

McCurdy, Lauren

From: Robert L. Kehr [rlkehr@kscllp.com]
Sent: Wednesday, October 28, 2009 11:50 AM
To: Difuntorum, Randall; McCurdy, Lauren
Cc: CommissionerJ2@gmail.com; Jerome Sapiro Jr.; Anthonie Voogd; hbsondheim@verizon.net; kemohr@charter.net; Kevin Mohr G; Lee, Mimi
Subject: FW: RRC_Rule 1.0.1 November 2009 agenda item IV.A.

Randy and Lauren: The Rule 1.0.1 materials should be the three items I previously sent to you plus this e-mail, including Tony's message below. Unless Harry has a different preference, I would place the three items in the following order --- the revised rule draft, then the screening memo, and then the memo on possible additional defined terms.

The footnotes to the revised rule draft include a number of drafters' recommendations. I don't have time now to revise them to reflect that all recommendations are mine alone. There also is one footnote that refers to me rather than to the drafters as a group, but no different meaning is implied - I simply was inconsistent.

rlk

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

From: Anthonie Voogd [mailto:avoogd@roadrunner.com]
Sent: Wednesday, October 28, 2009 10:42 AM
To: Robert L. Kehr
Subject: Re: RRC_Rule 1.0.1 November 2009 agenda item IV.A.

Sorry for the delay - just back from another vacation trip. My comments, which do not changes, are a continuing belief that we are over editing the Model Rules. I will discuss this in a more general dissent.

With regard to screening, I would adhere to the Model Rules as well. If I were to make a change, I would include the definition in a new rule which would specify who is responsible for the insuring that screening is done properly and imposing discipline upon that lawyer if the screen fails for reasons within his or her reasonable control.

Tony

On Oct 25, 2009, at 6:52 PM, Robert L. Kehr wrote:

> <Rule 1.0.1 - DFT 2 (10-25-09) - Cf to MR 1.0.doc>

McCurdy, Lauren

From: Robert L. Kehr [rlkehr@kscllp.com]
Sent: Sunday, October 25, 2009 6:52 PM
To: JoElla L. Julien; Anthonie Voogd; Jerome Sapiro
Cc: Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Kevin Mohr; Kevin Mohr G
Subject: RRC_Rule 1.0.1 November 2009 agenda item IV.A.
Attachments: Rule 1.0.1 - DFT 2 (10-25-09) - Cf to MR 1.0.doc

JoElla, Tony, and Jerry: Here is my redraft of Rule 1.0.1. The footnotes contain recommendations from the drafting team that, as usual, express only my views and are subject to change once I've heard from you. I noticed in a quick final review that there is one footnote that speaks in the first person singular, and I'll need to change that after you have had the chance to look at this.

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1 **Rule 1.0 Terminology**
2

3 | (a)¹ “Belief” or “believes” means² that the person involved actually supposed the fact
4 in question to be true. A person’s belief may be inferred from circumstances.

5
6 (a-1)^{II} “Confidential information relating to the representation” is defined in Rule 1.6,
7 Comment [3], and is not limited to information that relates to the subject of the
8 representation.

9
10 (b)³ “Disclosure” means informing the client or former client of the relevant
11 circumstances and of the actual and reasonably foreseeable adverse consequences to
12 the client or former client.”
13

¹ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting.

The partial draft of this Rule considered at the Commission’s August 28-29, 2009 meeting (ending with “reasonably should know”) included extensive footnotes describing the jurisdictional variations of the defined terms. We have removed those footnotes from each of the terms on which the Commission decided at the August meeting so that the current draft won’t become too unwieldy, and thus have these explanatory terms only for terms that were not covered in the prior, partial draft.

² The Commission at its August 28-29, 2009 meeting voted 11-0-0 to substitute throughout this rule the word “means” in place of the Model Rule’s less definite “denotes”. With this change, paragraph (a) was deemed approved. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶¶ 4 and 7A. I want to note for future reference that at least Maine has made the same change in its new Rules effective 8/1/09.

^{II} One of the terms identified at the August 2009 meeting for possible inclusion was “confidential information” – a term not defined in the Model Rule. The discussion of Rule 1.6 has revealed that some members of the Commission think that the phrase “confidential information relating to the representation” is limited to information that in some sense is within the subject of a lawyer’s engagement by a client and have objected to Rule 1.6 on that basis. Other members believe that the phrase is defined in the Rule 1.6 Comment to mean all information a lawyer is bound to preserve under 6068(e)(1) or the lawyer-client privilege. This additional definition is offered as a means for bridging that gap by eliminating any possible suggestion that a lawyer’s duty under Rule 1.6 is any less than is described in Section 6068(e)(1). Although there are definitions of confidential information in the rules adopted in a few other states, we are not referring to them because our definition must be based on Section 6068(e)(1).

³ The removal of the MR term “confirmed in writing”, which is MR paragraph (b), was deemed approved at the Commission’s August 28-29, 2009 meeting because that term is not used in these proposed Rules. This definition of “disclosure” was deemed approved at the same time. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶5. The use of “disclosure” needs to be reconsidered in light of what the Commission finally decides with respect to “informed consent” and “informed written consent”. The term “disclosure” is used in our current rules, but it might become unnecessary if the Commission decides to use a definition of “informed consent” and “informed written consent” that does not include “disclosure”. See fn. 6, below.

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14 (c)⁴ “Law firm” means a law partnership; a professional law corporation; a sole
15 proprietorship or an association engaged in the practice of law; or lawyers employed in
16 a legal services organization or in the legal department, division or office of a
17 corporation, a government entity or other organization.

18
19 (d)⁵ “Fraud” or “fraudulent” means conduct that is fraudulent under the ~~substantive or~~
20 ~~procedural~~ law of the applicable jurisdiction and has a purpose to deceive.

21
22 (e)⁶ “Informed ~~written~~ consent” means a person’s the agreement ~~by a person~~ to a
23 proposed course of conduct after the lawyer has communicated adequate information

⁴ This is the post-public comment draft as previously approved by the Commission.

⁵ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting. The Commission then voted 8-2-0 to delete “substantive or procedural” from the definition. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶¶9 and 9A.

⁶ Because some proposed rules, e.g., Rule 1.6, refer only to “informed consent,” Kevin has recommended deleting the reference to “written” in the definition currently found in rule 3-310(A)(2), but including in a comment to this Rule that “informed written consent” requires “written” disclosure. See 8/10/09 KEM E-mail to Drafters, #3. However, “informed written consent” is used in a number of rules, and after further study Bob Kehr therefore recommends that we define both terms in Rule 1.0.1 so that there will be no question about whether a lawyer’s failure to obtain informed written consent can be the basis for professional discipline. While the term “disclosure” is key under California’s current rules, and while the use of this separate label facilitates the needed emphasis on the lawyer’s affirmative obligation to provide information and explanation when obtaining a person’s consent, RLK is satisfied that this can be handled through the Comment. The elimination of “disclosure” as a separate defined term is possible because of the Commission’s decision to change the Rule 1.7(d) standard to one of informed written consent. Please note that Mark Tuft expressed disagreement with Kevin’s recommendation at the August 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶10.c.

There are a number of variations on the MR definition.

Alaska Rule 1.0(g) makes non-substantive changes and one substantive change; it changes the phrase “communicated adequate information and explanation about” to: “adequately explained”. **The Drafters do not recommend** this change b/c, although shorter, it does not by its express terms show that the disclosure must include both “information” and “explanation”, leaving unclear what, in Alaska’s language, is an “adequate” explanation.

Maine Rule 1.0(e) makes two changes. The first straightens out the beginning of the definition by changing “the agreement of a person” to: “a person’s agreement”. **The Drafters recommend** this change and have incorporated it above. Its second change is substantive in adding an additional sentence: “Whether a client has given informed consent to representation shall be determined in light of the mental capacity of the client to give consent, the explanation of the advantages and risks involved provided by the lawyer seeking consent, the circumstances under which the explanation was provided and the consent obtained, the experience of the client in legal matters generally, and any other circumstances bearing on whether the client has made a reasoned and deliberate choice.” **The Drafters do not recommend** this change;

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24 and explanation about the material risks of and reasonably available alternatives to the
25 proposed course of conduct. “Informed written consent” means that the lawyer must
26 communicate the information and explanation in writing and obtain the person’s consent
27 in writing.

28
29 (f)⁷ “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question.
30 A person’s knowledge may be inferred from circumstances.

31
32 (g)⁸ “Partner” means a member of a partnership, a shareholder in a law firm
33 organized as a professional corporation, or a member of an association authorized to
34 practice law.

Proposed **Michigan** Rule 1.0(e) makes a minor wording change not worth taking the time to discuss;

NY Rule 1.0(j) “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated ~~adequate~~ information adequate for the person to make an informed decision, and ~~explanation about~~ after the lawyer has adequately explained to the person the material risks of ~~and reasonably available alternatives to~~ the proposed course of conduct and reasonably available alternatives.” The Drafters view these rearrangement of the definition as slightly better but non-substantive, and the **do not recommend** its use because it does not materially advance understanding of the meaning of the term;

North Carolina 1.0(f) is as follows: “‘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~~ appropriate to the ~~proposed course of conduct~~ circumstances. The Drafters **do not recommend** using this variation as it substitutes vagueness for vagueness.

Oregon Rule 1.0(g) adds the following sentence to the MR definition: “When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.” The Drafters **do not recommend** use of this variation, preferring that the recommendation to seek independent counsel appear in the text of applicable Rules.

Penn. Rule 1.0(e) is the same as the MR but substitutes the word “consent” for “agreement”. The drafter believe this is non-substantive and **do not recommend** making this change.

South Carolina Rule 1.0(g) is the same as the MR but limits the lawyer’s obligation to “reasonably” adequate information and explanation. The Drafters **do not recommend** this change.

Wyoming Rule 1.0(f) changes the defined term from “informed consent” to “informed decision”. The Drafters view this change as likely to cause confusion because the change is non-substantive and **do not recommend** it.

⁷ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶11.

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- 35
36 (h)⁹ “Reasonable” or “reasonably” when used in relation to conduct by a lawyer
37 | [means](#) the conduct of a reasonably prudent and competent lawyer.
38
39 (i)¹⁰ “Reasonable belief” or “reasonably believes” when used in reference to a lawyer
40 | [means](#) that the lawyer believes the matter in question and that the circumstances are
41 such that the belief is reasonable.
42
43 | (j)¹¹ “Reasonably should know” when used in reference to a lawyer [means](#) that a
44 lawyer of reasonable prudence and competence would ascertain the matter in question.
45
46 (k)¹² “Screened” the isolation of a lawyer from any participation in a matter through the
47 timely imposition of procedures within a firm that are reasonably adequate under the
48 circumstances to protect information that the isolated lawyer is obligated to protect
49 under these Rules or other law.
50
51 | (l)¹³ “Substantial” when used in reference to degree or extent [means](#) a material
52 matter of clear and weighty importance.

⁸ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶12.

⁹ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶13.

¹⁰ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶14.

¹¹ This definition was deemed approved at the Commission’s August 28-29, 2009 meeting. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶15.

¹² The possible definition of “screened” is addressed in a separate Memo to the Commission.

¹³ **Georgia** has revised this by adding the ten words at the end of the definition: “Substantial’ when used in reference to degree or extent denotes a material matter of clear and weighty importance, [or may refer to things of more than trifling value.](#)” There is one place in the Rules in which Georgia’s addition might be helpful. This is in MR 1.8(c), which says that: “A lawyer shall not solicit any substantial gift from a client” On balance, it does not appear that this addition or anything along those lines would materially enhance the reasonably predictable application of the Rule. The Drafters **do not recommend** Georgia’s addition or any addition along similar lines.

Ohio Rule 1.0(m): “‘Substantial’ when used in reference to degree or extent denotes a ~~material~~ matter of ~~clear and weighty~~[real](#) importance [or great consequence.](#)” This wordsmithing does not appear to alter the meaning of the definition or improve the ease of its application, and the **Drafters do not recommend** that we follow Ohio on this. Ohio’s Cmt. [11] clarifies that the definition of “substantial” does not apply to the uses of “substantially”: [\[11\] The definition of “substantial” does not extend to “substantially” as used in Rules 1.9, 1.10, 1.11, 1.12, 1.16, 1.18, and 7.4. The definition of “substantially related matter” is taken from Rule 1.9, Comment \[3\] and defines the term for purposes of Rules 1.9, 1.10, and 1.18. “Personally and substantially,” as used in Rule 1.11, originated in 18 U.S.C. Sec. 207. Rule 1.12, Comment \[1\] defines “personally](#)

53

54 | (m)¹⁴ “Tribunal” means: (i) a court, an arbitrator, or an administrative law judge in a
55 ~~binding arbitration proceeding or a legislative body, administrative agency or other body~~

and substantially” for former adjudicative officers.” We should consider a clarification along these lines when we get to the Comment.

Tennessee Rule 1.0(l) is identical to the MR but includes “substantially”: “Substantial’ or ‘substantially’ when” This seems immaterial, and the **Drafters do not recommend** making this change.

Texas has revised the definition somewhat along the lines of Ohio, and for the same reason the **Drafters do not recommend** that we follow Texas. It is: “Substantial’ when used in reference to degree or extent denotes a ~~material~~-matter of ~~clear and weighty importance~~ meaningful significance or involvement.”

¹⁴ The major use of this definition is in Rule 3.3, which imposes extremely high standards of conduct on lawyers. Current rule 5-200 applies when “presenting a matter to a tribunal”, but the term “tribunal” is not defined in the rule (and there is no rule 5-200 Discussion). It is the view of the Drafters that “tribunal” in that context has been understood in the narrow sense of an adjudicative body, and that rule 5-200 has not been applied in the materially different context of legislative bodies and administrative agencies, which would follow from the use of the MR definition of “tribunal”. The **Drafters recommend** adherence to the narrower use of “tribunal”. The application of Rule 3.3 could be radically enlarged by expanding the definition of the tribunals to which Rule 3.3 will apply. The Drafters believe that the concept of “controlling legal authority” in our Rule 3.3(a)(ii) is problematic when the context is a governmental license or a zoning application. The Drafters also believe that the possible application of the *ex parte* requirements of Rule 3.3(d) is problematic in these contexts. The suggested use of “can be binding” picks up a point suggested by North Carolina, which is that the application of Rule 3.3 should not depend on whether the court actually enters a binding judgment but only whether the lawyer is involved in a proceeding in which the court could do so. The addition of special masters is based on the Indiana and Texas definitions.

Arizona Rule 1.0(m), **Georgia**, and **New York** Rule 1.0(w) are identical to the MR, but each removes the word “binding” twice, so that the definition includes non-binding arbitrations and non-binding judgments. **N.J.** Rule 1.0(m) makes this change only with the first use of “binding” so that its definition includes non-binding arbitrations but only binding judgments. The **Drafters do not recommend** broadening the definition in either of these ways.

Indiana Rule 1.0(m) makes a major change in the definition. While it retains the limitation to “binding” decisions eliminated by Arizona and Georgia, it apparently eliminates the reference to legislative hearings (legislative bodies presumably are not neutral in the same sense as a court, but Indiana has no Comment on this definition). Indiana has: “Tribunal’ denotes a court, an arbitrator, or any other neutral body or neutral individual making a decision, based on evidence presented and the law applicable to that evidence, which decision is binding on the parties involved.” The Drafters agree with the spirit of Indiana’s limitations but not with its expression of the concepts. The **Drafters do not recommend** Indiana’s use of “neutral body” out of uncertainty over what that arguably might encompass – **but see the Texas discussion, below.** The **Drafters also don’t recommend** Indian’s use of “making a decision”, which is too limiting as it is the entire process that should be covered by the lawyer’s duties under Rule 3.3, or its use of “based on evidence” because some decisions, such a rulings on demurrers, involve no evidence.

Kentucky Rule 1.0(m) to the MR language the phrase: “... [disciplinary or admissions entity created by the Supreme Court](#)”. **The Drafters recommend** making the application to the State Bar Court explicit, but that can be done in a Comment because the definition already refers to “court”. The **Drafters do not recommend** extending this to admissions because there is a separate rule applicable in that situation, Rule 8.1, and there should be no suggestion that Rule 3.3 applies there.

