 3/27/09 KEM Meeting Notes, III.A., at para. 9. The vote was 2-6-1. That is the only place I found such a discussion.

3. I've also just run a search of the Model Rules. The phrase "current client" appears in only two places, both in MR 1.7: Comments [6] (in explaining directly adverse) and [9] (used in way that you suggest, i.e., noting that the lawyer's independence of judgment might be materially limited not only by duties to current C's, but also by duties to former C's under Rule 1.9.

4. I also searched the phrase, "present client." That phrase appears in two places: 1.10, cmt. [5], and in MR 3.8(e) ("(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: ...") The latter use is simply inclusive as opposed to distinguishing.

Please let me know if you have any questions.

**August 3, 2009 KEM E-mail to Tuft,**

Just so you know and we don't duplicate effort, I'm in the process of updating the most recent draft of Rule 1.10 based on the discussion at the May 2009 meeting.

I've also largely completed the comparison charts for Rule 1.8.13, again based on the discussion at the May 2009 meeting.

I'll get you and the other drafters 1.10 by later today or this evening. I probably won't be able to get back to 1.8.13 until tomorrow or Wednesday.

Please let me know if you have any questions.

**August 3, 2009 KEM E-mail to Lamport, cc Drafters (Tuft, Julien, Kehr & Vapnek), Chair, Difuntorum & McCurdy:**

Greetings Stan:

1. I'm writing for your assistance in preparing Comment [2] to proposed Rule 1.10. **Please let me know whether or not you can get me something by Wednesday** so I can get the Rule out to the drafters for their approval and begin the process of putting together a comparison chart and get this submitted by the 8/12/09 deadline.

2. Here are my notes from the 5/8-9/09 meeting concerning Comment [2]:

9. **Comment [2]**.

a. Harry: Need to change the word "disqualification" in Comment [2].

(1) Stan: See Stan Point #1. (**see below**) We need to address the three types of imputation.

(2) Mark: I suggest Stan submit a comment to the drafters.

(3) **Harry: Stan to draft the comment and submit to the drafters.**

b. Footnote 7. Second sentence of Comment [2] provides: "Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."

(1) **Drafters' Disagreement**: Bob Kehr would delete the second sentence of comment [2], as " it only muses over the logic behind the principle that is fully stated in the first sentence." 6/10/08 Kehr Memo, #5.

Mark Tuft & KEM disagree with the deletion of the sentence. Imputation is grounded in loyalty; the issue of loyalty played a central role in the recent screening debate in the ABA. They believe it is important to keep this sentence.

(2) Harry: Give Stan an opportunity to do his drafting.

3. Here is point #1 from your 3/24/09 e-mail to the RRC:

1. At the outset, we should be clear about what this rule would be addressing. I think there are three (or four depending on how you count) types of conflicts this rule will address. The **first** situation involves **concurrent adversity** conflicts. If a lawyer in a firm is representing a client and therefore cannot be directly adverse to that client, no other lawyer in the firm can accept a representation directly adverse to that client without both clients' informed written consent. The **second** situation involves **adverse use of confidential information** conflicts. If a lawyer in a firm has obtained a present or former client's confidential information by virtue of representing that client, then, without the present or former client's informed written consent, neither the lawyer, nor any other lawyer in the firm, can accept or continue employment that would involve the use or disclosure of that information in a manner in which the present or former client would not want it used or disclosed. **Third**, there are **relationship and interest in the subject matter conflicts**, which typically involve situations that would affect the independent judgment of and faithful representation by the lawyer representing the client. If the lawyer representing the client knows that another lawyer has a relationship or an interest that would affect the lawyer's exercise of independent judgment on a client's behalf or would otherwise affect the lawyer's duty of undivided loyalty, the lawyer must disclose those relationships or interests. (Emphasis added).

4. In addition, you offered to draft a new third sentence to Rule 1.10, cmt. [5]. Again, here are my notes from the May 2009 meeting:

b. **Footnote 16**. Drafters revised the third sentence as follows: “However, the law firm may not represent a person with interests adverse to those of a [-present-] current client of the firm, [-which would violate-] in violation of Rule 1.7.

(1) Bob: Change is not crucial. Keep the MR language.

(2) Stan: I'll draft a new third sentence.

This doesn't strike me as an important change. In fact, Bob is now fine w/ the MR language. Do you see a compelling reason to change the MR language?

5. I've attached Comment [2] to MR 1.10, in Word.

6. I've also attached Comment [5] to MR 1.10, in Word.

Thanks in advance.

**August 3, 2009 Tuft E-mail to KEM:**

Thanks, Kevin. I will be returning to the office tomorrow from our trip to Knoxville, TN so your timing is good.

**August 4, 2009 Lamport E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy:**

I just got back from my Yosemite backcountry trip. I am going to need today to get caught up. I may need until Thursday.

**August 7, 2009 Lamport E-mail to KEM, cc Drafters, Chair, Difuntorum, McCurdy:**

Attached is my draft of Comment [2]. I looked over Comment [5] and decided that I don't see a compelling reason to revise it, other than to correct the error on the third "lawyer for formerly was associated with the firm." It probably should read "lawyer formerly associated with the firm." I checked the ABA website and saw that the error is in the Comment posted on the site.

I await everyone's input.

**August 7, 2009 KEM E-mail to Drafters, cc Lamport, Chair, Difuntorum & McCurdy:**

I've attached the following:

1. Rule 1.10 [3-310], Draft 3.1 (8/7/09), redline, compared to Draft 2.2 (3/16/09), the draft considered at the 5/8-9/09 meeting. The draft incorporates the revisions approved at that meeting. In Word and PDF.
2. My meeting notes for Rule 1.10 from the 5/8-9/09 meeting, in PDF.
3. A PDF of the Model Rule that is posted to the ABA website, redline, compared to the Report 109 rule that the ABA House of Delegates actually approved last February 2009. I've highlighted the errors in the rule version that is posted and have notified the ABA of their errors, but they still have not corrected them. Rest assured that I the Word file I started with for our proposed Rule contained the necessary corrections. The comments in the file I had sent Stan contained versions I had copied and pasted from the web site, thinking they had corrected the errors by now.

Some comments:

1. Our deadline for submission of a rule and Comparison Charts for the rule is Wednesday, August 12, 2009. Because we need to create the comparison charts -- though I don't think we need to have explanations just yet -- it would be very helpful if everyone were to submit their comments, if any, by **Monday, August 10**. We can't create a comparison to the Model Rule until we have some idea of what the drafters are proposing as our rule.
2. I've incorporated Stan's proposed substitute for MR 1.10, cmt. [2] in the attached rule so that you can read it all in one placed.

Please let me know if you have any questions.

