

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Tuesday, August 11, 2009 7:52 PM
To: McCurdy, Lauren; Difuntorum, Randall
Cc: Mark Tuft; Robert L. Kehr; Kurt Melchior; Kevin Mohr G; Dominique Snyder (Home) (E-mail); Harry Sondheim; Lee, Mimi
Subject: RRC - 3-310 [1.8.13] - III.G. - August 28-29, 2009 Meeting Materials
Attachments: RRC - 3-310 [1-8-13] - Compare - Intro, Rule & Comment - COMBO - DFT1.1 (08-05-09).pdf;
RRC - 3-310 [1-8-13] - E-mails, etc. - REV (08-24-09)-EXC_081109.pdf

Greetings Lauren & Randy:

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

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

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

Kevin

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COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

July 2009

(Draft rule prepared for circulation for public comment)

INTRODUCTION:

Proposed Rule 1.8.13, which governs the imputation of conduct prohibited in the 1.8 series of Rules to lawyers associated in law firms, is based on Model Rule 1.8(k). Changes to the language in Model Rule 1.8(k) are primarily intended to conform the Rule to the Commission's numbering convention for the proposed rule counterparts to Model Rule 1.8. Rather than follow the ABA in placing a group of largely unrelated conflict concepts in a single rule, for ease of reference the Commission has assigned each concept in Model Rule 1.8 its own separate rule number.

There is one substantive difference between Model Rule 1.8(k) and proposed Rule 1.8.13 that concerns the imputation of personal relationship conflicts. Under the Model Rule scheme, all relationship conflicts, whether business, professional, or of a close personal nature, including those involving the opposing party's lawyers, are governed by Rule 1.7(a)(2), and thus imputation of such conflicts in a law firm is governed by Model Rule 1.10. However, even though Rule 1.7(a)(2) covers all types of relationship conflicts, only such conflicts that "present a significant risk of materially limiting the representation of the client" are imputed to other lawyers in the law firm under Model Rule 1.10.

* Proposed Rule, Draft 2 (6/27/09).

INTRODUCTION (Continued):

The Commission, on the other hand, recommends that in the limited situation where there is a lawyer in a firm who has a family or close personal relationship conflict involving the lawyer of another person in a firm matter be governed under Rule 1.8.11 (“Relationship With Other Person’s Lawyer”), which provides:

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

Under proposed Rule 1.8.13, conflicts arising from such relationships would not be imputed to other members in the firm. Nor would such conflicts be imputed under proposed Rule 1.10, which does not govern imputation under the 1.8 series of rules. This approach comports with current California law. There is no evidence that the public has been harmed by this approach. Other relationship conflicts, for example those involving business and professional relationships, as well as other personal relationships not involving a lawyer participating in the matter, are addressed in proposed Rule 1.7, and thus may be imputed under Rule 1.10 if the conflict presents “a significant risk of having a

Minority. A minority of the Commission believes that excluding rule 1.8.11 entirely from rule 1.8.13 departs substantially from the Model Rules and would result in a significant void in public protection in situations where opposing counsel have a lawyer-client relationship while simultaneously representing third party clients whose interests are adverse. When the representing lawyer has a conflict of interest, the conflict is imputed to other lawyers in the firm under rule 1.10(a) because of the fundamental principle that the duties that one lawyer has to a client are shared by all lawyers in the firm. ABA Formal Opinion 97-406. There is no reason why the same result should not occur in California. The imputation analysis differs for the represented lawyer under the Model Rules, but proposed rule 1.8.11 is limited to only the representing lawyer and the current version of proposed rule 1.7 excludes conflicts that arise under rule 1.8.11. Thus, inadequate protection exists where (i) the lawyer representing a client in a matter knows that opposing counsel represents the lawyer’s supervisor or head of the office, (ii) the lawyer is the client of opposing counsel or (iii) the lawyer knows that his or her managing partner is opposing counsel’s client. This is not good public policy.

<p align="center"><u>ABA Model Rule</u></p> <p>Rule 1.8(b) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p>Rule 1.8.13—Conflict Imputation of Interest: Current Clients: Specific Prohibitions Under Rules <u>1.8.1 through 1.8.9, and 1.8.12</u></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.</p>	<p>(k) While lawyers are associated in a <u>law</u> firm, a prohibition in the foregoing paragraphs (a)<u>Rules 1.8.1</u> through (i)<u>Rule 1.8.9, and 1.8.12</u> that applies to any one of them shall apply to all of them.</p>	<p>Rule 1.8.13 is based on Model Rule 1.8(k). The changes made to the Model Rule conform the proposed Rule to the Commission's numbering convention in the 1.8 series of Rules. See Introduction.</p>