Maryland Rule 1.0(o) and **Missouri** Rule 1.0(m) use the MR language, except that each broadens the application of the Rule by changing “**judgment**” to “**decision**”. The effect of this would be to include in the duty of candor under Rule 3.3 all administrative decisions, while the MR applies only to proceedings that lead to binding judgments. California lawyers already have a duty of candor in administrative decision to the extent that the duty of honesty under B & P C § 6106 would subject a lawyer to professional discipline for making a false statement of fact or law (Rule 3.3(a)). This makes it tempting to include “decisions” so that the § 6106 aspect would not be hidden there. However, there would be at least two problems with this expansion of the definition. Under Rule 3.3(b) a lawyer would have a duty to disclose the legal authority “not disclosed by opposing counsel” and under 3.3(d) the lawyer would have the duty to disclose “all material facts” if the administrative proceeding is *ex parte* and there is no opposing counsel. **The Drafters do not recommend** this expansion of the definition because the concept of candor to a court or its equivalent would be at odds with the lawyer’s duty in non-litigation settings to advance the client’s interest. The candor concept should be limited to courts and their equivalents except where the lawyer’s dishonesty triggers consequences under § 6106, and in those situations § 6106 is sufficient without the detailed requirements of Rule 3.3. However, **we should consider** adding a Comment that references the fact that there can be duties under § 6106 even when the more detailed requirements of Rule 3.3 don’t apply.

North Carolina Rule 1.0(n) is identical to the MR but word “may” is substituted for “will” in the second sentence, so that the definition involves bodies that “may render a binding legal judgment” rather than “will render a binding legal judgment”.

Texas in its unnumbered Terminology section has a completely rewritten definition: “[‘Tribunal’ denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. ‘Tribunal’ includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.](#)” Texas has excluded legislative bodies and also has excluded the MR limitation of “binding”. The Drafters don’t see anything in this rewrite that isn’t adequately covered either by the MR definition or by the variations in other states that we have commented on elsewhere in this footnote and, with one exception, the **Drafters do not recommend** use of the Texas definition. That exception is that, in picking up special masters, Texas implicitly has recognized that, when a court uses an outside decision maker or fact finder, the work of that person should be treated as part of the judicial process. This might happen, for example, in patent litigation when a district court uses a distinguished patent lawyer as a special master, or in any litigation in which a trial court appoints a discovery referee.

Vermont Rule 1.0(m) is identical to the MR but adds at the beginning: “... [denotes a court and all ancillary court proceedings such as depositions and hearings before a referee or master](#)”

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56 acting in an adjudicative capacity, and authorized to make a decision that can be
57 binding on the parties involved; or (ii) a special master or other person to whom a court
58 refers one or more issues and whose decision or recommendation can be binding on
59 the parties if approved by the court. ~~A legislative body, administrative agency or other~~
60 ~~body acts in an adjudicative capacity when a neutral official, after the presentation of~~
61 ~~evidence or legal argument by a party or parties, will render a binding legal judgment~~
62 ~~directly affecting a party's interests in a particular matter.~~

63
64 | (n)¹⁵ “Writing” or “written” means a tangible or electronic record of a communication or
65 representation, including handwriting, typewriting, printing, photostating, photography,
66 audio or videorecording and e-mail. A “signed” writing includes an electronic sound,
67 symbol or process attached to or logically associated with a writing and executed or
68 adopted by a person with the intent to sign the writing.

69

70 **Comment¹⁶**

71

72 **Confirmed in Writing**

73

74 [1] If it is not feasible to obtain or transmit a written confirmation at the time the client
75 gives informed consent, then the lawyer must obtain or transmit it within a reasonable

The drafter **do not recommend** including depositions because that would cause uncertainty with Rule 3.3(d) if no opposing party is present. It states that, in ex parte proceedings, “... a lawyer shall inform the tribunal of all material facts known to the lawyer” Other ancillary proceedings are discussed under the heading of the Texas version of the definition.

¹⁵ Attached to this draft is a side by side comparison of the Model Rule and Evidence Code § 250 definitions of “writing”. There being no substantive difference between them, **the Drafters recommend** the use of the MR definition without any change. Kevin’s chart shows only two state variations on this definition. They are:

Alaska Rule 9.1(s) renders “videorecording” as two words and if changes the concluding sentence to say: A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing ~~and, if it is~~ executed or adopted by a person with the intent to sign the writing. The first change is good but not necessary, and the second is non-substantive. **The Drafters do not recommend** either of these changes.

Montana Rule 1.0(p) also revises the second sentence: “A ‘signed’ writing includes the electronic equivalent of a signature, such as an electronic sound, symbol or process, which is attached to ~~or logically associated with~~ a writing and executed or adopted by a person with the intent to sign the writing.” The Drafters do not find any material improvement or clarification in this and **do not recommend** its use.

¹⁶ The Drafters have not addressed the Comments on definitions not yet addressed by the Commission. Time constraints have permitted the Drafters to look only cursorily at the Comments from other jurisdictions, but there does not appear to be anything to discuss in any of the variations related to definitions the Commission so far has adopted. Quite a few jurisdictions adopt the Model Rule Comment with little or no change, and a number of other jurisdictions have no Comment to the definitions (as was true of the 1983 Model Rules).

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76 time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act
77 in reliance on that consent so long as it is confirmed in writing within a reasonable time
78 thereafter.

79

80 **Firm**

81

82 [2]¹⁷ A sole proprietorship is a law firm for purposes of these Rules. Whether two or
83 more lawyers constitute a law firm can depend on the specific facts. For example, two
84 practitioners who share office space and occasionally consult or assist each other
85 ordinarily would not be regarded as constituting a firm. However, if they present
86 themselves to the public in a way that suggests that they are a firm or conduct
87 themselves as a firm, they may be regarded as a law firm for purposes of these Rules.
88 The terms of any formal agreement between associated lawyers are relevant in
89 determining whether they are a firm, as is the fact that they have mutual access to
90 information concerning the clients they serve. Furthermore, it is relevant in doubtful
91 cases to consider the underlying purpose of the rule that is involved.

92

93 [3] Whether a lawyer who is denominated as “of counsel” should be deemed a
94 member of law firm can also depend on the specific facts. The term “of counsel” implies
95 that the lawyer so designated has a relationship with the firm, other than as a partner or
96 associate, or officer or shareholder, that is close, personal, continuous, and regular.
97 Thus, to the extent the relationship between a law firm and a lawyer is sufficiently
98 “close, personal, regular and continuous,” such that the lawyer is held out to the public
99 as “of counsel” for the law firm, the relationship of the firm and “of counsel” lawyer will
100 be considered a single firm for purposes of disqualification. See, e.g., *People ex rel.*
101 *Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th
102 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as
103 “of counsel” with another lawyer and is providing extensive legal services on a matter,
104 they will not necessarily be considered the same firm for purposes of dividing fees
105 under Rule 1.5.1 [2-200] where, for example, they both continue to maintain
106 independent law practices with separate identities, separate addresses of record with
107 the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v.*
108 *Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

109

110 [4] Similar questions can also arise with respect to lawyers in legal aid and legal
111 services organizations. Depending upon the structure of the organization, the entire
112 organization or different components of it may constitute a firm or firms for purposes of
113 these Rules.

114

115 [4A] This Rule is not intended to authorize any person or entity to engage in the
116 practice of law in this state except as otherwise permitted by law.

117

118

¹⁷ This is the post-public comment draft as previously approved by the Commission.

119 **Fraud**

120

121 [5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that
122 is characterized as such under the ~~substantive or procedural~~ law of the applicable
123 jurisdiction and has a purpose to deceive. This does not include merely negligent
124 misrepresentation or negligent failure to apprise another of relevant information. For
125 purposes of these Rules, it is not necessary that anyone has suffered damages or relied
126 on the misrepresentation or failure to inform.¹⁸

127

128 **Informed Consent**

129

130 [6] Many of the Rules of Professional Conduct require the lawyer to obtain the
131 informed consent of a client or other person (e.g., a former client or, under certain
132 circumstances, a prospective client) before accepting or continuing representation or
133 pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The
134 communication necessary to obtain such consent will vary according to the Rule
135 involved and the circumstances giving rise to the need to obtain informed consent. The
136 lawyer must make reasonable efforts to ensure that the client or other person
137 possesses information reasonably adequate to make an informed decision. Ordinarily,
138 this will require communication that includes a disclosure of the facts and circumstances
139 giving rise to the situation, any explanation reasonably necessary to inform the client or
140 other person of the material advantages and disadvantages of the proposed course of
141 conduct and a discussion of the client’s or other person’s options and alternatives. In
142 some circumstances it may be appropriate for a lawyer to advise a client or other
143 person to seek the advice of other counsel. A lawyer need not inform a client or other
144 person of facts or implications already known to the client or other person; nevertheless,
145 a lawyer who does not personally inform the client or other person assumes the risk that
146 the client or other person is inadequately informed and the consent is invalid. In
147 determining whether the information and explanation provided are reasonably
148 adequate, relevant factors include whether the client or other person is experienced in
149 legal matters generally and in making decisions of the type involved, and whether the
150 client or other person is independently represented by other counsel in giving the
151 consent. Normally, such persons need less information and explanation than others,
152 and generally a client or other person who is independently represented by other
153 counsel in giving the consent should be assumed to have given informed consent.

154

155 [7] Obtaining informed consent will usually require an affirmative response by the
156 client or other person. In general, a lawyer may not assume consent from a client’s or
157 other person’s silence. Consent may be inferred, however, from the conduct of a client
158 or other person who has reasonably adequate information about the matter. A number
159 of Rules require that a person’s consent be confirmed in writing. See Rules 1.7(b) and

¹⁸ The first sentence of this Comment merely repeats the Rule, which is not consistent with our drafting style. We nevertheless kept the language of the Model Rule, altered only to conform to the definition adopted by the Commission. See fn. 5, above.

RRC – Rule 1.0.1 [1-100] – Terminology
Rule – Draft 2 (10/25/09) – COMPARED TO MR 1.0 (2002)
November 2009 Meeting; Agenda Item IV.A.

160 1.9(a). For a definition of “writing” and “confirmed in writing,” see paragraphs (n) and
161 (b). Other Rules require that a client’s consent be obtained in a writing signed by the
162 client. See, e.g., Rules 1.8(a) and (g). For a definition of “signed,” see paragraph (n).
163

164 **Screened**

165
166 [8] This definition applies to situations where screening of a personally disqualified
167 lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11,
168 1.12 or 1.18.
169

170 [9] The purpose of screening is to assure the affected parties that confidential
171 information known by the personally disqualified lawyer remains protected. The
172 personally disqualified lawyer should acknowledge the obligation not to communicate
173 with any of the other lawyers in the firm with respect to the matter. Similarly, other
174 lawyers in the firm who are working on the matter should be informed that the screening
175 is in place and that they may not communicate with the personally disqualified lawyer
176 with respect to the matter. Additional screening measures that are appropriate for the
177 particular matter will depend on the circumstances. To implement, reinforce and remind
178 all affected lawyers of the presence of the screening, it may be appropriate for the firm
179 to undertake such procedures as a written undertaking by the screened lawyer to avoid
180 any communication with other firm personnel and any contact with any firm files or other
181 materials relating to the matter, written notice and instructions to all other firm personnel
182 forbidding any communication with the screened lawyer relating to the matter, denial of
183 access by the screened lawyer to firm files or other materials relating to the matter and
184 periodic reminders of the screen to the screened lawyer and all other firm personnel.
185

186 [10] In order to be effective, screening measures must be implemented as soon as
187 practical after a lawyer or law firm knows or reasonably should know that there is a
188 need for screening.

To: JoElla Julian, Jerry Sapiro, and Tony Voogd

cc: Harry Sondheim, Randy Difuntorum, Kevin Mohr, Lauren McCurdy, and Stan Lamport

From: rlk

Date: October 24, 2009

Re: Rule 1.0.1 – definition of “screened”

Rather than attempting to squeeze all of the materials on this into a footnote in a redraft of the entire Rule, I thought it would make it easier for all of us if I were to move the discussion of this one definition into a separate Memo. I will begin with the MR definition, changing only “denotes” to “means” as decided at the August 2009 meeting. It is:

“Screened” means the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Other jurisdictions:

Alaska Rule 9.1(o): This is identical to the MR but substitutes “person” for “lawyer”. This change raises the question of whether non-lawyer personnel must be included in the screening system. My recommendation is that they should be, but I don’t think that the Alaska drafting solves the problem.

Massachusetts did not include “screened” among its definitions. It instead includes the elements of a screen in its Rule 1.10(e). It is as follow.

“(e) For the purposes of paragraph (d) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if: (1) all material information which the personally disqualified lawyer has been isolated from the firm; (2) the personally disqualified lawyer has been isolated from all contact with the client relating to the matter, and any witness for or against the client; (3) the personally disqualified lawyer and the firm have been precluded from discussing the matter with each other; (4) the former client of the personally disqualified lawyer or of the firm with which the personally disqualified lawyer was associated receives notice of the conflict and an affidavit of the personally disqualified lawyer and the firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will

not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and (5) the personally disqualified lawyer and the firm with which he is associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client”

Nebraska Rule 1.0(k) addresses the same point more directly. It states: (k) " ‘Screened’ denotes the isolation of a lawyer or support person from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or support person is obligated to protect under these Rules or other law.” Nebraska has adopted the comment to the 2002 version of MR 1.0 verbatim, except that it has added the following sentence to MR 1.0, cmt. [8]: The definition, as well as Comments [9] and [10] to this rule, also generally apply to the screening of support persons pursuant to Rule 1.9(e)(2).

New Jersey Rule 1.0(l): Modifies MR 1.0(k) non-substantively by changing “imposition” to “adoption and enforcement” and, more substantively, by requiring that the procedures be written. This states: "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely ~~imposition of procedures within~~adoption and enforcement by a law firm that are of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law. I agree with the requirement of a writing, but I think it should apply both to the procedures and the notice that a screen is being imposed.

New York Rule 1.0(t) adds “screening” to the defined term (I’m not certain that we have “screening” anywhere in our proposed Rules) and adds a reference to information that the firm is obligated to protect (I don’t expect that this has any application outside a jurisdiction that disciplines law firms). This reads in full: “ ‘Screened’ or ‘screening’ denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.”

North Carolina Rule 1.0(l): This is identical to the MR but it limits its application to “... participation in a *professional* matter” This limitation seems unnecessary to me because the imputation Rules all involve the practice of law.

My reading of the MR definition and of these variations is that they have in common that they do not attempt to include in the definition what the elements of an adequate screen are. Compare this to what California courts have said about what an adequate screen is, and what one federal court said in a case arising under California law. I think this is important because of the Model Rules use of “adequate under the circumstances”.

What is Adequate Screening?

- § In *Henriksen v. Great American Savings & Loan Association*, 11 Cal. App.4th 109, 114 n. 6 (1992), the Court said that screening typically includes the following five elements: (i) physical, geographic, and departmental separation of attorneys; (ii) prohibitions against and sanctions for discussing confidential information; (iii) established rules and procedures for preventing access to confidential information in files; (iv) procedures preventing a disqualified attorney from sharing in profits from the representation; and (v) continuing education and professional responsibility.
- § In *San Gabriel Basin Water Quality Authority v. Aerojet-General Corporation*, 105 F. Supp.2d 1095 (C.D.Cal. 2000) the Court approved screening of an attorney who previously had represented the moving party while at another firm:(i) screening was imposed the day that the firm learned of the potential conflict; (ii) the affected attorney was told not to discuss with anyone in the firm any information received from the moving party; (iii) the firm labeled all of its files on the case, and the drawers in which they were kept, with the following phrase in capital and bold letters: AConfidential. Do Not Disclose to [the affected attorney]; and (iv) the firm spoke to every member of the firm, including staff and new hires, and followed up with an e-mail that precluded anyone from communication with the affected attorney about the litigation or the affected attorney =s activities concerning his earlier representation of the moving party.
- § In *UMG Recordings, Inc. v. Myspace, Inc.*, 526 F. Supp. 2d 1046, 1054 (C.D. Cal. 2007), the court provided the following approving description of a consensual ethics screen established by O=Melveny & Myers: AThe [firm=s internal] memorandum identified by name the attorneys working for Fox and the attorney who had been assigned to the representation of UMG. It provided that both sets of attorneys >are screened= from working on the other client's matters. It then proceeded to define >screened= to mean >disqualified from any participation or involvement= in the other matter. [Emphasis in original.] Elsewhere the memorandum extended the >screen= to staff members. The memorandum explicitly prohibited discussions, requests for assistance, assistance, hypothetical questions based upon facts involving the representation of the other client and access to any files or information related thereto. It contained provisions requiring the specified attorneys to call the notice to the attention >of any new attorneys, law clerks, summer associates, legal assistants, secretaries, and other staff members:=@

I don't take any of these opinions to attempt a definition of what is adequate. The discussion in *Henriksen* is of what the court thought was typical, and the other discussions are of screens that the court found to be adequate. Nevertheless, they are suggestive of what should be included in an "adequate" screen.