**August 8, 2009 KEM E-mail mail to Drafters, cc Lamport, Chair, Difuntorum & McCurdy:**

I've attached new draft 3.2 (8/8/09), redline, compared to Draft 2.2 (3/16/09), the draft considered at the 5/8-9/09 meeting. The draft incorporates the revisions approved at that meeting. In Word and PDF.

The only differences between draft 3.2 and draft 3.1 that I circulated yesterday is that I've added the specific paragraphs in 1.7 to which Stan was referring, as well as a few minor edits. I had intended to include those in the draft I sent yesterday but I overlooked it. My apologies for any inconvenience.

By the way, I'm not sure I agree with what Stan has written. I simply was trying to include the cross-references and made some other changes. I may have some other suggestions later.

**August 9, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:**

I have the following comments on your Draft 3.2 ---

1. Older but wiser, I want to record my disagreement with the Commission's decision to adopt the word "knowing" in paragraph (a). As I have separately expressed in an e-mail on Rule 1.11, the use of "knowing" creates the possibility that a lawyer who performs a deficient conflicts check, or performs none at all, will have a defense to a claim made under this Rule. This is b/c "knowing" is defined to mean actual knowledge. Illinois has caught this in its Rule 1.10(a), which says: "**(a)** No lawyer associated with a firm shall represent a client when the lawyer **knows or reasonably should know** that another lawyer associated with that firm would be prohibited from doing so by Rules 1.7, 1.8(c) or 1.9, except as permitted by Rules 1.10(b), (c), or (d), or by Rule 1.11 or Rule 1.12." (I've just caught that Stan made a similar point in his 3/27/09 e-mail)
2. I generally am fine with Stan's proposed Comment [2]. I have a computer-marked version that makes some minor editing suggestions.

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

Thanks for your comments. Here are my responses:

1. I wonder if Dylan's line from "My Back Pages" is more appropriate here ("Ah, but I was so much older then, I'm younger than that now.") I think I agree that the standard should be "knows or reasonably should know" to get at the "bad" lawyer who chooses not to run a conflicts check to run afoul of the rule. I say "I think," because I'm not sure the intent of the rule is to get at the "bad" lawyer so much as to provide a safe harbor for a "good" lawyer who does make the conflicts check but for some reason the information had not been inputted or if a "bad" lawyer in the firm decided not to input the information. Please see my May 2009 meeting notes for Rule 1.10, attached, at paragraph 1, where we had that discussion and Mark explained his understanding of the purpose of the Rule. The Commission agreed w/ Mark by a 7-3-1 vote. I had suggested that "knowingly" should reach the lawyer that intentionally chose not to use the firm's conflict checking procedure and received looks that implied I had just flopped down from Pluto. I agree after that episode that "knowingly" means "actual" knowledge and that if you want

to reach the "bad," "head in the sand" lawyer, you need to use the objective "know or reasonably should know." The question is whether we should expand the scope of the rule. I thought the previous vote indicated the Commission's intent not to do so. Perhaps others of the drafters can enlighten or some other members of the Commission might request that we revisit the issue.

2. Here is what I wrote Stan when he asked me what problem I might have w/ his proposed comment [2] and why I reserved giving it my unalloyed enthusiasm:

In principle, I'm fine with the concept of thoroughly explaining imputation. However, proposed comment [2b], by referring to "loyalty," threatens to undo what you attempted to accomplish with your proposed comments re 1.9(a). I've tried to address some of that with cross-references to Rule 1.9 and the comments (to be determined), but I'm not sure it completely addresses my concerns (which I thought were yours as well). Perhaps we can lift some of the language we used in 1.9. It will make the comment longer but less confusing.

At any rate, I haven't given your proposal an appropriate level of ratiocination to be able to agree wholeheartedly with you. Like you, I'm under a number of time pressures extraneous to the Commission (not to mention the time pressures of other rules).

I hope this helps explain my position. On the whole, however, after a relatively quick read, I thought you did a fine job

Please let me know if you have any questions.

**August 10, 2009 Peck E-mail to Drafters, cc Chair, Lampport & Staff:**

I think Bob's dissent should be recorded. I do not think that we have time to revisit this again. My recollection and intent are as Kevin has stated below.

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

I offer the following comments to Draft 3.1 of Rule 1.10 for the co-drafters' consideration:

1. I am unclear whether the vote at the last meeting to add the word "each" on line 23 has resolved Jerry's point in note 9 or whether the issue has been preserved for discussion as Bob requested.
2. Paragraph (d) as revised is overly broad. Rule 1.11 governs imputation for lawyers associated in a firm with government lawyers - not for all purposes. I recommend the paragraph begin with the words: "Imputation of conflicts of interest involving" before "lawyers" on line 25 and change "are" to "is" on line 26.
3. Retaining the second sentence of MR Comment [1] without the first sentence does not work. I recommend substituting the words "for purposes of this rule" in place of "within this definition" on line 36.

4. I am not comfortable with simply having the second sentence in the Model Rule Comment as the only sentence in Comment [1]. That sentence only tells lawyers that whether lawyers are associated in a "firm" depends on the facts. We should begin the comment with a sentence that tells lawyers that the definition of "firm" is critical to the rule. I would start the comment with the following sentence:

"The term 'firm' for purposes of this rule is defined in Rule 1.0(c)."

If you agree, then my concern express in paragraph 3, above, would no longer apply.

4. Comment [2]

a. I do not see any reason for not retaining the language in Model Rule Comment [2]. Putting aside Bob's objection to the second sentence on "musing" grounds, the first, third and fourth sentences are informative and useful to understanding the scope and structure of the rule. Without them, lawyers will wonder how the rule differs in structure from the Model Rule.

b. The second sentence in the Model Rule comment is important to understanding that imputation is based on the concept of loyalty owed by each lawyer in the firm to the clients of the firm. I would keep the sentence but recommend deleting the word "vicariously" on line 45.

c. The last two sentences in the Model Rule comment are particularly important. There is often confusion as to whether paragraph (a) or paragraph (b) applies. These sentences clarify that paragraph (a) applies to lawyers currently practicing together without regard to whether there has been any sharing of confidential information and why a strict imputation rule applies. The comment states in clear terms that paragraph (b) applies when a lawyer *leaves* the firm.

d. I share some of Kevin's reservations about Stan's detailed explanation of loyalty in the context of imputing current and former client conflicts and wonder whether such an exacting explanation is necessary and would be workable in actual practice. Loyalty to a former client is a narrow concept and Stan's proposed paragraph 2(b) reads too broadly for me. I assume Stan's third and fourth sentences relate to rule 1.9(a) and not 1.9(b). Even so, I am not convinced that the duty of loyalty owed by the lawyer who formerly represented a client is imputed to another lawyer in the firm who represents a client with materially adverse interests in a substantially related matter that does not required attacking the first lawyer's prior work. I would prefer that we hew closely to the Model Rule comment and explain loyalty to a former client in relation to rule 1.9(a).