* Proposed Rule, Draft 2 (6/27/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.8(b) Conflict Of Interest: Current Clients: Specific Rules</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.8.13 Conflict Imputation of Interest: Current Clients: Specific Prohibitions Under Rules <u>1.8.1 through 1.8.9, and 1.8.12</u></p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.</p>	<p>[201] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) Rules 1.8.1 through (j) 1.8.9, and 1.8.12 also applies to all lawyers associated in a <u>law</u> firm with the personally prohibited lawyer. For example, one lawyer in a <u>law</u> firm may not enter into a business transaction with a client of another member of lawyer <u>associated in the law</u> firm without complying with paragraph (a) Rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. The <u>This Rule does not apply to Rules 1.8.10 and 1.8.11 since the</u> prohibition set forth in paragraph (j) those Rules is personal and is not applied to associated lawyers.</p>	<p>Comment [1] to proposed Rule 1.8.13 is based on Model Rule 1.8, cmt. [20]. As with the Rule itself, the changes made to the Model Rule conform the proposed Rule to the Commission's numbering convention in the 1.8 series of Rules. See Introduction.</p>

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May 28, 2009 Tuft E-mail to Drafters, cc Chair & Staff:

Here is my dissent to proposed rule 1.8.13:

Excluding rule 1.8.11 entirely from rule 1.8.13 departs substantially from the Model Rules and would result in a significant void in public protection in situations where opposing counsel have a lawyer-client relationship while simultaneously representing third party clients whose interests are adverse.

The Model Rules correctly analyze the conflicts of interest consequences of both the representing lawyer and the represented lawyer under rule 1.7.

When the representing lawyer has a conflict of interest, the conflict is imputed to other lawyers in the firm under rule 1.10(a) because of the fundamental principle that the duties that one lawyer has to a client are shared by all lawyers in the firm. ABA Formal Opinion 97-406. There is no reason why the same result should not occur in California. The imputation analysis differs for the represented lawyer under the Model Rules, but proposed rule 1.8.11 is limited to only the representing lawyer and the current version of proposed rule 1.7 excludes conflicts that arise under rule 1.8.11. Thus, inadequate protection exists where (i) the lawyer representing a client in a matter knows that opposing counsel represents the lawyer's supervisor or head of the office, (ii) the lawyer is the client of opposing counsel or (iii) the lawyer knows that his or her managing partner is opposing counsel's client. This is not good public policy.

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

I've attached the following, both in PDF:

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

Notes:

1. At the 5/8-9/09 meeting, Harry noted the rule had been approved over Mark's objection that these conflicts should be addressed in Rule 1.7 as is done by the ABA, and thus imputation governed by Rule 1.10. Harry then directed that the drafters prepare a comparison chart, w/ Mark's dissent included. That is what I have done. I took my best shot at explaining why California differs from the Model Rule with respect to these kinds of conflicts. I'm not sure I agree w/ what I have written. I've been in a minority in believing this is an area where the ABA might have gotten it right.

2. I do have an alternative suggestion that might remove the need for a dissent. I believe both camps are on the drafting team. How about if we were to remove from Rule 1.8.11 the phrase "is client of the lawyer" so that Rule 1.8.11 would provide:

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

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

Please let me know if you have any questions.

August 6, 2009 KEM E-mail to Tuft:

I just sent you and the other drafters 1.8.13.

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

Please let me know if you have any questions.

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

August 6, 2009 KEM E-mail to Tuft:

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

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

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

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

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

Conflicts of interest based on a personal interest of the prohibited lawyer under Rule 1.7(a)(2) are not imputed to other lawyers in the firm under Rule 1.10(a) unless the conflict presents a significant risk of materially limiting the representation of the client by the other lawyers in the firm. An example of where this occurs is when a partner or lead counsel is represented by opposing counsel in a matter that is of critical importance to that lawyer. Other lawyers working on the matter are requested or chose not to pursue a certain course of action as a result of that relationship. The situation does not have to rise to the level of "incompetence" for there to be a conflict of interest. Comment [1] to the Model Rule 1.7 clarifies that client loyalty and independent judgment are the interests sought to be protected by the rule. Imputation under rule 1.10 applies this protection to the remaining lawyers in the firm who know of the prohibited lawyer's conflict and there is a significant risk their representation of the client will be materially limited as a result.

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

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

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

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

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

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

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

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

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

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

**RRC – Rule 1.8.13 [MR 1.8(k) & 3-310]
E-mails, etc. – Revised (8/24/2009)**

pay particular attention to Mark's 8/10/09 and Bob's 8/10/09 e-mails, which identify drafter disagreements.

Please let me know if you have any questions.

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Please let me know if you have any questions.

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

I join with Mark in his dissent.

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

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