Jerry in his August 10, 2009 e-mail suggested a revision that includes elements of an adequate screen, including a requirement of notice. Here is his draft definition, marked by the computer to show how it differs from the MR:

“Screened” denotes means at a minimum the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that ~~are reasonably adequate under the circumstances to protect~~ prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers or non-lawyers in the firm; that include notice to lawyers and non-lawyer personnel within the firm that the isolated lawyer is prohibited from participating in the matter and is not to be given any information about the matter; and that protect from disclosure to other lawyers and non-lawyers in the firm information that the isolated lawyer is obligated to protect under these Rules or other law.

As Jerry has explained to me, he reads the MR definition as protecting only the tainted lawyer’s sharing of information with the firm, but he thinks there are two other elements that should be included in the definition. These are: (i) preventing others in the firm from sharing information about the matter with the tainted lawyer; and (ii) assuring that everyone in the firm knows the tainted lawyer is off limits. I agree with the first of these points in principle. While it is not strictly logical because it is the tainted lawyer’s information that is being sealed, I think that one reasonably can have greater confidence in the screen if the seal works in both directions. However, there seems to me to be a major problem with including it as a required element of the screen because some information is entirely innocuous and might be part of regular internal law firm reports. For example, a law firm might routinely circulate lists of current clients or current open matters. A law firm might report internally on collections during the preceding month. Some information regarding a matter might appear in a routine conflicts check on another, later matter. There might be litigation or other calendars showing where firm lawyers are. If others in a law firm were prohibited from providing any information about a matter to the personally prohibited lawyer, the secretary for another lawyer in the firm would be unable to answer a routine question of where is the lawyer and when will she get back to the office (b/c she is deposing a witness in the screened matter). All this seems to me to cause administrative problems that are beyond the scope of the problem, and likely would make any screen impossible. My recommendation is to try to include Jerry’s concern only in the Comment because it will not be possible to define without reference to Potter Stuart.

Jerry’s second addition is to require notice to others in the firm. Again, I agree with Jerry on this (but I would go further and require *written* notice). My view is that a requirement of written notice really isn’t part of the definition of what a screen is, but that the definition should include any of the elements of adequate screening that is universal and therefore should be mandatory. I can think of only two in addition to written notice. These are that the screening procedures should be written, and the notice and procedures should be available to anyone with a need to see them.¹

Additional comments on Jerry’s draft:

- I don’t agree with his suggested use of “prevent”. That arguably amounts to a guaranty that client information cannot be shared. Because there can be no guaranty, I think something closer to the MR’s “reasonably adequate” would be correct.

¹ There is a separate question as to whether the law firm should take the affirmative step of giving notice to the affected clients or former clients. See n. 14, below, and its accompanying text.

- If you agree with my preceding thought, then we don't need Jerry's suggested addition of "at a minimum". My reason is that "reasonably adequate" communicates the idea that the elements of an adequate screen will vary. Because the elements of an adequate screen will change with the circumstances, I would include some of the possibilities in a Comment rather than in the definition. The definition of an adequate screen would become too unwieldy and inflexible if we tried to identify in the definition what always is or might be included.

Here is my suggestion for the definition and the Comment, both marked to compare to the MR:

"Screened" ~~denotes~~ means the isolation of a lawyer from any participation in a matter through the ~~timely~~ prompt imposition² of procedures within a firm that are reasonably adequate under the circumstances to prevent ~~protect information that~~ the isolated lawyer from sharing with any other law firm lawyer or non-lawyer personnel any information the lawyer is obligated to protect under these Rules or other law, and from otherwise being involved in the matter from which that lawyer is screened³. These procedures must be in writing, the imposition of the procedures in a particular matter must be in a dated writing and that is sent to all law firm lawyers and non-lawyer personnel⁴, and to everyone hired by the law firm while the screen is in effect. The law firm shall provide copies of these writings to all affected clients and former clients promptly after the imposition of a screen.⁵

Screened

[8] This definition applies to situations where information possessed by a lawyer might be imputed to other lawyers in a law firm ~~screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules [1.10(d)(2), 1.11(e), 1.12, or 1.18].~~⁶

² There is inconsistent language in other Rules. Draft 4 of Rule 1.11 says in paragraph (b)(1) that the prohibited lawyer must be "... timely and effectively screened ...". My view is that we should have a single standard for this, and that it should be in the definition. We will need to look at the other applicable Rules to be certain we have been consistent.

³ As you will see from the draft Comment, my suggestion goes beyond the sharing of confidential information.

⁴ This draft requires that the procedures be communicated to everyone in the law firm, while MR Comment [9] speaks of communicating with those working on the matter. Although it might seem to be overkill to require that the imposition of a screen be sent to everyone in a multi-branch law firm, my inclination is to make it a blanket requirement so that it becomes a non-discretionary act. This also would recognize that the largest firm commonly staff matters using personnel from different offices. Does anyone have any different thought about this?

⁵ See n. 14, below, and its accompanying text.

⁶ The brackets are inserted so that the accurate cross-references can be determined later.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally ~~prohibited~~⁷ ~~disqualified~~ lawyer is not directly or indirectly shared with any law firm lawyer or non-lawyer personnel working on the matter, and that the personally prohibited lawyer is not otherwise involved in the representation ~~remains protected~~. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.⁸ The imposition of a screen in a particular matter, and the screening procedures, must be communicated in writing to all law firm lawyers and non-lawyer personnel, whether or not they are expected to work on the matter. They also must be provided to all new law firm hires not later than the commencement of their employment. The imposition of screening in a matter must be acknowledged in a dated writing⁹ by the personally prohibited lawyer ~~disqualified~~, and by each lawyer and non-lawyer personnel who will work on the matter before being permitted by the law firm to do so.¹⁰ ~~should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.~~

[9A] Reasonably adequate screening procedures must include the written statement of the requirement that the personally prohibited lawyer not communicate with any firm lawyer or non-lawyer personnel working on the matter, and that such persons not communicate with the personally prohibited lawyer, regarding either the matter or the personally prohibited lawyer's earlier representation. In addition: (i) screening must be in accordance with written rules and procedures for preventing access by the personally prohibited lawyer to confidential and other

⁷ The change from “disqualified” to “prohibited” is intended to track changes the Commission made in the related Rules.

⁸ The preceding sentence is MR Comment [10]. I propose re-ordering the Comment so that the requirements for establishing a screen are stated before discussion of the elements of a reasonably adequate screen.

⁹ The requirement of written attestation of the screen is found in Massachusetts Rule 1.10(e)(4)(i), there with the requirement of an “affidavit”. I have rendered it here only as a writing because it seems to me that any writing serves the same purpose without dinging anyone for failing to have the right form of writing. However, I’ve added a requirement that the writing be dated by the individual because I think that a court’s satisfaction with the procedures should be influenced by proof that the writing was at the time of the imposition of the screen on that individual.

¹⁰ This provides for written acknowledgments by the personally prohibited lawyer and by everyone else in the firm who will work on the matter. It does not provide for written acknowledgements by everyone in the firm.

information and materials maintained by the law firm for the matter in any format; (ii) the personally prohibited lawyer must be isolated from all contact with the firm's current client relating to the matter, and any witness for or against the client;¹¹ (iii) the written screening rules and procedures must identify an individual who is responsible for imposing and maintaining the screen in a matter; and (iv) screened lawyer and non-lawyer personnel shall acknowledge in a dated writing that he or she is screened with respect to a particular matter. Additional screening measures that are appropriate for a particular matter will depend on the circumstances.¹² However, these measures could include periodic reminders of the screen to the screened lawyer and all other firm personnel working on the matter, the physical labeling or physical separation of firm files, and the use of special computer passwords to prevent improper access. Also, the personally prohibited lawyer should receive no direct financial benefit from the firm's representation in the matter, such as a financial bonus or a larger share of firm income directly attributable to the matter. However, that lawyer may receive compensation and benefits under standing arrangements established prior to the representation.¹³

[10] ~~In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.~~

In addition to the case law referred to above, I also have looked at Christopher J. Dunnigan, *The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 Geo. J. Legal Ethics 291 (1998). It lists a number of factors that will impact a court's willingness to find that a screen is effectively protecting privileged information from being leaked. You will see that I have included only some of these factors in my initial draft. Here is what the article says, with footnotes and some of the more obvious explanation removed: (1) *How Soon the Screen is Established* ; (2) *Time Lapse Between the Matters* -- If the representation was in the distant past, memories of specific facts regarding the previous representation are likely to have faded, and a breach of confidences detrimental to the former client is less likely; (3) *Size of the Firm* -- Large firms are considered more capable by the courts and commentators of creating an effective screen, as they are able to better physically separate attorneys and files, as well as being able to distribute excess work to other members of the firm. Large firms often have separate departments, which allows for easy separation. While this factor may seem to give an unfair advantage to large firms, it must be remembered that large firms also are far more likely to have a successive conflict, as they represent more clients and have more lawyers with past connections outside the firm; (4) *Number of Disqualified Attorneys* -- When the number of attorneys to be screened is large, the screen is less likely to succeed. Conversely, if relatively few attorneys need to be screened, the likelihood of successfully taking them out of the loop becomes greater; (5) *Position the Disqualified Attorney Previously Held* -- A junior associate who worked

¹¹ This element is borrowed from Massachusetts Rule 1.10(e), with “prohibited” substituted for “disqualified”.

¹²The preceding sentence is taken from Comment [9].

¹³The last two sentences of [9A] are taken from Restatement § 124, Comment *d(ii)* with minor changes. Please note that Draft 4 of Rule 1.11 contains in paragraph (b)(1) a requirement that the prohibited lawyer “...is apportioned no part of the fee therefrom” We should consider whether this should be a universal requirement and therefore placed in the definition of “screened”, or whether it applies only to Rule 1.11.

on only peripheral matters, or one aspect of the previous representation, may be less likely to have known facts detrimental to the former client's case than a senior partner; (6) *Nature of the Work Done for the Previous Client* -- If the attorney did only peripheral work concerning the former client's representation, he is less likely to be aware of facts of which the former client does not wish the opposing lawyers to be aware. Likewise, if the attorney was involved only in a supervisory position (this is especially applicable to government lawyers), he is less likely to have such knowledge; and (7) *Specialty of the Tainted Lawyer* -- A lawyer whose expertise and dealings with the former client were limited to one area of the law, when the current representation involves another area of the law entirely, is less capable of passing along information to other members of the firm that would breach the tainted lawyer's duty of fidelity and harm the former client.

Another possibility would be to require the law firm to give notice of the screen. Restatement § 124, Comment *d(iii)*, includes the following: “An affected client will usually have difficulty demonstrating whether screening measures have been honored. Timely and adequate notice of the screening must therefore be given to the affected clients, including description of the screening measures reasonably sufficient to inform the affected client of their adequacy. Notice will give opportunity to protest and to allow arrangements to be made for monitoring compliance.” This requirement also is in Massachusetts Rule 1.10(e)(4). This possibility creates the risk that the law firm will not be able to accept a new engagement and the potential new client will lose its choice of counsel because the new client will be unwilling to allow the firm to make the disclosure to the former client, or because the firm recognizes that doing so might harm the new client. This draft assumes that these risks to the potential new client and to the law firm should not weigh in how we write the screening requirements. My current feeling is that notice to the affected clients or former clients is important not just for the reasons given by the Restatement Comment, but also because it likely will increase the firm’s resolve. Notice that the requirements of various writings means that the affected clients or former clients will know what the procedures are, when they were imposed, and which individuals in the law firm are involved (which means that outsiders will now know how a matter is being staffed). I would appreciate your thoughts on the requirement of notice to the former client.¹⁴

There are various other possibilities that I haven’t included in this initial draft. These include the imposition of sanctions for violating the procedures and continuing professional education (suggested by *Henricken*) and examples of improper communications with the screened lawyer such as not asking hypothetical questions (this was part of the O’Melveny procedure discussed in *UMG*).

One final thought. This drafting is built on the premise of this being a non-consensual screen. Do you have any thoughts on whether the same standards – or minimum standards – should apply to consensual screens?

¹⁴ Please note that our Draft 4 of Rule 1.11 includes in paragraph (b)(2) requirement that “written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.”

M E M O

To: JoElla Julian, Jerry Sapiro, and Tony Voogd
From: rlk
Date: October 24, 2009
Re: Possible additions to the Rule 1.0.1 definitions

At the August 2009 meeting we were requested to make recommendations to the Commission about the possibility of including the following additional terms in Rule 1.0.1. Here is the list with my comments and suggestions:

1. “advance fee” or “advances for fee”: Rule 1.15(d) and (i) use the phrase “an advance for fees”. This phrase then is defined in Comment [5] as “... a payment or retainer intended by the client to be funds paid in advance for some or all of the services that the lawyer is expected to perform on the client’s behalf.” I see no need to move the definition to Rule 1.0.1 rather than keeping it in the Rule where the phrase is used. I cannot locate any variation of this phrase in Rule 1.5, which is the only one I can think of that might be involved. I therefore recommend that we not add this to Rule 1.0.1. It appears that only Wisconsin has a definition of the term, but I don’t think it is quite as clean as ours. See the footnote.¹
2. “client”: Alaska appears to be the only jurisdiction that has added a definition of “client”.² Alaska’s definition states the obvious, which is that a client can be an individual or any form of private or public organization. I had understood when we were requested to consider a definition of “client”, the concern was about those situations in which it might be uncertain whether someone is a client, that is, whether a lawyer-client relationship exists. I don’t believe we should attempt this. As stated in paragraph [17] of the Preamble to the Model Rules, a determination of whether there is a lawyer-client

¹ “Advanced fee” denotes an amount paid to a lawyer in contemplation of future services, which will be earned at an agreed-upon basis, whether hourly, flat, or another basis. Any amount paid to a lawyer in contemplation of future services whether on an hourly, flat or other basis, is an advanced fee regardless of whether that fee is characterized as an “advanced fee,” “minimum fee,” “nonrefundable fee,” or any other characterization. Advanced fees are subject to the requirements of SCR 20:1.5, SCR 20:1.15 (b) (4) or (4m), SCR 20:1.15 (e) (4) h., SCR 20:1.15 (g), and SCR 20:1.16(d).

² Its Rule 9.1(b) states: “Client” denotes a person, a public officer or agency, or a corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer.

relationship depends.³ The same is true under California law.⁴ I don't believe it would be an efficient use of our time to try to capture all this in a fixed definition, and I also believe that any definition would ossify what by its nature is a fact-dependent inquiry.

3. "confidential information" – a proposal is included in the rule draft, which is not quite done so it is not attached to this Memo.
4. "independent lawyer": I have an e-mail out to Kevin on this, so I will skip it for now.
5. "law clerk": This term is used in the Model Rules in Rules 1.11(d) and 1.12(b) with respect to a law clerk seeking employment and in Rule 1.12(a) with respect to a lawyer who has a conflict because of prior involvement in a matter while a law clerk. I don't see the need to define "law clerk" in those contexts because the meaning does not seem to me to be unclear. However, D.C., which is the only jurisdiction that defines this term,⁵ has used "law clerk" in a broader way. D.C. has in its Rule 1.6(h): "The obligation of a lawyer under paragraph (a) also applies to confidences and secrets learned prior to becoming a lawyer in the course of providing assistance to another lawyer." While this use is interesting and substantive, we don't use "clerk" in our Rule 1.6, so I don't recommend adding a definition of the term.
6. "lawyer": There are only two jurisdictions that define "lawyer". These are copied into the footnote.⁶ I don't see how these definitions or anything like them would avoid any confusion that otherwise might occur with any Rule.

³ [17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

⁴ See Cal. State Bar Formal Opn. 2003-161 for a partial view of this. Many a law review article has spilled ink on the question. See, e.g., Ronald Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 Cal. W.L.Rev. 209 (1986)

⁵ (g) " 'Law clerk' denotes a person, typically a recent law school graduate, who acts, typically for a limited period, as confidential assistant to a judge or judges of a court; to an administrative law judge or a similar administrative hearing officer; or to the head of a governmental agency or to a member of a governmental commission, either of which has authority to adjudicate or to promulgate rules or regulations of general application."