5. Comment [3]. I do not have a problem with the revisions to comment [3] given the current construct of rule 1.7. I fervently hope we will eventually reconsider rule 1.7. I agree that the comment is important and should be retained.

6. Comment [4] I agree to striking "ordinarily" on line 115.

7. Comment [9] Words such as "diminish" and "interfere" are ambiguous. I recommend the wording of the first line in Comment [9] on line 151 be redrafted as follows:

"Nothing in this Rule shall be construed as limiting or altering the power of a court of this State to . . . ."

8. The remaining endnotes accurately reflect my views.
9. In regard to Kevin's excellent chart comparing screening provisions among various versions of rule 1.10, I am on record as favoring a rule that permits screening for lateral lawyers in private practice in limited situations such as the rules in Arizona, Colorado, Indiana and Tennessee.
10. My understanding is that the RRC's previous vote indicated an intent not to expand the imputation rule to a "know or reasonably should know" standard as Bob advocates. However, I have no problem if Bob's position is included in the Introduction to elicit public comment.

**August 11, 2009 KEM E-mail to Drafters, cc Lampert, Chair & Staff:**

In an attempt to capture Bob's and Mark's e-mails from yesterday, I've attached the following:

1. Rule & Comment Comparison Chart, in scaled PDF. The comparison is to the MR and I've included the footnotes from the most recent draft, 3.3B (8/10/09).
2. Rule 1.10 [3-310], Draft 3.3B (8/10/09), redline, compared to Draft 2.2, which attempts to record Mark's and Bob's exchange yesterday. This is the draft on which I've based item #1. The heading refers to "Version B". It is identical to "Version A," which I have not attached, except that Version B includes Arizona Rule 1.10(d), which permits screening in limited situations, and footnote 8A, which explains that we are including Ariz. Rule 1.10(d) for discussion purposes only, though Mark and I would not oppose the inclusion of a similar provision.
3. Rule 1.10 [3-310], Draft 3.3A (8/10/09), redline, compared to Draft 2.2. This is version A, identified in #2. I've included only to complete your records. As noted, it's identical to Version B, except as described in #2.

**Comment**

1. I propose circulating to the Commission only item #1. It lays out all the issues in the footnotes. Although the document might look a bit cramped, I want to avoid the confusion that would likely result at the August meeting if some Commissioners worked off the comparison chart and others used the draft.

a. If I don't hear you by 8:00 p.m. tonight, I'll assume your agreement.

2. I don't think we need to provide anything else. I think providing the Chart on Rule 1.10 I prepared would be overkill, though we might consider making it available at the Collaboration site. Similarly, I would make the same recommend for the document I prepared that has the full versions, in clean and redline comparisons to the Model Rules, of all rules from the 24 jurisdictions that permit screening.

a. If I don't hear you by 8:00 p.m. tonight, I'll assume your agreement.

Please let me know if you have any questions or would like anything added to the footnotes.

**August 11, 2009 Tuft E-mail to KEM:**

I am ok with this approach as long as our respective emails are included in the email compilation that goes with the rule.

## McCurdy, Lauren

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**Subject:** FW: [Fwd: RE: RRC - 3-310 [1.10] - III.I. - Draft 3.3B (8/10/09) & Comparison Charts]

----- Original Message -----

**Subject:** RE: RRC - 3-310 [1.10] - III.I. - Draft 3.3B (8/10/09) & Comparison Charts

**Date:** Thu, 13 Aug 2009 22:48:57 -0700

**From:** Lamport, Stanley W. <[SLamport@coxcastle.com](mailto:SLamport@coxcastle.com)>

**To:** Kevin Mohr <[kemohr@charter.net](mailto:kemohr@charter.net)>, Mark Tuft <[MTuft@cwclaw.com](mailto:MTuft@cwclaw.com)>

**CC:** JoElla L. Julien <[CommissionerJ2@gmail.com](mailto:CommissionerJ2@gmail.com)>, Robert L. Kehr <[rkehr@kscllp.com](mailto:rkehr@kscllp.com)>, Paul Vapnek <[pwvapnek@townsend.com](mailto:pwvapnek@townsend.com)>, Kevin Mohr G <[kejmohr@gmail.com](mailto:kejmohr@gmail.com)>, Harry Sondheim <[hbsondheim@verizon.net](mailto:hbsondheim@verizon.net)>, Randall Difuntorum <[Randall.Difuntorum@calbar.ca.gov](mailto:Randall.Difuntorum@calbar.ca.gov)>, Lauren McCurdy <[Lauren.McCurdy@calbar.ca.gov](mailto:Lauren.McCurdy@calbar.ca.gov)>

**References:** <[43C27BDDAB319F438D82134A0AA43FB803A9F71D@CWC-EXCHANGE.CWCLAW.com](mailto:43C27BDDAB319F438D82134A0AA43FB803A9F71D@CWC-EXCHANGE.CWCLAW.com)>  
<[4A81AC7D.8000805@charter.net](mailto:4A81AC7D.8000805@charter.net)>

Kevin:

These are my comments on the latest versions:

1. Comment [2] Alt 1 - My problem with Model Rule Comment [2] is that imputation is not just about loyalty. It is about loyalty in the 1.7(a) sense, but when it comes to Rule 1.9 and personal interests it is about confidential information and independent judgment. While all of these duties could be lumped under the broad rubric of loyalty, I doubt most lawyers would understand the nuance there. I don't have a problem saying in the 1.7(a) sense what is contained in the second sentence of the Model Rule Comment, as Mark would like. We could add the second sentence to the end of Comment [2a] in the Alt 2 version. I have no problem keeping the last two sentences of the Model Rule Comment either at the end of Comment [2] Alt 2 version or as a separate Comment.

2. Comment [2b] - Alt 2 - I understand the concern about the duty of loyalty with respect to 1.9 and agree that in trying to get to the point quickly I overstated the duty. The problem is with the fourth sentence in the draft. Starting with the third sentence, I would revise the Comment to state (with revised language highlighted):

"Rule 1.9 involves two primary duties: *(i) a duty to refrain from representing a client in circumstances that would injuriously affect a former client with respect to a matter in which the lawyer represented the former client, and (ii) a duty to not reveal or use a former client's confidential information in a manner that is contrary to the former client's interests.* In this context, the knowledge of a client's matter and information related to the representation of the former client possessed by one of the lawyer's in the law firm is deemed to be possessed by all other lawyers in the law firm. The duties exist to promote candor in the lawyer client relationship by assuring that the client can entrust the client's matter to the lawyer and can communicate to a lawyer without fear that the knowledge of the client's matter and the information imparted to the lawyer in the representation would be used or disclosed against the client's interests. The imputed conflict rule exists....[pick up the rest of the comment from there]."