⁶ These are Florida and Georgia. Florida has: "'Lawyer' denotes a person who is a member of The Florida Bar or otherwise authorized to practice in any court of the State of Florida." Georgia has: "'Lawyer,' denotes a person authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia including persons admitted to practice in this state pro hac vice." Georgia also has: "'Foreign Lawyer' denotes a person authorized to practice law by the

7. “matter”: The term “matter” is used in two distinct contexts. One is to distinguish, say, a lawyer’s representation of a client in litigation from representation in other ways. This has been picked up in Draft 5.1 of Rule 1.11 subject to any later decision to include the definition in Rule 1.0.1.⁷ However, there is a second use of the term. This is with respect to the scope of a representation so that, for example, a lawyer’s representation of a client will be deemed to be in the same matter as the lawyer’s representation of another current or former client. This is picked up in Model Rule MR 1.9, cmt. [2]⁸ There are five jurisdictions that define this term. These definitions are copied in the footnote, and my recommendation follows at the end of the footnote.⁹

duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.” It also has: “ ‘Domestic Lawyer’ denotes a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.”

⁷ (f) As used in this Rule, the term “matter” includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

⁸ [2] The scope of a “matter” for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

⁹ **Alaska Rule 9.1(i)**: “ ‘Matter’ includes any judicial or other proceeding, any application, or request for a ruling or other determination, and any contract, claim, controversy, investigation, charge, accusation, arrest, negotiation, or other particular transaction or dealings involving a specific party or parties.”

D.C. Rule 1.0(h): “ ‘Matter’ means any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a

negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule.”

New York Rule 1.0(l): (l) “ ‘Matter’ includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.”

North Dakota Rule 1.0(i): "Matter", for purposes of Rules 1.7 through 1.12, includes any judicial or other proceeding, application, request for a ruling or other determination, contract claim, controversy, investigation, charge, accusation, arrest, or other transaction.”

Oregon Rule 1.0(i): (i) "Matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of a government agency.

Although the wording differs somewhat, these five definitions all address the *nature* of a “matter” rather than the *scope* of a “matter”. Here are my recommendations on this:

1. Although we so far have attempted to address this vital question only in the Rule 1.9 Comment, questions about the scope of a “matter” appear in all of the conflicts rules. The term is used over and over in Rule 1.7 and its Comment, but the closest that Comment comes to a definition is in Comment [5]: “The duty of loyalty reflected in paragraph (a) applies equally in transactional and litigation matters. For example,” It should be apparent from looking at the definitions in these five jurisdictions that this is only part of the picture. I would leave that portion of the Rule 1.7 Comment but add a fuller definition in Rule 1.0.1.
2. The Rule 1.9, Comment [2] discussion seems to me largely to be correct. I will suggest at the end of this list a specific variation, in part to make it fit into a universal definition that includes both “matter” issues.
3. While I agree with the five jurisdictions that have a universal definition that the nature of a “matter” should be included universally, I have some specific disagreements with these five jurisdictions. I don’t agree with New York’s use of “party” (no, its not what you’re thinking – Rule 4.2 never crossed my mind - but because there are countless representations in which there is no “party” such as with D.C.’s reference to a lobbying engagement or when a lawyer advises on the possible application of a new statute, regulation, or appellate opinion to the client’s activities). I also don’t agree with Oregon’s reference to governmental conflicts rules because I don’t immediately see how that would have any application outside of Rule 1.11. My recommendation is to treat the Rule 1.11(f)(2) definition as peculiar to that Rule, to carve it out of a universal definition of the kind of representation that can be deemed a “matter” because, as one can see from Rule 1.11, the definition will change depending on the Rule involved.
4. I am at the moment agnostic as to whether the definition should refer to the conflicts rules, as does North Dakota.

I don't have the time now to search other proposed rules to see how "matter" is used elsewhere, but here is a partial list of how it is used in the Model Rules: Preamble [3] ("In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter."), in Preamble [15] ("The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."), in Preamble [18] ("Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships."), in Rule 1.0(i) ("Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.), in Rule 1.0(k) ("Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.), in Rule 1.0(l) ("Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.), Rule 1.0(m) (the definition of "tribunal" ends with: "...will render a binding legal judgment directly affecting a party's interests in a particular matter."), the Rule 1.0 Comment discussion of informed consent (this includes "...whether the client or other person is experienced in legal matters generally and in making decisions of the type involved,"), and Rule 8.1 (titled "Bar Admission and Disciplinary Matters").

This partial list makes it apparent that the term "matter" is used in more than one way. Any definition we attempt therefore must distinguish. Here is my recommendation, which combines what largely is the N.Y. definition with what we have in Rule 1.11 (f):

"Matter" when used with reference to the subject of a representation includes means any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or ~~any~~ other proposed, current, or former representation of any nature involving a specific party or parties. The scope of a "matter" ~~for purposes of this Rule~~ depends on the facts of a particular situation ~~or transaction~~. ~~The~~ A lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific ~~transaction~~ matter, subsequent representation of other clients with materially adverse interests in that ~~transaction~~ matter ~~clearly~~ is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the ~~prior~~ former client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in ~~the~~ a matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

8. “person”: There are six jurisdictions that define this term. I have copied them into the next footnote with a contractual definition of the term.¹⁰ My view is that there is little risk of any confusion about what the word “person” means, but I see no harm in using one of these definitions.

I then would revise Rule 1.11(f) to say: “For purposes of this Rule, the term “matter” includes any other act or activity ~~matter~~ covered by the conflict of interest rules of the appropriate government agency.”

¹⁰ **Alaska Rule 9.1(k)**: “ ‘Person’ denotes a government officer or agency, corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person.”

Connecticut Rule 1.0(b): (b) “ ‘Client’ or ‘person’ as used in these Rules includes an authorized representative unless otherwise stated.” I don’t have the time to read the Connecticut rules in order to be certain why it felt the need for this. I assume it has to do with confidential information received from a client, but I don’t think this is a point on which confusion reasonably can be expected to occur. I would skip this.

Massachusetts Rule 9.1(k): “ ‘Person’ includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.”

Michigan Rule 1.0.1(b): (b) “ ‘Person’ means a natural person or entity recognized as such by law.”

Staff Comment: These two additional terms were added by the State Bar Ethics Committee for extra clarity. In Michigan, adjudicative officers and parajudicial officers have many titles, so a definition of these officers is helpful. Also, the definition of "person" clarifies that it includes corporate entities. These added definitions were placed in a separate rule so as to not unduly modify the ABA Model Rules' numbering system.

New York Rule 1.0(n): “ ‘Person’ includes an individual, a corporation, an association, a trust, a partnership, and any other organization or entity.”

Texas: “ ‘Person’ includes a legal entity as well as an individual.”

If the goal here is to make clear that the term is to be given the most expansive possible meaning, here is one from one of my own form agreements: “ ‘Person’ means a natural person, partnership, corporation, limited liability company, general or limited partnership, association, joint stock company, trust, joint venture, unincorporated organization, other form of for-profit or non-profit organization or any federal, state, local or foreign government or any subdivision, authority, department, commission, board, bureau, agency, court, administrative panel or other instrumentality thereof, in each case whether acting for itself or on behalf of any other Person.”

9. “personally and substantially”: There appears to be no definition of that term, but Kevin’s chart has caught Ohio’s discussion of this in Ohio Rule 1.0, cmt. [11].¹¹ This does not seem to me to be the basis for any needed addition to our definitions. My view is that whether a lawyer is personally and substantially involved in a representation is inherently fact specific and not subject to useful definition.
10. “primary responsibility”: The only definition of this term is in New Jersey’s rule 1.0(h).¹² Again, I don’t think the addition of a definition along these lines would be useful.
11. “pubic official” or “public officer”: No jurisdiction defines either of these terms. I would leave this where it is, in proposed Rule 4.2: “(g) As used in this Rule, ‘public official’ means a public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).” I have nothing to add to this.
12. “retainer” or “true retainer”: These terms have caused more confusion than I would have thought, and it this makes it tempting to include definitions. However, the term “advance fee” or “retainer” is not used in Rule 1.5. The only similar term used in Rule 1.5 is “true retainer”, and it is defined in Rule 1.5(e). I don’t think there is anything to be gained by repeating the definition in Rule 1.0.1.
13. “substantially related”: There are only two jurisdictions that define this term.¹³ I don’t believe that either of these definitions accurately captures California’s long-standing rule

¹¹ [11] The definition of “substantial” does not extend to “substantially” as used in Rules 1.9, 1.10, 1.11, 1.12, 1.16, 1.18, and 7.4. The definition of “substantially related matter” is taken from Rule 1.9, Comment [3] and defines the term for purposes of Rules 1.9, 1.10, and 1.18. “Personally and substantially,” as used in Rule 1.11, originated in 18 U.S.C. Sec. 207. Rule 1.12, Comment [1] defines “personally and substantially” for former adjudicative officers.

¹² “Primary responsibility” denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.”

¹³ **Alaska Rule 9.1(q)**: “ ‘Substantially related’ matters for purposes of the rules governing a lawyer’s duties to former, current, and prospective clients denotes matters:

- (1) that involve the same transaction or the same underlying legal dispute, or
- (2) where there is a substantial risk that confidential factual information obtained in the prior matter would materially advance a client’s position in the subsequent matter. In assessing the risk under subsection (2), a court or disciplinary body may rely on the nature of the services that the lawyer provided to the earlier client, the type of information that would ordinarily be learned by a lawyer providing such services, and whether this information would predictably be used to the detriment of the earlier client by a zealous, conflict-free advocate. However, matters will not be deemed “substantially related” under paragraph (2) if the confidential information imparted to the lawyer has since been disclosed to the public or to other adverse parties.”

that the duties of loyalty and confidentiality owed to former clients are independent. It only was with considerable effort that we were able to deal with that principle in our drafting of Rule 1.9, and I don't believe that any effort to define "substantially related" will advance what we did there. My recommendation is to move on to other matters.

Ohio Rule 1.0(n): (n) "Substantially related matter" denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter.

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March 23, 2009 Julien E-mail to KEM:

How do you propose we attack the terminology section? Is there anyway easy way of culling out of the rules we have written so far all of the terms which need defining? Have they been set aside so that we can define them?

As you may know, I have been worried about this since the beginning and now here we are. Harry has asked me to work on that section, and I think I am overwhelmed with this task. Please help if you can.

July 29, 2009 Kehr E-mail to Voogd, cc Drafters (Julien, Sapiro), Chair, Difuntorum & KEM:

I see that Rule 1.0 has been added to the agenda. I very much would appreciate your getting your initial draft out as early as you can. Lead time will be important to me as I seem to be on the drafting team for six of the 12 agenda items.

July 30, 2009 KEM E-mail #1 to Drafters, cc Chair & Staff:

To avoid confusion, we should for the time being refer to the Terminology section as Rule 1.0.1. The Commission has already assigned the number 1.0 to the revision of current rule 1-100, titled "Purpose and Scope of the Rules of Professional Conduct." When approved, our proposed Rule 1.0 was intended as the counterpart to the Preamble & Scope sections of the Model Rules. The Commission voted 7-0-1 to make it Rule 1.0, after voting 6-2-0 on the concept of the "purpose and function" section of the rules being a rule. See 11/19/04 KEM Meeting Notes, III.A., at paragraphs 4,5. We've already assigned 1.0.1 to the definition of "law firm" with the idea that 1.0.1 would be the terminology section. See id. at paragraph 5.

I'm working on updating a chart I've been keeping of definitions we've included in our Rules. I should be able to get it to you all by later this afternoon or evening. As you will see, in most instances, the definitions are specific to the Rules in which they've been inserted, so they might not be susceptible to inclusion in a global terminology section.

July 30, 2009 E-mail #2 to Drafters, cc Chair & Staff:

To follow up on my earlier e-mail, below, I've attached the following:

1. Model Rule 1.0 (2002), in Word.
2. Chart of Definitions (and/or explanations) of words/terms that we have used in specific rules, sorted by term (Column 1). In Word.
3. Chart of Definitions (and/or explanations) of words/terms that we have used in specific rules, sorted by rule number (Column 2). In Word.

Comments:

**CalBar – RRC – Rule 1.0.1 [1-100] [“Terminology”]
E-mails, etc. – Revised (11/3/2009)**

1. I think the attached are self-explanatory. As I mentioned in the earlier e-mail, most of the definitions in the charts are specific to the rules which they are found and not susceptible to being placed in a global definition section. However, in some instances, we might be able to move some definitions (e.g., "writing" or "written" is defined in several rules and probably can be placed in the terminology section as in the Model Rule.
2. I've inserted the Model Rule in some instances where we have not yet decided on language, e.g., Rule 1.9.
3. There may be other definitions that will come to mind as you review the attached charts. These are the ones I've been trying to keep track of during the process.
4. One last point. During our discussion of Rule 8.5 at the last meeting, Jerry raised the issue whether the SEC should be treated as a "tribunal" for purposes of our Rules. The definition in MR 1.0(m) appears to cover that territory.

Please let me know if you have any questions.

July 31, 2009 Voogd E-mail to Sondheim, cc Kehr, Difuntorum, McCurdy & KEM:

Just noted the change. As previously advised, I will not be at the August meeting as I am taking a ship cruise. Moreover, I will have little time for the preparation. Any chance it can be deferred?

July 31, 2009 Sondheim E-mail to Difuntorum, cc Voogd, McCurdy & KEM:

Can this be deferred to Sept. or should Tony attempt to get someone else from the drafting team to temporarily be the lead drafter for the August meeting?

July 31, 2009 Sondheim E-mail to Difuntorum, cc McCurdy & KEM:

One additional thought regarding 1.0.1. One of the rules assigned to Bob is 5.7 for which there is no RPC counterpart. Would it make any sense to defer this rule to Sept. and ask Bob if he would be willing to be the temporary lead drafter for 1.0.1?

July 31, 2009 Difuntorum E-mail to Sondheim, cc McCurdy & KEM:

Bob has noted in his emails that he has a number of responsibilities as lead and co-drafter for the August meeting. To alleviate his burden, I recommend giving the option to Bob so that he can decide which rule he would like to keep on the agenda and complete. Rule 1.0.1 is on the agenda because you wanted to prioritize consideration of definitions that relate to the RPCs. Rule 5.7 is on the agenda because there are already prior materials (that led to the Commission's rejection of a rule) that might be susceptible to quick work to bring it to completion. Kevin has already provided the prior materials to Bob and Bob seems to have already begun working on the rule (see messages below exchanged between Bob and Kevin). So, in short, I recommend empowering Bob by letting him decide which rule he prefers to work on for the August meeting.

July 31, 2009 KEM E-mail to Sondheim & Difuntorum, cc McCurdy:

I was in San Diego or traveling there from the afternoon on yesterday and so was unable to respond to this e-mail thread. Here are my thoughts.

First, let's find out whether we are going to have a Rule 5.7 or not. That would require Bob to prepare a revised rule which, I believe, he has already begun. Therefore, I would ask Bob to go ahead and prepare the Rule 5.7 materials rather than give him a choice to prepare 5.7 or 1.0.1. The vote not to pursue a MR 5.7 counterpart was close last time (6-5-0) and it's likely the Commission will choose to pursue it now. However, let's have the Commission make the decision in August and perhaps we can wrap it up at the September meeting. I don't foresee the debate over a terminology section going so quickly.

Second, although I don't see the terminology debate going as quickly as that for 5.7, I also don't see an advantage from moving up our consideration of such a rule by two weeks. Starting in September, or even October, would be timely. This is a section we will not be able to put to sleep finally until we have drafted all the other rules. We can advance it, but it will necessarily be in the last batch. If we do consider it at the August meeting, then I think all we need to do is poll the members whether they favor a global terminology. I think the Commission members have decided by now whether they think such a section is necessary. Frankly, they could review MR 1.0 and the materials attached to the second e-mail I sent the drafters on Thursday to make that determination. A simple cover memo stating that the only issue for the August meeting is whether or not to have a terminology section, and a request that the members review the chart(s) I prepared to see if there are other definitions we should be including in the terminology section, providing the Commission votes to pursue it.

Third, we need to find out from Tony whether he would be able to have the terminology section prepared for the September meeting. My reading of his e-mail is that he would not have time to prep a report between now and August and it's not clear when he'll return from the cruise or whether he would have time after his return to prepare a report for the September meeting (there's only two weeks between meetings). We should calendar it for the September meeting, but it should be more than just the materials I prepared. There should be some recommendations on what to adopt, not just whether to adopt.

Fourth, if Tony can't prepare a report for the September meeting, then rather than impose further on Bob, I would assign Dom as lead drafter. She's effectively been taken off of Rule 1.2 by our change of submission date for the August meeting. I anticipate Rule 1.2 will, at worst, be designated for a 10-day ballot at the August meeting. That would leave Dom as lead drafter on only 3.5, 6.1 and 6.2 in the rolling agenda. Rule 3.5 has been through public comment and largely tracks the Model Rule, so creating the comparison charts should not be onerous. Rule 6.2 is straightforward and likely can be resolved as we resolved 6.3 and 6.4 (w/ virtually no debate Paul's proposed drafts, w/ minor changes to the MR's, were deemed approved.) Rule 6.1, pro bono, is the only rule that might present a problem, but the MR pretty much parallels the BOG resolution on pro bono, so the only issue is probably whether there should be a pro bono rule in the California Rules or whether we should continue w/ the BOG resolution. I also think that Dom can bring to the terminology discussion her experience as a bar prosecutor and terms and provisions that might have caused problems in the past. Dom returns on 8/9, so will have time to prepare the rule for consideration at the September meeting.

Please let me know if you have any questions.

August 1, 2009 Sondheim E-mail to Kehr, cc Difuntorum, McCurdy & KEM:

We have run into a glitch regarding the definitions rule 1.0.1 because Tony will be on a cruise and not at the August meeting and has also indicated that he does not have enough time to work on this rule for August. As you can see from the exchange of e-mails set forth below between myself and Randy, one possibility would be to place 5.7 on the Sept. agenda if you would be willing to become the temporary lead for 1.0.1. Your call. If you decide on 5.7, we will place 1.0.1 on the Sept. agenda and delete it from the Aug. agenda since I think this is a rule for which the ABA definitions should not automatically become the agenda material.

August 1, 2009 Kehr E-mail to Sondheim, cc Difuntorum, McCurdy & KEM:

I've been trying to work ahead of the calendar b/c of other commitments, principally knee surgery scheduled for this Wednesday. I'm assured that this won't interfere with our dinner on the 14th, but it will squeeze my productive time. I have some things that must be taken care of before the operation, and I will be out of the office Wednesday through Friday. I'm not able at the moment to accomplish nearly as much as I would like b/c of the pain meds I'm on, but in trying to work ahead I've nearly finished a report on Rule 5.7. Jerry is the only remaining 5.7 co-drafter, and I expect to have my draft out to him on Monday.

My next priority after completing the initial draft of the 5.7 report will be to complete the Rule 1.9 redraft. I would estimate that I'm about 20% or so done with that.

My situation makes it hard to make any promise, but I think there is a fair chance that I will be able to do at least part of 1.0.1 even if I can't get to all of it. It would be helpful if Kevin could put together a comparison chart. I seem to remember that there has been some tinkering with the definitions in at least a few jurisdictions, and I definitely won't have time to dig into that myself.

My vote therefore is to leave the calendar as it is, and I'll do my best.

August 2, 2009 KEM E-mail to Kehr, cc Sondheim, Difuntorum & McCurdy:

I'm working on a chart of state variations for Rule 1.0 along w/ other matters. I should complete it by Wednesday (or Thursday at the latest). From what I've reviewed so far, there is not that much variation. However, there are some definitions in other jurisdictions (e.g., "person" and "client") that have been flagged during our meetings that might prove worthy of a global definition.

Please let me know if you have any questions.

August 2, 2009 Kehr E-mail to KEM, cc Sondheim, Difuntorum & McCurdy:

Thank you, but please don't rush. If I get to this at all it won't be before next weekend.

August 2, 2009 Sondheim E-mail to Kehr, cc Difuntorum, McCurdy & KEM:

I appreciate your willingness to always pinch hit when necessary. Hope all goes well with your surgery.

I am sending Tony an e-mail asking him to assist you if he has any time before he leaves on his vacation and also to get a commitment from him that he will pick up from wherever you leave off (to the extent you can do something on 1.0.1) in time for the Sept. meeting.

August 2, 2009 Sondheim E-mail to Voogd, cc Kehr & KEM:

One of your co-drafters (Bob Kehr) for this rule has indicated he will try to get a start on the rule for our August meeting. To the extent that you have time before your forthcoming vacation, could you contact Bob to ascertain if there is anything you can do to assist him before you leave. Also, to the extent that Bob is unable to complete the drafting of this rule, will you be able to do so for our Sept. meeting?

August 3, 2009 Voogd E-mail to Sondheim, cc Kehr & KEM:

The answer to both questions is yes.

August 3, 2009 KEM E-mail to Voogd, cc Sondheim, Kehr, Difuntorum & McCurdy:

I'm in the process of compiling a chart of state variations on MR 1.0 (Terminology). As I noted earlier to Bob & Harry, some of the definitions other states have added are ones that we've debated during our meetings (e.g., definitions of "person," "client," and "organization.") I should have it done by Wednesday, but at the latest I'll have it to you and the drafters by Thursday. Please let me know if you have any questions.

August 6, 2009 KEM E-mail to Drafters, cc Chair & Staff:

Greetings Drafters & others;

I've attached the following to this e-mail, all in Word:

1. Model Rule 1.0 Terminology (2002), clean version.
2. Model Rule 1.0 Terminology (2002), annotated to reference variations in other jurisdictions. The referenced variations in other jurisdictions can all be found in item #3, below.
3. Chart of Variations of MR 1.0 in State Adoptions of the Rule.
4. Chart of Word & Terms, sorted in alphabetical order, that (i) we have used in our proposed Rules to date and defined or explained; (ii) appear in Model Rule 1.0 (2002); or (iii) have been added to their MR 1.0 counterpart by other jurisdictions.

5. Our approved proposed Rule 1.0.1 ("Law Firm"), which I recommend we renumber as 1.0.1(c) as in the Model Rule, at least for the time being. Both clean and redline versions.

Some Notes:

1. Again, here is my first e-mail sent on 7/29/09 on why we should, for the time being, number our terminology section 1.0.1:

To avoid confusion, we should for the time being refer to the Terminology section as Rule 1.0.1. The Commission has already assigned the number 1.0 to the revision of current rule 1-100, titled "Purpose and Scope of the Rules of Professional Conduct." When approved, our proposed Rule 1.0 was intended as the counterpart to the Preamble & Scope sections of the Model Rules. The Commission voted 7-0-1 to make it Rule 1.0, after voting 6-2-0 on the concept of the "purpose and function" section of the rules being a rule. See 11/19/04 KEM Meeting Notes, III.A., at paragraphs 4,5. We've already assigned 1.0.1 to the definition of "law firm" with the idea that 1.0.1 would be the terminology section. See id. at paragraph 5.

2. There's a lot of material attached. It can't be avoided at this early stage of considering a terminology section. I'll explain each of the above documents so you can most quickly absorb the materials.

3. Item #1. Clean version of MR 1.0. This will probably your starting point for our terminology section (assuming the Commission votes to have a global terminology section). Before the Ethics 2000 draft was largely adopted by the ABA House of Delegates in 2001-2002, the Terminology section had appeared as an unnumbered section after the "Preamble" and "Scope" sections and before MR 1.1 (Competence). Since 2002, it has been a numbered Rule. As noted above, we have assigned 1.0 to our proposed revision of current rule 1-100, and tentatively had assigned 1.0.1 to our terminology section (if we had one).

4. Item #2. Annotated Version of MR 1.0. This should not be confused w/ Rule 1.0 from the ABA's Annotated Model Rules. This is an annotation I've created. In a footnote after each rule and comment paragraph, I have listed the state rules where you can review variations of the Model Rule definitions to determine whether other states' language might be more appropriate for California. ALL OF THESE REFERENCED VARIATIONS CAN BE FOUND IN ITEM #3, DESCRIBED BELOW. As you can see from a quick review of the footnotes of this document, most jurisdictions have adopted the MR definitions verbatim. However, more than a handful have revised the definitions for "law firm," "fraud," "informed consent," and "tribunal". There are also some significant language changes to the comments, even in states that have not varied the language of the black letter itself.

5. Item #3. This is probably the most important of the attached documents (and unfortunately, the longest).

- a. The chart itself is 43 pages long. Listed by state in alphabetical order are all the actual variations to the MR 1.0 definitions, as well as definitions that other states have added to their MR 1.0 counterpart.

- b. I recommend that you simply read through this top to bottom to get some sense of the language other states have chosen over the MR language, and whether to change. However, in some instances where California already has corresponding definitions

(e.g., "informed [written] consent," "writing"), we may want to carry forward the definition already found in our Rules or statutes.

c. The chart has 4 columns:

(1) Jurisdiction;

(2) Whether a state has adopted a comprehensive set of post-E2K Rules (e.g., Alabama, Georgia and Virginia do not appear to have conducted a comprehensive review of the Ethics 2000 changes)

(3) Whether a state has made changes to Rule 1.0. If yes, I've identified the degree of change as "slight," "moderate," or "substantial." Please take these w/ a grain of salt. I didn't put a lot of thought into them. My rating is based primarily on number of changes, not necessarily based on their significance. This is one of those small details we shouldn't worry about.

(4) Notes/Comments. This column contains the actual language of a state's adopted or proposed rule. I've also noted where a state has not completed its E2K review, or where its new rules have been adopted but not yet become effective. Please note that I've also inserted a link to the web page where you can find the jurisdictions full set of Rules or proposed Rules. In Word, you need to hold down "Ctrl" as you click the link and you will be taken to the web page.

d. In addition to the chart itself, I've attached after the chart clean and red-line versions of the states that have made the greatest number of revisions or additions to MR 1.0. New York leads, followed closely by Alaska (who would have thought?) and Wisconsin. You will also find Georgia, ND, Ohio, Oregon, and Washington. I've included the latter primarily because, although it made only a few changes to the rule itself (primarily in its definition of "fraud"), it added six comments to supplement the MR comments.

e. As to the numbering issue, note that two jurisdictions, Alaska and Massachusetts, have numbered their terminology rules as 9.1. Aside from those jurisdictions that have not yet completed their E2K review and therefore have carried forward the 1983 Model Rules unnumbered Terminology section, these are the only two jurisdictions that have not assigned the number "1.0" to their Terminology section.

f. For what it's worth, I have clean and redline versions of all the jurisdictions' counterparts to MR 1.0. As I've noted, all the revisions are included in this Chart. However, if for some reason you want the complete rule in one place and it is not attached to the chart, please contact me and I'll send it your way.

5. Item #4. This is an update of the chart I sent you all on 7/29/09 (I sent it to Tony, w/ copies to you on 7/30/09). The first draft of the chart contained only those Word & Terms that (i) we have used in our proposed Rules to date and defined or explained. In this draft, I also added the Words and Terms that (ii) appear in Model Rule 1.0 (2002); or (iii) have been added to their MR 1.0 counterpart by other jurisdictions.

a. Our proposed terms appear in plain font. In some instances, I've added a footnote that refers you to the same or similar term in other jurisdictions. The actual language for that term will be in Item #3. In addition, I've also included references to "related" terms

(e.g., for "communication," which we define in Rule 7.1, I've cross-referenced "computer-assisted communication" from NY and "electronic communication" from Oregon.

b. The Model Rule terms appear in bold font. I've also added the footnotes that refer you to variations to the Model Rule definition that have been adopted in other jurisdictions.

c. The additions from other jurisdictions are italicized.

6. Item #5. The only standalone definition we have completed is for "law firm," which we tentatively assigned as Rule 1.0.1. It varies from the Model Rule, primarily in Comment [2], which is our attempt to explain whether "of counsel" lawyers should be considered part of a firm. As noted above, see paragraph 4 re Item #2, law firm" is one of the most revised of the MR 1.0 definitions (though you should note that in some instances, the only difference is to include a reference to a governmental agency or organization).

As usual, please let me know if you have any questions.

August 7, 2009 Kehr E-mail to KEM:

Kevin: Is there any place where we have used "confirmed in writing"?

August 7, 2009 KEM E-mail to Kehr:

No, Bob. We've discussed it, for example, when we wrangled over 1.8.7, aggregate settlements, but instead we went w/ "informed written consent," as we have w/ all other rules where's it been an issue.

August 7, 2009 Kehr E-mail to KEM:

That was my recollection, but I'm still groggy and wanted to be certain. Thank you as always.

August 7, 2009 Kehr E-mail to KEM:

Your chart entitled "CHART MR 1 0 adoptions" lists Wisconsin Rule 1.0(e) as being different from the MR. This appears to be incorrect, which makes me think that you had intended to refer to another jurisdiction. Can you help on this?

To clarify, I am referring to the definition of fraud and fraudulent.

August 7, 2009 KEM E-mail to Kehr:

The Annotated Model Rule (the document in portrait format w/ footnotes after each paragraph and comment), does make that error at footnote 4. The reference should be to Wyoming Rule

1.0(e). I'd like to say Wisconsin, Wyoming, what's the difference, but I lived in Wisconsin for about 10 years. Oh well. Thanks for catching that.

I've attached a revised version of that document.

August 7, 2009 Kehr E-mail to KEM:

Thank you. I'll try to get back to this later.

August 8, 2009 Kehr E-mail #1 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM:

Tony, JoElla, and Jerry: I set a deadline of noon for getting out a draft of this Rule, with the hope of giving you the opportunity to make your comments and of giving me the ability to address other agenda items with which I'm involved. My partial draft is attached. It is as far as I was able to get.

1. I have no comment on the MR definitions that I recommend keeping without change or that I've added. My footnotes should be self-explanatory, but I want to emphasize that my statement of drafters' recommendations state my views and my knowledge from Tony's earlier e-mail that he would keep all of the MR definitions. Please add your views as you think appropriate.
2. There were several variations of the definition of "fraud". I have carried them from Kevin's charts into the attachment so that everything will be on the same page. Before giving you my comments on them, I think we should have in mind where in the Rules "fraud" or a variant of it appear. They are in:

Rule 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

Rule 1.6(a)(2) – which is not applicable in California - "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;"

1.16 (b): "Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: ... (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

3.3 (a): "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

**CalBar – RRC – Rule 1.0.1 [1-100] [“Terminology”]
E-mails, etc. – Revised (11/3/2009)**

4.1: “In the course of representing a client a lawyer shall not knowingly: ... (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

8.4: “It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Here are my comments on them ---

- a. I disagree with North Carolina’s substitution of “North Carolina” for “the applicable jurisdiction”. This change seems to me to materially narrow the Rule. A lawyer should be subject to discipline under each of the five of these Rules that will apply in California for “fraud” however that might be defined under the applicable laws of any jurisdiction.
 - b. I don’t know what N.Y. has in mind in inserting: “provided that it does not include conduct that, although characterized as fraudulent by statute or administrative rule, lacks an element of scienter, deceit, intent to mislead,”. Subject to any comments from you, I can’t picture how that insertion improves the Rule.
 - c. The other variations seem to me to be interesting restatements that don’t materially alter the definition. Therefore, my conclusion is to go with the MR definition.
3. The other MR definition on which I hope to have your comments is “screened”. B/c I was approaching my noon deadline, I didn’t carry them into the attached draft. Here are the variations:

- a. Alaska Rule 9.1(o) alters the MR by substituting “person” for “lawyer”. This is interesting b/c it is correct that proper screening must include non-lawyer personnel. Thus, Alaska has: ““Screened” denotes the isolation of a ~~lawyer~~ person from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated ~~lawyer~~ person is obligated to protect under these Rules or other law.”
- b. Nebraska Rule 1.0(k) does essentially the same thing, substitution “support person” for the MR “lawyer” and the Alaska “person”. I would appreciate your thoughts on the Alaska and Nebraska corrections of what appears to be a substantive error in the MR. Note that Alaska doesn’t follow up on this with any correction of the corresponding Comment paragraph. However, Nebraska does by adding this sentence to Comment [8]: “The definition, as well as Comments [9] and [10] to this rule, also generally apply to the screening of support persons pursuant to Rule 1.9(e)(2).”
- c. New Jersey Rule 1.0(l) misses the point picked up by Alaska and Nebraska but makes two other changes. First, it alters the MR “imposition” to: “adoption and enforcement”. This does not seem to me to be materially different and don’t recommend it. Second, it requires that the screening procedures be in writing. I would appreciate your comments on this addition, which seems to state what is implicit in the MR definition. The N.J. Rule reads in full: “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely ~~imposition of procedures within~~ adoption and enforcement by a law firm that are of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

d. New York Rule 1.0(t) also misses the point picked up by Alaska and Nebraska and makes two changes. First, its definition covers “screening” as well as “screened”. This is a nit that we can pick up once we know what useages will appear in the California Rules. Second, it adds a reference to information that the firm is obligated to protect. Its Rule reads as follows: ““Screened” or “screening” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.” I would appreciate your comments on N.Y.’s second change. I don’t immediately see its logic as the purpose of screening is to isolate information that the affected lawyer possesses, but perhaps I am missing something obvious.

e. North Carolina Rule 1.0(l) makes a single change: “‘Screened’ denotes the isolation of a lawyer from any participation in a professional matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” I don’t see how the absence of “professional” could cause any confusion as screening applies only to lawyer-client relationship described in other Rules. Subject to any comments you might have, I don’t recommend this change.

f. Finally, there is a threshold question about the definition of “screening”: should we include details as to what “reasonably adequate” procedures must include rather than scattering them among other Rules?