I think this narrows the Comment to what we are discussing in the 1.9 Comments.

3. Paragraph (d), Version B. - I cannot support this rule. I will not repeat what I have written at length on at least two prior occasions except to say that an unconsented screen does not to promote candor in a lawyer client relationship, because the former client has no effective means to oversee compliance with the screen. I don't know why former clients in a non-litigation matter are entitled to less protection of their confidential information than former clients in a litigation matter. Nor do I understand why the non-litigation former client should have any less right not to worry about whether a screen is being violated than a former client in a litigation matter. The same can be said for the substantial role distinction with respect to litigation matters. So paragraph (d)(1) does not work for me.

Furthermore, paragraph (d)(3) is meaningless for a former client. A former client has no way to ascertain compliance with a screen. No written notice can enable a former client to ascertain compliance. Paragraph (d)(3) offers no client protection.

STAN

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**From:** Kevin Mohr [<mailto:kemohr@charter.net>]

**Sent:** Tuesday, August 11, 2009 10:38 AM

**To:** Mark Tuft

**Cc:** Lampport, Stanley W.; JoElla L. Julien; Robert L. Kehr; Paul Vapnek; Kevin Mohr G; Harry Sondheim; Randall Difuntorum; Lauren McCurdy

**Subject:** Re: RRC - 3-310 [1.10] - III.I. - Draft 3.3B (8/10/09) & Comparison Charts

Greetings:

In an attempt to capture Bob's and Mark's e-mails from yesterday, I've attached the following:

1. Rule & Comment Comparison Chart, in scaled PDF. The comparison is to the MR and I've included the footnotes from the most recent draft, 3.3B (8/10/09).
2. Rule 1.10 [3-310], Draft 3.3B (8/10/09), redline, compared to Draft 2.2, which attempts to record Mark's and Bob's exchange yesterday. This is the draft on which I've based item #1. The heading refers to "Version B". It is identical to "Version A," which I have not attached, except that Version B includes Arizona Rule 1.10(d), which permits screening in limited situations, and footnote 8A, which explains that we are including Ariz. Rule 1.10(d) for discussion purposes only, though Mark and I would not oppose the inclusion of a similar provision.
3. Rule 1.10 [3-310], Draft 3.3A (8/10/09), redline, compared to Draft 2.2. This is version A, identified in #2. I've included only to complete your records. As noted, it's identical to Version B, except as described in #2.

### **Comment**

1. I propose circulating to the Commission only item #1. It lays out all the issues in the footnotes. Although the document might look a bit cramped, I want to avoid the confusion that would likely result at the August meeting if some Commissioners worked off the comparison chart and others used the draft.

- a. If I don't hear you by 8:00 p.m. tonight, I'll assume your agreement.
2. I don't think we need to provide anything else. I think providing the Chart on Rule 1.10 I prepared would be overkill, though we might consider making it available at the Collaboration site. Similarly, I would make the same recommendation for the document I prepared that has the full versions, in clean and redline comparisons to the Model Rules, of all rules from the 24 jurisdictions that permit screening.
  - a. If I don't hear you by 8:00 p.m. tonight, I'll assume your agreement.

Please let me know if you have any questions or would like anything added to the footnotes.  
Thanks,

Kevin

Mark Tuft wrote:

I offer the following comments to Draft 3.1 of Rule 1.10 for the co-drafters' consideration:

1. I am unclear whether the vote at the last meeting to add the word "each" on line 23 has resolved Jerry's point in note 9 or whether the issue has been preserved for discussion as Bob requested.
2. Paragraph (d) as revised is overly broad. Rule 1.11 governs imputation for lawyers associated in a firm with government lawyers - not for all purposes. I recommend the paragraph begin with the words: "Imputation of conflicts of interest involving" before "lawyers" on line 25 and change "are" to "is" on line 26.
3. Retaining the second sentence of MR Comment [1] without the first sentence does not work. I recommend substituting the words "for purposes of this rule" in place of "within this definition" on line 36.
4. I am not comfortable with simply having the second sentence in the Model Rule Comment as the only sentence in Comment [1]. That sentence only tells lawyers that whether lawyers are associated in a "firm" depends on the facts. We should begin the comment with a sentence that tells lawyers that the definition of "firm" is critical to the rule. I would start the comment with the following sentence:

"The term 'firm' for purposes of this rule is defined in Rule 1.0(c)."

If you agree, then my concern expressed in paragraph 3, above, would no longer apply.

4. Comment [2]

- a. I do not see any reason for not retaining the language in Model Rule Comment [2]. Putting aside Bob's objection to the second sentence on "musing" grounds, the first, third and fourth sentences are informative and useful to understanding the scope and structure of the rule. Without them, lawyers will wonder how the rule differs in structure from the Model Rule.

b. The second sentence in the Model Rule comment is important to understanding that imputation is based on the concept of loyalty owed by each lawyer in the firm to the clients of the firm. I would keep the sentence but recommend deleting the word "vicariously" on line 45.

c. The last two sentences in the Model Rule comment are particularly important. There is often confusion as to whether paragraph (a) or paragraph (b) applies. These sentences clarify that paragraph (a) applies to lawyers currently practicing together without regard to whether there has been any sharing of confidential information and why a strict imputation rule applies. The comment states in clear terms that paragraph (b) applies when a lawyer *leaves* the firm.

d. I share some of Kevin's reservations about Stan's detailed explanation of loyalty in the context of imputing current and former client conflicts and wonder whether such an exacting explanation is necessary and would be workable in actual practice. Loyalty to a former client is a narrow concept and Stan's proposed paragraph 2(b) reads too broadly for me. I assume Stan's third and fourth sentences relate to rule 1.9(a) and not 1.9(b). Even so, I am not convinced that the duty of loyalty owed by the lawyer who formerly represented a client is imputed to another lawyer in the firm who represents a client with materially adverse interests in a substantially related matter that does not require attacking the first lawyer's prior work. I would prefer that we hew closely to the Model Rule comment and explain loyalty to a former client in relation to rule 1.9(a).

5. Comment [3]. I do not have a problem with the revisions to comment [3] given the current construct of rule 1.7. I fervently hope we will eventually reconsider rule 1.7. I agree that the comment is important and should be retained.

6. Comment [4] I agree to striking "ordinarily" on line 115.

7. Comment [9] Words such as "diminish" and "interfere" are ambiguous. I recommend the wording of the first line in Comment [9] on line 151 be redrafted as follows:

"Nothing in this Rule shall be construed as limiting or altering the power of a court of this State to . . . . ."

8. The remaining endnotes accurately reflect my views.

9. In regard to Kevin's excellent chart comparing screening provisions among various versions of rule 1.10, I am on record as favoring a rule that permits screening for lateral lawyers in private practice in limited situations such as the rules in Arizona, Colorado, Indiana and Tennessee.