August 8, 2009 Kehr E-mail #1 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM:

I have a p.s. to my message of earlier today. Kevin’s July 2009 meeting notes show that a decision was made to place the definition of screening in Rule 1.0.1, so that remains to be done. This was part of the discussion of Rule 1.11 at ¶10 in Kevin’s notes.

August 10, 2009 Voogd E-mail to Drafters, cc Chair, Difuntorum, McCurdy & KEM:

Sorry for the delay in responding. I agree with your comments and conclusions. As for "reasonably adequate" screening procedures we might consider deleting "reasonably," i.e. a strict liability standard establishing the concept that if you are going to screen to advance lawyers' interests you must protect clients' interest.

August 10, 2009 KEM E-mail to Kehr, cc Drafters, Chair, Difuntorum, McCurdy & KEM:

I've attached a slightly revised draft 1.1 (8/8/09) of Rule 1.0.1. All I've done is complete your thought in footnote 4 and delete the reference to "written" in the definition of "informed written consent" and explain why in footnote 6. See my point #3, below.

I have a few observations on the definitions for which you've sought guidance from the drafters:

1. Fraud: As to the Rules where "fraud" or "fraudulent" are used, I would add that in our proposed rules, you will also find one or the other word in:

Rule 1.5 [4-200] (definition of "unconscionability"): "A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching,"

Rule 1.13 [3-600], cmt. [13]: ". . . If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2.1 [1.2(d)] may also be applicable, in which event the lawyer may be required to withdraw from the representation under Rule 1.16(a)(1)."

2. Screened: I see that in your subsequent e-mail, you note that the Commission had agreed to put the definition of screening in a global section. However, further definition or description may be appropriate for certain rules (e.g., Harry observed that the vote to include "screen" in a global definition section was w/o prejudice to adding further definitions or comments in particular rules, e.g., in rule 1.11.

3. Informed written consent. You didn't ask about this, but I wanted to observe that in Rule 1.6, the reference is to "informed consent," not "informed written consent." There may be other rules that require only informed consent. I think we should follow the Model Rule lead and define "informed consent" in the black letter, but in a comment explain that informed written consent requires written disclosure. I'm not suggesting we use the MR definition; just use our definition of "informed written consent" but w/o the reference to "written":

"Informed ~~written~~-consent" means the client's or former client's ~~written~~ agreement to the representation following ~~written~~ disclosure.

In addition, I realize that time was short so you were not able to address all the possible issues concerning a terminology section. I don't think we need to address them at the next meeting but I'd like to preserve for discussion the following thoughts I had when reviewing terminology rules/sections in the various jurisdictions.

4. I don't know whether the Commission will recommend adding other definitions, but we might consider a separate rule/section for definitions in addition to those in the Model Rule. See proposed Michigan Rule 1.0A.

a. Alternatively, if we put all definitions in a single section, we should not follow what New York has done in terms of lettering -- i.e., intersperse new definitions in its rule and reletter all other definitions. Better to keep the Model Rule lettering for Model Rule definitions and reletter new definitions "(aa)," "(ab)," "(da)," "(fa)", etc. depending on where they land in the rule. This will make for easier cross-referencing in other rules and facilitate research in other jurisdictions as Professor has argued.

5. Even if we don't include a definition in the terminology, should we cross-reference where a particular definition can be found, similar to what NY did w/ its definition of "confidential information" and other states have done as to other rules:

(d) "Confidential information" is defined in Rule 1.6.

a. Note that Oregon has actually provided a definition of "information relating to the representation of a client" in its terminology rule, i.e., a definition based on ABA Code of Professional Responsibility, DR 4-101(A). Oregon was one of the last four states, along w/ Iowa, Nebraska and New York, that adopted the Model Rules for the first time after Ethics 2000 had completed its task.

6. Definitions defined in other rules. Although we might consider cross-referencing in the black letter of proposed Rule 1.0.1 a definition or term which appears in another rule AND which is used in several rules (e.g., "confidential information relating to the representation of a client" in 1.6, "communication" in 7.1), most other definitions we have proposed in other rules are specific to those rules (e.g., "advance for fees" in the Comment to Rule 1.15, "adverse pecuniary interests" in the Rule 1.8.1, etc.) I have provided you a list of those rules. See Chart titled "Definitions Used in Drafts of Proposed Rules of Commission, the Model Rules & Other Jurisdictions" (the file is named "RRC - 1-100 [1-0-1] - Definitions - Sorted by Term - DFT2 (08-05-09).doc").

a. Rather than include such "unique" definitions in the blackletter of Rule 1.0.1, I think we should leave them in the specific rule to which they apply. However, we might consider a comment paragraph at the end of the Comment to Rule 1.0.1 that cross-references all such definitions.

b. Alternatively, we might consider a "table of definitions used in these rules" which does not include the definitions but simply the rule location where it can be found. We could insert it after Rule 1.0.1 & its comment, and before Rule 1.0.

As to specific definitions, again I realize the shortness of time to prepare this matter, but would liked to preserve for discussion the issue of whether we should include the following definitions in a global terminology section, either as a definition per se or cross-referenced in the blackletter:

7. "Client" (includes "prospective client" and "authorized representative").

8. "Confidential information relating to the representation of a client". For what it's worth, I prefer the NY approach to the Oregon approach, i.e., define "confidential information," etc., in Rule 1.6 and cross-referencing it in the black letter of Rule 1.0.1, rather than moving the definition into the black letter of Rule 1.0.1.

9. "Matter". I'm not sure "matter" is amenable to a global definition, but it does appear in several rules.

10. "Retainer" or "true retainer".

11. "Advance fee" or "advances for fee".

12. "Person"

13. "Primary responsibility" or "personally and substantially"

14. "public official" or "public officer"

15. "Substantially related"

Please let me know if you have any questions.

August 10, 2009 Kehr E-mail to Voogd, cc Drafters, Chair, Difuntorum, McCurdy & KEM:

Thank you, Tony. I will include your comments in the final version.

August 10, 2009 Kehr E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy:

Thank you for all this. On your point 3, I want to consider whether “disclosure” is the right standard for obtaining informed consent under Rule 1.6, and how that might differ from a lawyer providing a reasonable explanation under Rule 1.4(b). Assuming that “informed consent” is used only in Rule 1.6, my nascent thought is that the consequences of revealing confidential information might be relatively obvious as compared to the often unexpected ripples that follow from accepting a representation in which a lawyer has a potential conflict of interest. If so, we might want to retain “disclosure” only for the conflict setting. And if we were to do that, perhaps we should have a cross-reference to Rule 1.4(b) in the Rule 1.6 Comment rather than having “informed consent” as a defined term. More on this later, perhaps this evening.

I wonder if any of the other drafters have any thoughts on this.

August 10, 2009 Sapiro E-mail to Drafters:

1. Attached are three versions of the definition of “screened.” The first is from the Model Rule. The second is my redraft of it. The third is a redlined comparison of the two.
2. It seems to me that the definition of a screen should address three subjects. The first is preventing the flow of information about a matter between the tainted lawyer and the rest of the firm. The second is assuring that everyone in the firm knows about the tainted lawyer being off limits. The third is the preventing the flow of confidential information about the former client or the government from the tainted lawyer to the rest of the firm.
3. The Model Rule definition only addresses the last of these subjects. Because we did not include in Rule 1.11 the minimum parameters of a screen, I think we should address all three in the definition.
4. I also changed “denotes” to “means” because I think “denotes” is too wishy-washy. To me, it means “indicates” where in this rule we are supposed to be defining it.
5. I also added “at a minimum” because to me the rules should state the minimum standards, but a given case may require more to be an effective screen.
6. I also deleted “reasonably adequate” because to me this should be a strict standard. We are absolving lawyers of conflicts of interest. If the screen they set up does not isolate the tainted lawyer, discipline should result.

Jerry Sapiro’s Proposed Screening Definition:

Model Rule 1.0(k):

- (k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Proposed Sapiro Definition:

“Screened” means the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers or non-lawyers in the firm;¹ that include notice to lawyers and non-lawyer personnel within the firm that the isolated lawyer is prohibited from participating in the matter and is not to be given any information about the matter;² and that protect from disclosure to other lawyers and non-lawyers in the firm information that the isolated lawyer is obligated to protect under these Rules or other law.

Redline Version Showing Differences between Sapiro Definition & Model Rule:

“Screened” ~~denotes~~means, at a minimum, the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that ~~are reasonably adequate under~~prevent the ~~circumstances~~flow of information about the matter between the personally disqualified lawyer and other lawyers or non-lawyers in the firm; that include notice to ~~protect~~lawyers and non-lawyer personnel within the firm that the isolated lawyer is prohibited from participating in the matter and is not to be given any information about the matter; and that protect from disclosure to other lawyers and non-lawyers in the firm information that the isolated lawyer is obligated to protect under these Rules or other law.³

August 12, 2009 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Lee:

I've attached the following for inclusion in the agenda materials for item III.A.:

1. Rule 1.0.1 [1-100], Draft 1.1 (8/8/09), redline, compared to Model Rule 1.0. In Word & PDF.

¹ Adapted from Model Rule.

² Adapted from proposed New York rule 1.11.

³ Adapted from Model Rule.

**CalBar – RRC – Rule 1.0.1 [1-100] [“Terminology”]
E-mails, etc. – Revised (11/3/2009)**

2. Rule 1.0.1 [Law Firm Definition], Post-PCD [#7.1] (6/16/07), compared to Model Rule 1.0(c). In Word.
3. E-mail compilation excerpt, which includes recent exchanges among the drafters. In PDF.

I've also attached following for your records, but do not believe they should be included in the agenda mailing because of their length:

4. Chart of Variations of MR 1.0 in State Adoptions of the Rule.
5. Chart of Words & Terms, sorted in alphabetical order, that (i) we have used in our proposed Rules to date and defined or explained; (ii) appear in Model Rule 1.0 (2002); or (iii) have been added to their MR 1.0 counterpart by other jurisdictions.

Comments for the Commission:

1. Please review the following e-mails, particularly the first Kehr e-mail, in the attached e-mail compilation for a quick read on the issues for the coming meeting:

August 8, 2009 Kehr E-mail #1 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM: 27
August 8, 2009 Kehr E-mail #2 to Drafters (Voogd, Julien & Sapiro), cc Chair, Difuntorum, McCurdy & KEM: 29
August 10, 2009 Voogd E-mail to Drafters, cc Chair, Difuntorum, McCurdy & KEM: 29
August 10, 2009 KEM E-mail to Kehr, cc Drafters, Chair, Difuntorum, McCurdy & KEM: 29
August 10, 2009 Kehr E-mail to Voogd, cc Drafters, Chair, Difuntorum, McCurdy & KEM: 32
August 10, 2009 Kehr E-mail to KEM, cc Drafters, Chair, Difuntorum & McCurdy: 32

Please note that Tony has joined in nearly all of Bob's recommendations in the draft.

2. The Commission previously approved the definition of "law firm" as Rule 1.0.1 but it should probably be included in the terminology section. See Point #3.
3. To avoid confusion, we should for the time being refer to the Terminology section as Rule 1.0.1. The Commission has already assigned the number 1.0 to the revision of current rule 1-100, titled "Purpose and Scope of the Rules of Professional Conduct." When approved, our proposed Rule 1.0 was intended as the counterpart to the Preamble & Scope sections of the Model Rules. The Commission voted 7-0-1 to make it Rule 1.0, after voting 6-2-0 on the concept of the "purpose and function" section of the rules being a rule. See 11/19/04 KEM Meeting Notes, III.A., at paragraphs 4,5. We've already assigned 1.0.1 to the definition of "law firm" with the idea that 1.0.1 would be the terminology section. See *id.* at paragraph 5.

Please let me know if you have any questions.

August 12, 2009 KEM E-mail #2 to McCurdy & Difuntorum, cc Drafters, Chair & Lee:

I've attached the following:

1. Revised E-mail compilation for 1.0.1 excerpt that includes Jerry's e-mail to the Drafters from Monday (page 32 of attached). In PDF. Please substitute it for the 1.0.1 compilation I sent you w/ the other materials earlier today.
2. A single page document, in Word & PDF, that includes Jerry's proposed definition of "screen." The proposed definition w/ the Model Rule definition and comparison to the Model Rule definition were attached to Jerry's e-mail. I think they should be included with the agenda materials.

I had inadvertently been left off the distribution of Jerry's e-mail, which is why it and the attachments were not included earlier.

Please let me know if you have any questions.

August 15, 2009 Kehr E-mail to KEM re “informed consent”:

Kevin: is paragraph (a)(1) of Rule 1.4 correct in saying that there are Rules that require a lawyer to obtain the client's “informed consent”, or have we in each location changed this to: “informed written consent”?

August 15, 2009 KEM E-mail to Kehr re “informed consent”:

At least for Rule 1.6, it is "informed consent," no requirement of written.

August 15, 2009 Kehr E-mail to KEM re “informed consent,” cc Drafters, Chair, Difuntorum & McCurdy:

Your reply led me to open your revision of my Rule 1.0.1 draft, and I'm afraid I don't agree with what you've done in removing the proposed definition of “informed written consent”. First, if “informed consent” is used only in Rule 1.6, your definition is incorrect b/c it refers only to acceptance of a representation, which has nothing to do with Rule 1.6; it is particular to conflicts situations where we have used “informed written consent”. Second, because a lawyer can be subject to discipline in a number of situations for failing to obtain “informed written consent”, I believe the definition the term “informed written consent” should be in the Rule, and not in the Comment as you have suggested in fn. 6 to Draft 1.1. Third, even if one might imagine that the term doesn't have to be defined in a Rule for a lawyer to be subject to discipline, the term is used many times in the conflict Rules, and I believe it therefore needs to be included in Rule 1.0.1 and not hidden in the Comment. Fourth, if the Commission were to include definitions of both terms, I don't agree with the use of “disclosure” with respect to Rule 1.6, this for reasons I first suggested in what is fn. 6.

I think we need to know whether “informed consent” is used anywhere other than in Rule 1.6. Depending on the answer to that question, I will raise these points at the meeting.

And by the way, I have no further comment on Rule 1.4 and vote to approve it.

August 15, 2009 KEM E-mail to Kehr re “informed consent,” cc Drafters, Chair, Difuntorum & McCurdy:

There are at least three proposed rules in which "informed consent" (not "written") appears: 1.6(a), 1.2(c) and 1.5(c)(11). There may be others. I haven't done a comprehensive search.

Also, if we go to the MR language in 1.11(d)(2)(i) ("unless the appropriate government agency gives its informed consent"), which I think may still be an open issue, we'll have another. Moreover, although we inserted "informed written consent" in 1.8.7, there was strong opposition to doing so, and we may revisit that issue.

I'd be wary of having two definitions, one for "informed consent" and another for "informed written consent," and that's the direction we might be headed. Might the better course be to use the MR definition for "informed consent" and for each of the conflicts rules, explain in a comment (as we have done for Rule 1.8.7) the specific kinds of disclosure required to obtain the informed written consent of the client? The problem as you identify below seems to arise more from our retaining the California definition in 3-310(A) as the global definition.

I agree we don't need to resolve this by e-mail. The meeting will be time enough.

August 25, 2009 Julien E-mail #1 to Drafters, cc Chair & Staff:

Since we are writing rules for California and not for the nation, it seems prudent to do what North Carolina did in substituting their state's name. I think that we should do the same.

I do like the idea of including support personnel by specific reference to a "person" in the screening process rather just the lawyers. If they have information and/or access to information, they, too, should be screened and named in the rule.

"Reasonably adequate screening" should be included in the terminology section rather than scattered throughout the rules although great care should be taken so as to not write a practice guide.

August 25, 2009 Julien E-mail to Sapiro, cc Drafters:

What if we use your version and added instead of "lawyer" just "personnel" which could include the lawyer and the non-lawyer?

August 25, 2009 Kehr E-mail to Julien, cc Drafters, Chair & Staff:

My drafting of Rule 1.0.1 stopped just before "screening", and I don't expect to have time to consider your message or Jerry's earlier message before Friday. I will hold them for the next meeting at which we deal with this Rule.

August 25, 2009 Julien E-mail to Drafters, cc Chair, Difuntorum & KEM:

I am concerned once again about the size of the new gray book.

First, please note that in the last book we defined 5 terms!! Why are we finding it necessary to even have a draft of 168 pages in our agenda to define our terms. Few of the terms we are defining are new electronic terms and, as such, require this kind of attention. Would our revision be better if we indexed these terms instead of having them in a terminology section? That might be more palatable.

I also note that practice pointers abound in our "terminology section". Is this really what we want to do?

August 25, 2009 Julien E-mail to Drafters, cc Chair, Difuntorum & KEM:

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First, please note that in the last book we defined 5 terms!! Why are we finding it necessary to even have a draft of 168 pages in our agenda to define our terms. Few of the terms we are defining are new electronic terms and, as such, require this kind of attention. Would our revision be better if we indexed these terms instead of having them in a terminology section? That might be more palatable.

I also note that practice pointers abound in our "terminology section". Is this really what we want to do?

August 27, 2009 McCurdy E-mail to Voogd, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission’s upcoming September, October and November meetings. A “rolling assignments agenda” is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered “rolling” because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don’t forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

1. III.B. Rule 1.0.1 Definition of "Law Firm" [1-100(B)(1)] (Post Public Comment Rule Draft dated 6/16/07) and a global terminology rule [MR 1.0, RPC 1-100(B)]

Codrafters: Julien, Kehr, Sapiro

Assignment: (1) a chart comparing a proposed California version of a global terminology rule to MR 1.0 (including a comparison of the Commission’s Rule 1.0.1 definition of “Law Firm” to MR 1.0(c)); (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received on the Commission’s Rule 1.0.1 definition of “Law Firm” and the Commission’s response.

2. III.K. Rule 3.1 Meritorious Claims and Contentions [3-200]
(April 2009 Comparison Chart - Post Public Comment Rule Draft #4 dated 6/26/07)

Codrafters: Ruvolo, Tuft

Assignment: (1) a chart comparing proposed Rule 3.1 to MR 3.1; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.L. Rule 3.2 Expediting Litigation [N/A]** (Dec. 2008 Comparison Chart; a rule is not recommended for adoption)

Codrafters: None

Assignment: (1) a chart comparing proposed Rule 3.2 to MR 3.2; and (2) a “dashboard” cover sheet.

4. **III.P. Rule 5.3.1 Employment of Disbarred Member [1-311]** (Dec. 2008 Comparison Chart – Post Public Comment Rule Draft #4 dated 6/26/07)

Codrafters: Lamport

Assignment: (1) a chart comparing proposed Rule 5.3.1 to RPC 1-311; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. **III.DD. Rule 1.8.5 Payment of Expenses for a Client [4-210]** (Post Public Comment Draft #7.3 dated 7/5/08)

Codrafters: Julien, Kehr

Assignment: (1) a chart comparing proposed Rule 1.8.5 to MR 1.8(e); (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **IV.K. Possible Rule re: Class Action (no counterpart rules)**

(possible rule last considered at the September 2006 meeting; see also the comments to proposed Rule 1.7)

Codrafters: Martinez, Sapiro (w/Karpman)

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

2. **IV.L. Possible Rule re: Hourly Fee (Record Time)** (no counterpart rules) (possible rule last considered at the August 2004 meeting; see also email compilation dated 1/31/08)

Codrafters: Foy, Peck

**CalBar – RRC – Rule 1.0.1 [1-100] [“Terminology”]
E-mails, etc. – Revised (11/3/2009)**

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

August 31, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

I would appreciate your getting me your notes on the Rule 1.0.1 discussion at the last meeting. It apparently will be on the September agenda, so I need to pick up the drafting. You also were going to try to identify for me where “consult” is used in the Model Rules so that I have some context for considering Harry’s request that the drafting team look at adding a definition for it (being a term not defined in the MRs).

September 1, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

Because of the 2-day ballots we have to get out today and some day job obligations, I won't be able to get you this until later today. However, I will be able to at least get you my notes before dinner (though not the "Early Bird" variety).

September 1, 2009 Kehr E-mail to Difuntorum, cc Drafters, Chair & Staff:

I'm not clear on the status of this Rule, but if you intend to include it in the package going to the Board, I suggest we limit ourselves to the definition of “firm”. Please let me know.

September 1, 2009 Difuntorum E-mail to Kehr, cc Drafters, Chair & Staff:

For the September meeting, the terminology rule (inclusive of the definition of “law firm”) would likely be last on the priority list. As you know, the Board’s goal is that the Commission finish the entire project to revise the rules by the 2010 State Bar Annual Meeting, if not sooner.

However, Harry has a back-up plan. If the Commission cannot finish all of the rules, the more modest objective would be to complete all of the rules for which there are existing California rule counterparts. For the global terminology rule, this suggests a possibility that Commission would truncate the consideration of that rule to cover only those terms necessary to deliver a final report on proposed rules with California counterparts. The definition of “law firm” which has already been distributed for an initial public comment would fall into that category.

In terms of the September assignments, again this one might be last on the priority list because the global terminology rule will be a Batch 6 rule that is not due to be submitted to RAC for public comment issuance until RAC’s January 7, 2010 meeting. RAC & BOG adoption of the definition of “law firm” would not be sought as part of the Batch 1 – 3 rules that are to be submitted for the Board’s November 12-13, 2009 meetings.

September 1, 2009 Kehr E-mail to Difuntorum, cc Drafters, Chair & Staff:

I will continue plugging away at Rule 1.0.1, but at least I know that there is no part of this that you intend to get to the Board today. And by the way, I consider September 2010 to be a hard deadline. Ellen and I are starting to plan a long vacation for October 2010.

September 1, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

I've attached my meeting notes re 1.0.1 from the August 2009 meeting.

I haven't had a chance to research "consult" in the rules but will do so by the end of the week.

September 2, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

As you requested, I've reviewed our proposed Rules and have identified the use of "consult" or "consultation" or some such variation in the following Rules and/or comments:

- Rule 1.0.1 Comment [1]. (this is the "law firm" definition, which currently is our proposed 1.0.1(c)).
- Rule 1.0 Paragraph (c); Comment [5].
- Rule 1.2 Paragraph (a); Comments 1, 2, 3, 7, 12
- Rule 1.4 Paragraphs (a)(2), (6); Comment 6
- Rule 1.6 Comments 5, 21
- Rule 1.7 Comment 2 (note the context: "Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules."); 4 (again, note context: "... the lawyer should consult paragraph (b).")
- Rule 1.8.1 Comment 6 (Context: "Lawyers should consult case law and ethics opinions to ascertain their professional responsibilities ...")
- Rule 1.14 Comments 3, 6
- Rule 1.18 Paragraphs (a), (b); Comments 2, 2A, 3, 4, 6

- Rule 5.3.1 [1-311] Paragraph (b)(1)

- Rule 6.5 Comment 1.

I haven't attached the rules but if you would like them, please let me know.

September 2, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

When you have the time, I would appreciate your providing me with the current versions of 1.0 and 5.3.1. I think I easily can put my hands on all of your other references. Thank you as always.

September 2, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

The reference to Rule 1.0 in my previous e-mail should have been to Rule 1.1 (competence). I've attached it, as well as 5.3.1. Again, please let me know if you need anything else.

September 4, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

1. At the August meeting, Harry asked that we consider adding a definition of "consult" and "consultation". I've now looked at Kevin's Rule 1.0.1 materials, and here is what I find with regard to "consult".

2. The 1983 version of the MRs included this definition: “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to understand the significance of the matter in question.” Although dropped from the MRs, Kevin’s chart shows that the 1983 definition was retained in 12 jurisdictions.
3. Missouri is one of the jurisdiction’s that dropped the definition. Its Rule 1.0.1, Comment [8] explains the change:

The prior version of the Rules used the phrase "consent after consultation" rather than "informed consent." "Consultation" is a term that is not well understood and does not sufficiently indicate the extent to which clients must be given adequate information and explanation in order to make reasonably informed decisions. The term "informed consent" is more likely to convey to lawyers what is required under the Rules. No change in substance is intended.

4. In other words, the term “consult” effectively has been folded into the new definition of “informed consent”, which for us in most places will be “informed written consent”. Thus, while variations of the word “consult” continue to be used in the MRs, the central use of the term has been replaced by the use of “informed consent”. Despite this, we should consider retaining the definition because several Rules and Comments continue to use some version of “consult”. However, I see another problem.
5. The term is not used in a single sense. For example, Rule 1.1, Comment [5] begins: “In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical.” This obviously has nothing to do with the 1983 definition.
6. The prohibition in Rule 5.3.1 includes the following:
 - (b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the lawyer’s client:
 - (1) Render legal consultation or advice to the client;
7. As one more of other possible examples, Rule 1.7, Comment 2 ("Determining whether a conflict exists may also require the lawyer to consult sources of law other than these Rules.") uses the term in a way quite different from the old MR definition.
8. Because of the variety of uses, my recommendation is that we not include a definition of “consult”. It is a word that is discussable but not definable in a way that will fit all uses.

Does any of you have any thoughts or suggestions about this?

September 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

I'm not sure you have made a note to look at this and I haven't had time to check the materials I sent you, but during the deliberations on Rule 1.8.8 [3-400], the RRC discussed the possibility of defining "independent counsel" or "independent lawyer" in the terminology section. This should probably be added to the list of terms to explore if you haven't already done so.

There is a comment re "independent lawyer" in Rule 1.8.1 [3-300]. Comment [14] of that Rule provides:

[14] Under paragraph (b), a lawyer must encourage the client to seek the advice of an independent lawyer and may not imply that obtaining the advice of an independent lawyer is unnecessary. An independent lawyer is a lawyer who (i) does not have a financial interest in the transaction or acquisition, (ii) does not have a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent, and (iii) represents the client with respect to the transaction or acquisition.

September 6, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

Will do, but a question: have we used both "independent counsel" as well as "independent lawyer" (I've caught "independent counsel" in Rule 1.8.1, Comment 13, but have we used it elsewhere?)?

If we add this term, there might be other editing might be needed. For example, MR 1.0 Comment [6] explains the term "informed consent" with a discussion that includes the phrase "... the client or other person is independently represented by other counsel" Assuming this otherwise would survive, we would have to change it to: "... represented by an independent lawyer"

The MR uses the same phrase in MR 1.7 Comment [22], but our corresponding Comment already uses "independent lawyer" in Comment [33], so no change would be needed there.

MR 1.8(a)(3) uses "independent legal counsel", but in our 1.8.1(b), but we have "independent lawyer of the client's choice". This means that, if we were to add a definition of independent lawyer, we would need to change 1.8(b) to eliminate the redundant "of the client's choice". We also would need to edit the 1.8.1 Comment as we have "independent legal advice" in Comment [1], "Independent Counsel" as the heading before Comment [12], and "independent counsel" and "independently represented" in Comment [13].

Can you locate anywhere else that we have referred to the concept of an independent lawyer?

My initial thought on the possibility of adding a definition of "independent lawyer" is that the perfect is the enemy of the good. While it might be nice to add this definition, it is not crucial and the effort would delay completion of our task.

September 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

I'll look elsewhere but I can't do it until Tuesday at the earliest. I actually am teaching two classes tomorrow, suggesting that what I do in the classroom is not labor (unless it be a labor of love).

This might be one term where, perhaps not crucial, it will be very worthwhile to have a global definition. Whether a client is independently represented is either a requirement to determine, or a factor to consider in determining, whether a lawyer is in violation of a duty and subject to discipline. As I've already noted, aside from 1.8.1, it also comes into play in 1.8.8, and you've already flagged some other rules where mention is made of a client being independently represented. It makes sense to clarify what we mean by that -- if it is possible. On the other hand, it's remained undefined so far, so maybe we can leave it to the next Commission.

September 6, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

There is no rush on this. I agree with you that a definition would be helpful, but many other things also would be, and *tempus fugit*.

September 7, 2009 Kehr E-mail to Sondheim, cc RRC:

Harry: Your message does not refer to III.C., which I think is Rule 1.0.1, but I cannot locate anything on it other than the skeleton materials that were attached to an 8/28/09 e-mail from Lauren. I've therefore done at least a partial job of completing the 1.0.1 materials as they relate to the definition of law firm, under the assumption this will be sent on although the balance of the Rule is in progress. Because of the shortness of time, the attachments have not yet been seen by the co-drafters.

September 7, 2009 KEM E-mail to Kehr, cc RRC:

I think Rule 1.0.1 is Agenda Item III.B., which Harry identified in his e-mail, below. I've attached the agenda for the 9/11 meeting that Lauren circulated last Friday. I think the title of the agenda item threw us off. When we finished our discussion of 1.0.1 (terminology) at the August meeting, Harry indicated we would pick up w/ the definition of "screening" at the September. As we already had those materials last month, perhaps we can at least do those definitions that you had prepared for the August meeting.

It's Harry's call whether to do that.

I would argue against sending on the definition of "law firm" to RAC/BOG. It was never intended as a standalone rule. We will just add to the confusion if we send this up now for adoption and then have it sent up as part of 1.0.1. I think it best to send terminology to RAC/BOG as a package.

September 7, 2009 Sondheim E-mail to RRC:

As a follow-up to the exchange of e-mails between Bob and Kevin, the definition of "law firm" will be part of 1.0.1. If there is time remaining after considering the agenda materials already distributed and if staff or Bob can distribute appropriate materials for 1.0.1 tomorrow, we could consider definitions other than those we considered at the August meeting. However, there may be some benefit in awaiting the Nov. meeting for a continuation of this discussion to ascertain how the definitions might impact Batch 6 rules (assuming some of those rules are adopted).

September 7, 2009 Kehr E-mail to Sondheim, cc RRC:

Given Kevin's message, I presume your reference to my distributing appropriate materials is intended to mean additional initial drafts of definitions beyond those we covered at the August meeting. In other words, not a comparison chart for what we already have done but only initial drafts of additional terms.

If that is right, what confused me was that Rule 1.0.1 is on the September agenda, I couldn't imagine that anyone thought that I would be able to complete all the MR definitions, consider the four or so additional terms that were suggested for inclusion, otherwise deal with the September agenda, and deal with the rest of my life. I'm thoroughly impressed by the spirit of optimism, but my answer remains uncertain. We'll see.

To clarify, my reference to four or so additional definitions is in addition to the nine that were in Kevin's 8/10/09 e-mail.

September 7, 2009 Sondheim E-mail to Kehr, cc RRC:

Your first paragraph of the 5:14 e-mail is correct. Don't worry about getting it done for the Sept. meeting. I would rather you deal with the Sept. agenda and the rest of your life. The definitions, as I suggested in my e-mail, can wait, if necessary, until the Nov. meeting.

September 8, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Difuntorum:

I have made considerable progress on Rule 1.0.1 but was not able to complete it. Perhaps we could at least get a decision on adding a definition of "consult". I believe that Tony replied with his agreement that we should not add a definition of this term.

September 8, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Difuntorum:

I agree that we probably should not pursue "consult" and should put that before the Commission. I think that most of the states (if not all) that have retained the term, a holdover from the 1983 Model Rules, did so because they also retain the "consents after consultation" standard of the 1983 Model Rules instead of adopting the 2002 Model Rules' standard "informed consent, confirmed in writing." I'll try to confirm that [do we need a definition of "confirm"? :-)] before Friday's meeting. Thanks,

September 8, 2009 Sapiro E-mail to Kehr, cc Drafters, Chair & Difuntorum:

I agree with you. Let's drop “consult.”

September 12, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

Attached is my memo on the definition of “screened”. I'm trying to move ahead b/c Ellen and I will be traveling September 22-26, which will be in the middle of October meeting preparation.