15. My understanding is that the RRC's previous vote indicated an intent not to expand the imputation rule to a "know or reasonably should know" standard as Bob advocates. However, I have no problem if Bob's position is included in the Introduction to illicit public comment.

6.

Mark L. Tuft  
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**From:** Kevin Mohr [<mailto:kemohr@charter.net>]

**Sent:** Monday, August 03, 2009 11:57 AM

**To:** Stan Lamport

**Cc:** Mark Tuft; JoElla L. Julien; Robert L. Kehr; Paul Vapnek; Kevin Mohr G; Harry Sondheim; Randall Difuntorum; Lauren McCurdy

**Subject:** RRC - 3-310 [1.10] - Comments [2] & [5]

Greetings Stan:

1. I'm writing for your assistance in preparing Comment [2] to proposed Rule 1.10. **Please let me know whether or not you can get me something by Wednesday** so I can get the Rule out to the drafters for their approval and begin the process of putting together a comparison chart and get this submitted by the 8/12/09 deadline.

2. Here are my notes from the 5/8-9/09 meeting concerning Comment [2]:

9. **Comment [2]**.

a. Harry: Need to change the word "disqualification" in Comment [2].

(1) Stan: See Stan Point #1. (**see below**) We need to address the three types of imputation.

(2) Mark: I suggest Stan submit a comment to the drafters.

(3) **Harry: Stan to draft the comment and submit to the drafters.**

b. Footnote 7. Second sentence of Comment [2] provides: "Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."

(1) **Drafters' Disagreement:** Bob Kehr would delete the second sentence of comment [2], as " it only muses over the logic behind the principle that is fully stated in the first sentence." 6/10/08 Kehr Memo, #5.

Mark Tuft & KEM disagree with the deletion of the sentence. Imputation is grounded in loyalty; the issue of loyalty played a central role in the recent screening debate in the ABA. They believe it is important to keep this sentence.

(2) **Harry: Give Stan an opportunity to do his drafting.**

3. Here is point #1 from your 3/24/09 e-mail to the RRC:

1. At the outset, we should be clear about what this rule would be addressing. I think there are three (or four depending on how you count) types of conflicts this rule will address. The *first*

situation involves **concurrent adversity** conflicts. If a lawyer in a firm is representing a client and therefore cannot be directly adverse to that client, no other lawyer in the firm can accept a representation directly adverse to that client without both clients' informed written consent. The **second** situation involves **adverse use of confidential information** conflicts. If a lawyer in a firm has obtained a present or former client's confidential information by virtue of representing that client, then, without the present or former client's informed written consent, neither the lawyer, nor any other lawyer in the firm, can accept or continue employment that would involve the use or disclosure of that information in a manner in which the present or former client would not want it used or disclosed. **Third**, there are **relationship and interest in the subject matter conflicts**, which typically involve situations that would affect the independent judgment of and faithful representation by the lawyer representing the client. If the lawyer representing the client knows that another lawyer has a relationship or an interest that would affect the lawyer's exercise of independent judgment on a client's behalf or would otherwise affect the lawyer's duty of undivided loyalty, the lawyer must disclose those relationships or interests. (Emphasis added).

4. In addition, you offered to draft a new third sentence to Rule 1.10, cmt. [5]. Again, here are my notes from the May 2009 meeting:

b. **Footnote 16.** Drafters revised the third sentence as follows: “However, the law firm may not represent a person with interests adverse to those of a [-present-] current client of the firm, [-which would violate-] in violation of Rule 1.7.

- (1) Bob: Change is not crucial. Keep the MR language.
- (2) Stan: I'll draft a new third sentence.

This doesn't strike me as an important change. In fact, Bob is now fine w/ the MR language. Do you see a compelling reason to change the MR language?

5. I've attached Comment [2] to MR 1.10, in Word.

6. I've also attached Comment [5] to MR 1.10, in Word.

Thanks in advance.

Kevin

--

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**August 3, 2009 KEM E-mail to Tuft,**

Just so you know and we don't duplicate effort, I'm in the process of updating the most recent draft of Rule 1.10 based on the discussion at the May 2009 meeting.

I've also largely completed the comparison charts for Rule 1.8.13, again based on the discussion at the May 2009 meeting.

I'll get you and the other drafters 1.10 by later today or this evening. I probably won't be able to get back to 1.8.13 until tomorrow or Wednesday.

Please let me know if you have any questions.

**August 3, 2009 KEM E-mail to Lamport, cc Drafters (Tuft, Julien, Kehr & Vapnek), Chair, Difuntorum & McCurdy:**

Greetings Stan:

1. I'm writing for your assistance in preparing Comment [2] to proposed Rule 1.10. **Please let me know whether or not you can get me something by Wednesday** so I can get the Rule out to the drafters for their approval and begin the process of putting together a comparison chart and get this submitted by the 8/12/09 deadline.

2. Here are my notes from the 5/8-9/09 meeting concerning Comment [2]:

9. **Comment [2]**.

a. Harry: Need to change the word "disqualification" in Comment [2].

(1) Stan: See Stan Point #1. (**see below**) We need to address the three types of imputation.

(2) Mark: I suggest Stan submit a comment to the drafters.

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b. Footnote 7. Second sentence of Comment [2] provides: "Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."

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Mark Tuft & KEM disagree with the deletion of the sentence. Imputation is grounded in loyalty; the issue of loyalty played a central role in the recent screening debate in the ABA. They believe it is important to keep this sentence.

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1. At the outset, we should be clear about what this rule would be addressing. I think there are three (or four depending on how you count) types of conflicts this rule will address. The **first** situation involves **concurrent adversity** conflicts. If a lawyer in a firm is representing a client and therefore cannot be directly adverse to that client, no other lawyer in the firm can accept a representation directly adverse to that client without both clients' informed written consent. The **second** situation involves **adverse use of confidential information** conflicts. If a lawyer in a firm has obtained a present or former client's confidential information by virtue of representing that client, then, without the present or former client's informed written consent, neither the lawyer, nor any other lawyer in the firm, can accept or continue employment that would involve the use or disclosure of that information in a manner in which the present or former client would not want it used or disclosed. **Third**, there are **relationship and interest in the subject matter conflicts**, which typically involve situations that would affect the independent judgment of and faithful representation by the lawyer representing the client. If the lawyer representing the client knows that another lawyer has a relationship or an interest that would affect the lawyer's exercise of independent judgment on a client's behalf or would otherwise affect the lawyer's duty of undivided loyalty, the lawyer must disclose those relationships or interests. (Emphasis added).

4. In addition, you offered to draft a new third sentence to Rule 1.10, cmt. [5]. Again, here are my notes from the May 2009 meeting:

b. **Footnote 16**. Drafters revised the third sentence as follows: “However, the law firm may not represent a person with interests adverse to those of a [-present-] current client of the firm, [-which would violate-] in violation of Rule 1.7.

(1) Bob: Change is not crucial. Keep the MR language.

(2) Stan: I'll draft a new third sentence.

This doesn't strike me as an important change. In fact, Bob is now fine w/ the MR language. Do you see a compelling reason to change the MR language?

5. I've attached Comment [2] to MR 1.10, in Word.

6. I've also attached Comment [5] to MR 1.10, in Word.

Thanks in advance.

**August 3, 2009 Tuft E-mail to KEM:**

Thanks, Kevin. I will be returning to the office tomorrow from our trip to Knoxville, TN so your timing is good.

**August 4, 2009 Lamport E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy:**

I just got back from my Yosemite backcountry trip. I am going to need today to get caught up. I may need until Thursday.

**August 7, 2009 Lamport E-mail to KEM, cc Drafters, Chair, Difuntorum, McCurdy:**

Attached is my draft of Comment [2]. I looked over Comment [5] and decided that I don't see a compelling reason to revise it, other than to correct the error on the third "lawyer for formerly was associated with the firm." It probably should read "lawyer formerly associated with the firm." I checked the ABA website and saw that the error is in the Comment posted on the site.

I await everyone's input.

**August 7, 2009 KEM E-mail to Drafters, cc Lamport, Chair, Difuntorum & McCurdy:**

I've attached the following:

1. Rule 1.10 [3-310], Draft 3.1 (8/7/09), redline, compared to Draft 2.2 (3/16/09), the draft considered at the 5/8-9/09 meeting. The draft incorporates the revisions approved at that meeting. In Word and PDF.
2. My meeting notes for Rule 1.10 from the 5/8-9/09 meeting, in PDF.
3. A PDF of the Model Rule that is posted to the ABA website, redline, compared to the Report 109 rule that the ABA House of Delegates actually approved last February 2009. I've highlighted the errors in the rule version that is posted and have notified the ABA of their errors, but they still have not corrected them. Rest assured that I the Word file I started with for our proposed Rule contained the necessary corrections. The comments in the file I had sent Stan contained versions I had copied and pasted from the web site, thinking they had corrected the errors by now.

Some comments:

1. Our deadline for submission of a rule and Comparison Charts for the rule is Wednesday, August 12, 2009. Because we need to create the comparison charts -- though I don't think we need to have explanations just yet -- it would be very helpful if everyone were to submit their comments, if any, by **Monday, August 10**. We can't create a comparison to the Model Rule until we have some idea of what the drafters are proposing as our rule.
2. I've incorporated Stan's proposed substitute for MR 1.10, cmt. [2] in the attached rule so that you can read it all in one placed.

Please let me know if you have any questions.

**August 8, 2009 KEM E-mail mail to Drafters, cc Lamport, Chair, Difuntorum & McCurdy:**

I've attached new draft 3.2 (8/8/09), redline, compared to Draft 2.2 (3/16/09), the draft considered at the 5/8-9/09 meeting. The draft incorporates the revisions approved at that meeting. In Word and PDF.

The only differences between draft 3.2 and draft 3.1 that I circulated yesterday is that I've added the specific paragraphs in 1.7 to which Stan was referring, as well as a few minor edits. I had intended to include those in the draft I sent yesterday but I overlooked it. My apologies for any inconvenience.

By the way, I'm not sure I agree with what Stan has written. I simply was trying to include the cross-references and made some other changes. I may have some other suggestions later.

**August 9, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:**

I have the following comments on your Draft 3.2 ---

1. Older but wiser, I want to record my disagreement with the Commission's decision to adopt the word "knowing" in paragraph (a). As I have separately expressed in an e-mail on Rule 1.11, the use of "knowing" creates the possibility that a lawyer who performs a deficient conflicts check, or performs none at all, will have a defense to a claim made under this Rule. This is b/c "knowing" is defined to mean actual knowledge. Illinois has caught this in its Rule 1.10(a), which says: "**(a)** No lawyer associated with a firm shall represent a client when the lawyer **knows or reasonably should know** that another lawyer associated with that firm would be prohibited from doing so by Rules 1.7, 1.8(c) or 1.9, except as permitted by Rules 1.10(b), (c), or (d), or by Rule 1.11 or Rule 1.12." (I've just caught that Stan made a similar point in his 3/27/09 e-mail)
2. I generally am fine with Stan's proposed Comment [2]. I have a computer-marked version that makes some minor editing suggestions.

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

Thanks for your comments. Here are my responses:

1. I wonder if Dylan's line from "My Back Pages" is more appropriate here ("Ah, but I was so much older then, I'm younger than that now.") I think I agree that the standard should be "knows or reasonably should know" to get at the "bad" lawyer who chooses not to run a conflicts check to run afoul of the rule. I say "I think," because I'm not sure the intent of the rule is to get at the "bad" lawyer so much as to provide a safe harbor for a "good" lawyer who does make the conflicts check but for some reason the information had not been inputted or if a "bad" lawyer in the firm decided not to input the information. Please see my May 2009 meeting notes for Rule 1.10, attached, at paragraph 1, where we had that discussion and Mark explained his understanding of the purpose of the Rule. The Commission agreed w/ Mark by a 7-3-1 vote. I had suggested that "knowingly" should reach the lawyer that intentionally chose not to use the firm's conflict checking procedure and received looks that implied I had just flopped down from Pluto. I agree after that episode that "knowingly" means "actual" knowledge and that if you want

to reach the "bad," "head in the sand" lawyer, you need to use the objective "know or reasonably should know." The question is whether we should expand the scope of the rule. I thought the previous vote indicated the Commission's intent not to do so. Perhaps others of the drafters can enlighten or some other members of the Commission might request that we revisit the issue.

2. Here is what I wrote Stan when he asked me what problem I might have w/ his proposed comment [2] and why I reserved giving it my unalloyed enthusiasm:

In principle, I'm fine with the concept of thoroughly explaining imputation. However, proposed comment [2b], by referring to "loyalty," threatens to undo what you attempted to accomplish with your proposed comments re 1.9(a). I've tried to address some of that with cross-references to Rule 1.9 and the comments (to be determined), but I'm not sure it completely addresses my concerns (which I thought were yours as well). Perhaps we can lift some of the language we used in 1.9. It will make the comment longer but less confusing.

At any rate, I haven't given your proposal an appropriate level of ratiocination to be able to agree wholeheartedly with you. Like you, I'm under a number of time pressures extraneous to the Commission (not to mention the time pressures of other rules).

I hope this helps explain my position. On the whole, however, after a relatively quick read, I thought you did a fine job

Please let me know if you have any questions.

**August 10, 2009 Peck E-mail to Drafters, cc Chair, Lampport & Staff:**

I think Bob's dissent should be recorded. I do not think that we have time to revisit this again. My recollection and intent are as Kevin has stated below.

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

I offer the following comments to Draft 3.1 of Rule 1.10 for the co-drafters' consideration:

1. I am unclear whether the vote at the last meeting to add the word "each" on line 23 has resolved Jerry's point in note 9 or whether the issue has been preserved for discussion as Bob requested.
2. Paragraph (d) as revised is overly broad. Rule 1.11 governs imputation for lawyers associated in a firm with government lawyers - not for all purposes. I recommend the paragraph begin with the words: "Imputation of conflicts of interest involving" before "lawyers" on line 25 and change "are" to "is" on line 26.
3. Retaining the second sentence of MR Comment [1] without the first sentence does not work. I recommend substituting the words "for purposes of this rule" in place of "within this definition" on line 36.

4. I am not comfortable with simply having the second sentence in the Model Rule Comment as the only sentence in Comment [1]. That sentence only tells lawyers that whether lawyers are associated in a "firm" depends on the facts. We should begin the comment with a sentence that tells lawyers that the definition of "firm" is critical to the rule. I would start the comment with the following sentence:

"The term 'firm' for purposes of this rule is defined in Rule 1.0(c)."

If you agree, then my concern express in paragraph 3, above, would no longer apply.

4. Comment [2]

a. I do not see any reason for not retaining the language in Model Rule Comment [2]. Putting aside Bob's objection to the second sentence on "musing" grounds, the first, third and fourth sentences are informative and useful to understanding the scope and structure of the rule. Without them, lawyers will wonder how the rule differs in structure from the Model Rule.

b. The second sentence in the Model Rule comment is important to understanding that imputation is based on the concept of loyalty owed by each lawyer in the firm to the clients of the firm. I would keep the sentence but recommend deleting the word "vicariously" on line 45.

c. The last two sentences in the Model Rule comment are particularly important. There is often confusion as to whether paragraph (a) or paragraph (b) applies. These sentences clarify that paragraph (a) applies to lawyers currently practicing together without regard to whether there has been any sharing of confidential information and why a strict imputation rule applies. The comment states in clear terms that paragraph (b) applies when a lawyer *leaves* the firm.

d. I share some of Kevin's reservations about Stan's detailed explanation of loyalty in the context of imputing current and former client conflicts and wonder whether such an exacting explanation is necessary and would be workable in actual practice. Loyalty to a former client is a narrow concept and Stan's proposed paragraph 2(b) reads too broadly for me. I assume Stan's third and fourth sentences relate to rule 1.9(a) and not 1.9(b). Even so, I am not convinced that the duty of loyalty owed by the lawyer who formerly represented a client is imputed to another lawyer in the firm who represents a client with materially adverse interests in a substantially related matter that does not required attacking the first lawyer's prior work. I would prefer that we hew closely to the Model Rule comment and explain loyalty to a former client in relation to rule 1.9(a).

5. Comment [3]. I do not have a problem with the revisions to comment [3] given the current construct of rule 1.7. I fervently hope we will eventually reconsider rule 1.7. I agree that the comment is important and should be retained.

6. Comment [4] I agree to striking "ordinarily" on line 115.

7. Comment [9] Words such as "diminish" and "interfere" are ambiguous. I recommend the wording of the first line in Comment [9] on line 151 be redrafted as follows:

"Nothing in this Rule shall be construed as limiting or altering the power of a court of this State to . . . ."

8. The remaining endnotes accurately reflect my views.
9. In regard to Kevin's excellent chart comparing screening provisions among various versions of rule 1.10, I am on record as favoring a rule that permits screening for lateral lawyers in private practice in limited situations such as the rules in Arizona, Colorado, Indiana and Tennessee.
10. My understanding is that the RRC's previous vote indicated an intent not to expand the imputation rule to a "know or reasonably should know" standard as Bob advocates. However, I have no problem if Bob's position is included in the Introduction to elicit public comment.

**August 11, 2009 KEM E-mail to Drafters, cc Lampert, Chair & Staff:**

In an attempt to capture Bob's and Mark's e-mails from yesterday, I've attached the following:

1. Rule & Comment Comparison Chart, in scaled PDF. The comparison is to the MR and I've included the footnotes from the most recent draft, 3.3B (8/10/09).
2. Rule 1.10 [3-310], Draft 3.3B (8/10/09), redline, compared to Draft 2.2, which attempts to record Mark's and Bob's exchange yesterday. This is the draft on which I've based item #1. The heading refers to "Version B". It is identical to "Version A," which I have not attached, except that Version B includes Arizona Rule 1.10(d), which permits screening in limited situations, and footnote 8A, which explains that we are including Ariz. Rule 1.10(d) for discussion purposes only, though Mark and I would not oppose the inclusion of a similar provision.
3. Rule 1.10 [3-310], Draft 3.3A (8/10/09), redline, compared to Draft 2.2. This is version A, identified in #2. I've included only to complete your records. As noted, it's identical to Version B, except as described in #2.

**Comment**

1. I propose circulating to the Commission only item #1. It lays out all the issues in the footnotes. Although the document might look a bit cramped, I want to avoid the confusion that would likely result at the August meeting if some Commissioners worked off the comparison chart and others used the draft.

a. If I don't hear you by 8:00 p.m. tonight, I'll assume your agreement.

2. I don't think we need to provide anything else. I think providing the Chart on Rule 1.10 I prepared would be overkill, though we might consider making it available at the Collaboration site. Similarly, I would make the same recommend for the document I prepared that has the full versions, in clean and redline comparisons to the Model Rules, of all rules from the 24 jurisdictions that permit screening.

a. If I don't hear you by 8:00 p.m. tonight, I'll assume your agreement.

Please let me know if you have any questions or would like anything added to the footnotes.

**August 11, 2009 Tuft E-mail to KEM:**

I am ok with this approach as long as our respective emails are included in the email compilation that goes with the rule.

**August 11, 2009 Kehr E-mail to KEM:**

I won't be able to look at this tonight.

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

I've attached the following:

1. Rule 1.10 [3-310], Rule & Comment Comparison Chart, Draft 1 (8/10/09), in scaled PDF. The comparison is to the MR and I've included the footnotes from the most recent draft, 3.3B (8/10/09).
2. E-mail compilation excerpt for Rule 1.10, which includes the drafters' recent exchange of e-mails, in PDF. See pages 63-67 of the attached.

Comment:

1. The chart is based on Rule 1.10 [3-310], Draft 3.3B (8/10/09). Version B includes Arizona Rule 1.10(d), which permits screening in limited situations, as new paragraph (d). In the footnote, we explain that we are including Ariz. Rule 1.10(d) for discussion purposes only, though Mark and I would not oppose the inclusion of a similar provision.

Please let me know if you have any questions.

**August 13, 2009 Lamport E-mail to KEM, cc Drafters, Chair & Staff:**

These are my comments on the latest versions:

1. Comment [2] Alt 1 - My problem with Model Rule Comment [2] is that imputation is not just about loyalty. It is about loyalty in the 1.7(a) sense, but when it comes to Rule 1.9 and personal interests it is about confidential information and independent judgment. While all of these duties could be lumped under the broad rubric of loyalty, I doubt most lawyers would understand the nuance there. I don't have a problem saying in the 1.7(a) sense what is contained in the second sentence of the Model Rule Comment, as Mark would like. We could add the second sentence to the end of Comment [2a] in the Alt 2 version. I have no problem keeping the last two sentences of the Model Rule Comment either at the end of Comment [2] Alt 2 version or as a separate Comment.
2. Comment [2b] - Alt 2 - I understand the concern about the duty of loyalty with respect to 1.9 and agree that in trying to get to the point quickly I overstated the duty. The problem is with the

fourth sentence in the draft. Starting with the third sentence, I would revise the Comment to state (with revised language highlighted):

"Rule 1.9 involves two primary duties: (i) a duty to refrain from representing a client in circumstances that would injuriously affect a former client with respect to a matter in which the lawyer represented the former client, and (ii) a duty to not reveal or use a former client's confidential information in a manner that is contrary to the former client's interests. In this context, the knowledge of a client's matter and information related to the representation of the former client possessed by one of the lawyer's in the law firm is deemed to be possessed by all other lawyers in the law firm. The duties exist to promote candor in the lawyer client relationship by assuring that the client can entrust the client's matter to the lawyer and can communicate to a lawyer without fear that the knowledge of the client's matter and the information imparted to the lawyer in the representation would be used or disclosed against the client's interests. The imputed conflict rule exists....[pick up the rest of the comment from there]."

I think this narrows the Comment to what we are discussing in the 1.9 Comments.

3. Paragraph (d), Version B. - I cannot support this rule. I will not repeat what I have written at length on at least two prior occasions except to say that an unconsented screen does not to promote candor in a lawyer client relationship, because the former client has no effective means to oversee compliance with the screen. I don't know why former clients in a non-litigation matter are entitled to less protection of their confidential information than former clients in a litigation matter. Nor do I understand why the non-litigation former client should have any less right not to worry about whether a screen is being violated than a former client in a litigation matter. The same can be said for the substantial role distinction with respect to litigation matters. So paragraph (d)(1) does not work for me.

Furthermore, paragraph (d)(3) is meaningless for a former client. A former client has no way to ascertain compliance with a screen. No written notice can enable a former client to ascertain compliance. Paragraph (d)(3) offers no client protection.

**August 14, 2009 KEM E-mail to Staff:**

If it's not too late, would you please include in the agenda materials Stan's e-mail, below, immediately after the e-mail compilation excerpt I sent you for inclusion in the agenda materials?

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

1. The column in the spreadsheet for the proposed rule has the wrong number. It says it is Rule 1.2.
2. Regarding footnote 2, I join with Bob Kehr in his dissent. Requiring that a lawyer in a firm must "knowingly" represent a client before the imposition of discipline encourages willful evasion of the requirement of checking for conflicts of interest.
3. I have mixed feelings about paragraph (d). On the one hand, I have difficulty accepting the concept that a former government lawyer, or current government lawyer, can be in a preferred position over a lawyer who migrates between firms in private practice. The

“revolving door” is too lucrative to think that former government lawyers should be allowed to use screening to absolve their firms from conflicts of interest. If government lawyers nevertheless can be screened and obtain absolution for their associates under 1.11, why can’t lateral transfers in private firms? Even if we do not always permit screening, there are circumstances in which I think screening can reasonably be applied. See, e.g., *Panther v. Park*.

4. Regardless of the resolution of that strategic issue, I do not like proposed paragraph (d)(1). Why limit screening to transactional matters? Former clients can be harmed by the conflicts of interest of a transactional lawyer just as seriously as former clients can be affected by the conflicts of interest of a litigator. In addition, whether the tainted lawyer played a substantial role in the former representation is, to me, too subjective a concept. Does a lawyer who appears at a deposition play a “substantial” role or not? Does a lawyer who participated for five minutes in a strategy meeting play a “substantial” role or not? Questions like these cannot objectively be answered, so whether the member of the public would be protected in a given situation cannot be forecast.
5. In addition, whether I would accept screening at all will depend on how we define screening in the terminology rule.
6. Regarding the dueling versions of Comment [2], I find merits in both versions. Therefore, I would recommend editing and using the substance of both. To me, Stan’s draft is a more comprehensive and thorough discussion of the reasons for the rule than the model rule. If we have to elect between the two versions, I would therefore vote in favor of Stan’s draft, subject, however, to editing.
7. Regarding Comment [3], I agree with Bob Kehr. The two examples do not aid the analysis. The first has been recast from the “material limitation” approach but still depends upon the same concept, just substituting the words “material adverse effect on.” In the second situation, where a lawyer in the firm owns an adverse party, the firm’s loyalty is inherently in question, and the conflict of interest should not be excused by the other lawyers in the firm protesting that the conflict should be ignored because one or more of them say, “I will not let the adverse consequences on my partner if we have success in this case affect my handling of it.” I wouldn’t believe such a statement, and a client should not have to accept it.
8. Regarding Comment [4], and footnote 20, I respectfully disagree with Kevin. If, while a law student, I worked on a case, I would have been exposed to confidential information about the client and the case. If, upon admission to the bar, I have an employment opportunity with the opponent of the firm for whom I clerked while a law student, I should not be permitted to work for that firm without the consent of the former client. If the client of the firm that employed me while a law student will not waive the conflict of interest created by my new employment, that should be a factor considered by the potential employer before it offers me a job. The fact that I may not have an employment opportunity with one firm that will pay me more than \$100,000 annual salary on admission to the bar, and would have to go another firm that might only pay me an even \$100,000 on admission to the bar, does not evoke any sympathy in my mind. Client trust is more important, and, if we will not screen lawyers in the same situation, I would not screen law clerks who become lawyers and change sides. Nor would I allow screening to protect the hiring firm from imputation when it knowingly hires another nonlawyer from an opposing firm. They can check for conflicts in the nonlawyer situation just as they can for lawyers.

**RRC – Rule 1.10 [3-310]  
E-mails, etc. – Revised (8/24/2009)**

9. Regarding Comment [9], I think what is stated in the draft is a step in the right direction. However, to me it is too abstruse. We should say, expressly, that nothing in this rule adds to or detracts from the ability of a tribunal to disqualify or not disqualify lawyers or firms that appear before it. Otherwise, no one will know that that is what we intend.