September 12, 2009 Kehr Memo to Drafters (Julien, Sapiro & Voogd), cc Chair & Staff:

To: JoElla Julian, Jerry Sapiro, and Tony Voogd
cc: Harry Sondheim, Randy Difuntorum, Kevin Mohr, Stan Lamport
From: rlk
Date: September 12, 2009
Re: Rule 1.0.1 – definition of “screened”

Rather than attempting to squeeze all of the materials on this into a footnote in a redraft of the entire Rule, I thought it would make it easier for all of us if I were to move the discussion of this one definition into a separate Memo. I will begin with the MR definition, changing only “denotes” to “means” as decided at the August 2009 meeting. It is:

“Screened” means the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Other jurisdictions:

Alaska Rule 9.1(o): This is identical to the MR but substitutes “person” for “lawyer”. This change raises the question of whether non-lawyer personnel must be included in the screening system. My recommendation is that they should be, but I don't think that the Alaska drafting solves the problem.

Massachusetts did not include “screened” among its definitions. It instead includes the elements of a screen in its Rule 1.10(e). It is as follow.

“(e) For the purposes of paragraph (d) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if: (1) all material information which the personally disqualified lawyer has been isolated from the firm; (2) the personally disqualified lawyer has been isolated from all contact with the client relating to the matter, and any witness for or against the client; (3) the personally disqualified lawyer and the firm have been precluded from discussing the matter with each other; (4) the former client of the personally disqualified lawyer or of the firm with which the personally disqualified lawyer was associated receives notice of the conflict and an affidavit of the personally disqualified lawyer and the firm describing the procedures being used effectively to screen the personally

disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and (5) the personally disqualified lawyer and the firm with which he is associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client”

Nebraska Rule 1.0(k) addresses the same point more directly. It states: (k) “Screened” denotes the isolation of a lawyer or support person from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or support person is obligated to protect under these Rules or other law. Nebraska has adopted the comment to the 2002 version of MR 1.0 verbatim, except that it has added the following sentence to MR 1.0, cmt. [8]: [The definition, as well as Comments \[9\] and \[10\] to this rule, also generally apply to the screening of support persons pursuant to Rule 1.9\(e\)\(2\).](#)

New Jersey Rule 1.0(l): Modifies MR 1.0(k) non-substantively by changing “imposition” to “adoption and enforcement” and, more substantively, by requiring that the procedures be written. This states: “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely ~~imposition of procedures within~~ adoption and enforcement by a law firm that are of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law. I agree with the requirement of a writing, but I think it should apply both to the procedures and the notice that a screen is being imposed.

New York Rule 1.0(t) adds “screening” to the defined term (I’m not certain that we have “screening” anywhere in our proposed Rules) and adds a reference to information that the firm is obligated to protect (I don’t expect that this has any application outside a jurisdiction that disciplines law firms). This reads in full: “Screened” or “screening” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.”

North Carolina Rule 1.0(l): This is identical to the MR but it limits its application to “... participation in a *professional* matter” This limitation seems unnecessary to me because the imputation Rules all involve the practice of law.

My reading of the MR definition and of these variations is that they have in common that they do not attempt to include in the definition what the elements of an adequate screen are. Compare this to what California courts have said about what an adequate screen is, and what one federal court said in a case arising under California law. I think this is important because of the Model Rules use of “adequate under the circumstances”.

What is Adequate Screening?

- In *Henriksen v. Great American Savings & Loan Association*, 11 Cal. App.4th 109, 114 n. 6 (1992), the Court said that screening typically includes the following five elements: (i) physical, geographic, and departmental separation of attorneys; (ii) prohibitions against and sanctions for discussing confidential information; (iii) established rules and procedures for preventing access to confidential information in files; (iv) procedures preventing a disqualified attorney from sharing in profits from the representation; and (v) continuing education and professional responsibility.
- In *San Gabriel Basin Water Quality Authority v. Aerojet-General Corporation*, 105 F. Supp.2d 1095 (C.D.Cal. 2000) the Court approved screening of an attorney who previously had represented the moving party while at another firm:(i) screening was imposed the day that the firm learned of the potential conflict; (ii) the affected attorney was told not to discuss with anyone in the firm any information received from the moving party; (iii) the firm labeled all of its files on the case, and the drawers in which they were kept, with the following phrase in capital and bold letters: “Confidential. Do Not Disclose to [the affected attorney]; and (iv) the firm spoke to every member of the firm, including staff and new hires, and followed up with an e-mail that precluded anyone from communication with the affected attorney about the litigation or the affected attorney’s activities concerning his earlier representation of the moving party.
- In *UMG Recordings, Inc. v. Myspace, Inc.*, 526 F. Supp. 2d 1046, 1054 (C.D. Cal. 2007), the court provided the following approving description of a consensual ethics screen established by O’Melveny & Myers: “The [firm’s internal] memorandum identified by name the attorneys working for Fox and the attorney who had been assigned to the representation of UMG. It provided that both sets of attorneys ‘are screened’ from working on the other client’s matters. It then proceeded to define ‘screened’ to mean ‘disqualified from any participation or involvement’ in the other matter. [Emphasis in original.] Elsewhere the memorandum extended the ‘screen’ to staff members. The memorandum explicitly prohibited discussions, requests for assistance, assistance, hypothetical questions based upon facts involving the representation of the other client and access to any files or information related thereto. It contained provisions requiring the specified attorneys to call the notice to the attention ‘of any new attorneys, law clerks, summer associates, legal assistants, secretaries, and other staff members:”

I don’t take any of these opinions to attempt a definition of what is adequate. The discussion in *Henriksen* is of what the court thought was typical, and the other discussions are of screens that the court found to be adequate. Nevertheless, they are suggestive of what should be included in an “adequate” screen.

Jerry in his August 10, 2009 e-mail suggested a revision that includes elements of an adequate screen, including a requirement of notice. Here is his draft definition, marked by the computer to show how it differs from the MR:

“Screened” ~~denotes~~ means at a minimum the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that ~~are~~ reasonably

adequate under the circumstances to protect prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers or non-lawyers in the firm; that include notice to lawyers and non-lawyer personnel within the firm that the isolated lawyer is prohibited from participating in the matter and is not to be given any information about the matter; and that protect from disclosure to other lawyers and non-lawyers in the firm information that the isolated lawyer is obligated to protect under these Rules or other law.

As Jerry has explained to me, he reads the MR definition as protecting only the tainted lawyer’s sharing of information with the firm, but he thinks there are two other elements that should be included in the definition. These are: (i) preventing others in the firm from sharing information about the matter with the tainted lawyer; and (ii) assuring that everyone in the firm knows the tainted lawyer is off limits. I agree with the first of these points in principle. While it is not strictly logical because it is the tainted lawyer’s information that is being sealed, I think that one reasonably can have greater confidence in the screen if the seal works in both directions. However, there seems to me to be a major problem with including it as a required element of the screen because some information is entirely innocuous and might be part of regular internal law firm reports. For example, a law firm might routinely circulate lists of current clients or current open matters. A law firm might report internally on collections during the preceding month. Some information regarding a matter might appear in a routine conflicts check on another, later matter. There might be litigation or other calendars showing where firm lawyers are. If others in a law firm were prohibited from providing any information about a matter to the personally prohibited lawyer, the secretary for another lawyer in the firm would be unable to answer a routine question of where is the lawyer and when will she get back to the office (b/c she is deposing a witness in the screened matter). All this seems to me to cause administrative problems that are beyond the scope of the problem, and likely would make any screen impossible. My recommendation is to try to include Jerry’s concern in the Comment.

Jerry’s second addition is to require notice to others in the firm. Again, I agree with Jerry on this (but I would go further and require a writing). My view is that a requirement of written notice really isn’t part of the definition of what a screen is, but that the definition should include any of the elements of adequate screening that is universal and therefore should be mandatory. I can think of only two in addition to written notice. These are that the screening procedures should be written, and the notice and procedures should be available to anyone with a need to see them.¹

Additional comments on Jerry’s draft:

- I don’t agree with his suggested use of “prevent”. That arguably amounts to a guaranty that client information cannot be shared. Because there can be no guaranty, I think something closer to the MR’s “reasonably adequate” would be correct.
- If you agree with my preceding thought, then we don’t need Jerry’s suggested addition of “at a minimum”. My reason is that “reasonably adequate” communicates the idea that the elements of an adequate screen will vary. Because the elements of an adequate screen will change with the circumstances, I would include some of the possibilities in a Comment rather than in the definition. The definition of an adequate screen would

¹ There is a separate question as to whether the law firm should take the affirmative step of giving notice to the affected clients or former clients. See n. 14, below, and its accompanying text.

become too unwieldy and inflexible if we tried to identify in the definition what always is or might be included.

Here is my suggestion for the definition and the Comment, both marked to compare to the MR:

“Screened” ~~denotes~~ means the isolation of a lawyer from any participation in a matter through the ~~timely~~ prompt imposition² of procedures within a firm that are reasonably adequate under the circumstances to prevent ~~protect information that~~ the isolated lawyer from sharing with any other law firm lawyer or non-lawyer personnel any information the lawyer is obligated to protect under these Rules or other law, and from otherwise being involved in the matter from which that lawyer is screened³. These procedures shall be in writing, the imposition of the procedures in a particular matter must be in a dated writing and that is sent to all law firm lawyers and non-lawyer personnel⁴, and to everyone hired by the law firm while the screen is in effect. The law firm shall provide copies of these writings to all affected clients and former clients promptly after the imposition of a screen.⁵

Screened

[8] This definition applies to situations where information possessed by a lawyer might be imputed to other lawyers in a law firm ~~screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules~~ [1.10(d)(2), 1.11(e), 1.12, or 1.18].⁶

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally prohibited⁷ ~~disqualified~~ lawyer is not directly or indirectly shared with any law firm lawyer or non-lawyer personnel working on the matter, and that the personally prohibited lawyer is not otherwise involved in the representation ~~remains protected. In order to be effective, screening measures must be implemented as soon as practical after a~~

² There is inconsistent language in other Rules. Draft 4 of Rule 1.11 says in paragraph (b)(1) that the prohibited lawyer must be “... timely and effectively screened”. My view is that we should have a single standard for this, and that it should be in the definition. We will need to look at the other applicable Rules to be certain we have been consistent.

³ As you will see from the draft Comment, my suggestion goes beyond the sharing of confidential information.

⁴ This draft requires that the procedures be communicated to everyone in the law firm, while MR Comment [9] speaks of communicating with those working on the matter. Although it might seem to be overkill to require that the imposition of a screen be sent to everyone in a multi-branch law firm, my inclination is to make it a blanket requirement so that it becomes a non-discretionary act. This also would recognize that the largest firm commonly staff matters using personnel from different offices. Does anyone have any different thought about this?

⁵ See n. 14, below, and its accompanying text.

⁶ The brackets are inserted so that the accurate cross-references can be determined later.

⁷ The change from “disqualified” to “prohibited” is intended to track changes the Commission made in the related Rules.

~~lawyer or law firm knows or reasonably should know that there is a need for screening.⁸ The imposition of a screen in a particular matter, and the screening procedures, must be communicated in writing to all law firm lawyers and non-lawyer personnel, whether or not they are expected to work on the matter. They also must be provided to all new law firm hires not later than the commencement of their employment. The imposition of screening in a matter must be acknowledged in a dated writing⁹ by the personally prohibited lawyer disqualified, and by each lawyer and non-lawyer personnel who will work on the matter before being permitted by the law firm to do so.¹⁰ should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.~~

[9A] Reasonably adequate screening procedures must include the written statement of the requirement that the personally prohibited lawyer not communicate with any firm lawyer or non-lawyer personnel working on the matter, and that such persons not communicate with the personally prohibited lawyer, regarding either the matter or the personally prohibited lawyer's earlier representation. In addition: (i) screening must be in accordance with written rules and procedures for preventing access by the personally prohibited lawyer to confidential and other information and materials maintained by the law firm for the matter in any format; (ii) the personally prohibited lawyer must be isolated from all contact with the firm's current client relating to the matter, and any witness for or against the client;¹¹ (iii) the written screening rules and procedures must identify an individual who is responsible for imposing and maintaining the screen in a matter; and (iv) screened lawyer and non-lawyer personnel shall acknowledge in a dated writing that he or she is screened with respect to a particular matter. Additional screening measures that are appropriate for a particular matter will depend on the

⁸ The preceding sentence is MR Comment [10]. I propose re-ordering the Comment so that the requirements for establishing a screen are stated before discussion of the elements of a reasonably adequate screen.

⁹ The requirement of written attestation of the screen is found in Massachusetts Rule 1.10(e)(4)(i), there with the requirement of an “affidavit”. I have rendered it here only as a writing because it seems to me that any writing serves the same purpose without dinging anyone for failing to have the right form of writing. However, I’ve added a requirement that the writing be dated by the individual because I think that a court’s satisfaction with the procedures should be influenced by proof that the writing was at the time of the imposition of the screen on that individual.

¹⁰ This provides for written acknowledgments by the personally prohibited lawyer and by everyone else in the firm who will work on the matter. It does not provide for written acknowledgements by everyone in the firm.

¹¹ This element is borrowed from Massachusetts Rule 1.10(e), with “prohibited” substituted for “disqualified”.

circumstances.¹² However, these measures could include periodic reminders of the screen to the screened lawyer and all other firm personnel working on the matter, the physical labeling or physical separation of firm files, and the use of special computer passwords to prevent improper access. Also, the personally prohibited lawyer should receive no direct financial benefit from the firm's representation in the matter, such as a financial bonus or a larger share of firm income directly attributable to the matter. However, that lawyer may receive compensation and benefits under standing arrangements established prior to the representation.¹³

[10] ~~In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.~~

In addition to the case law referred to above, I also have looked at Christopher J. Dunnigan, *The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How*, 11 Geo. J. Legal Ethics 291 (1998). It lists a number of factors that will impact a court's willingness to find that a screen is effectively protecting privileged information from being leaked. You will see that I have included only some of these factors in my initial draft. Here is what the article says, with footnotes and some of the more obvious explanation removed: (1) *How Soon the Screen is Established* ; (2) *Time Lapse Between the Matters* -- If the representation was in the distant past, memories of specific facts regarding the previous representation are likely to have faded, and a breach of confidences detrimental to the former client is less likely; (3) *Size of the Firm* -- Large firms are considered more capable by the courts and commentators of creating an effective screen, as they are able to better physically separate attorneys and files, as well as being able to distribute excess work to other members of the firm. Large firms often have separate departments, which allows for easy separation. While this factor may seem to give an unfair advantage to large firms, it must be remembered that large firms also are far more likely to have a successive conflict, as they represent more clients and have more lawyers with past connections outside the firm; (4) *Number of Disqualified Attorneys* -- When the number of attorneys to be screened is large, the screen is less likely to succeed. Conversely, if relatively few attorneys need to be screened, the likelihood of successfully taking them out of the loop becomes greater; (5) *Position the Disqualified Attorney Previously Held* -- A junior associate who worked on only peripheral matters, or one aspect of the previous representation, may be less likely to have known facts detrimental to the former client's case than a senior partner; (6) *Nature of the Work Done for the Previous Client* -- If the attorney did only peripheral work concerning the former client's representation, he is less likely to be aware of facts of which the former client does not wish the opposing lawyers to be aware. Likewise, if the attorney was involved only in a supervisory position (this is especially applicable to government lawyers), he is less likely to have such knowledge; and (7) *Specialty of the Tainted Lawyer* -- A lawyer whose expertise and dealings with the former client were limited to one area of the law, when the current representation involves another area of the law entirely, is less capable of passing along information to other members of the firm that would breach the tainted lawyer's duty of fidelity and harm the former client.

¹²The preceding sentence is taken from Comment [9].

¹³The last two sentences of [9A] are taken from Restatement § 124, Comment *d(ii)* with minor changes. Please note that Draft 4 of Rule 1.11 contains in paragraph (b)(1) a requirement that the prohibited lawyer “...is apportioned no part of the fee therefrom” We should consider whether this should be a universal requirement and therefore placed in the definition of “screened”, or whether it applies only to Rule 1.11.

Another possibility would be to require the law firm to give notice of the screen. Restatement § 124, Comment *d(iii)*, includes the following: “An affected client will usually have difficulty demonstrating whether screening measures have been honored. Timely and adequate notice of the screening must therefore be given to the affected clients, including description of the screening measures reasonably sufficient to inform the affected client of their adequacy. Notice will give opportunity to protest and to allow arrangements to be made for monitoring compliance.” This requirement also is in Massachusetts Rule 1.10(e)(4). This possibility creates the risk that the law firm will not be able to accept a new engagement because the new client is unwilling to allow the firm to make the disclosure to the former client, or because the firm recognizes that doing so might harm the new client, but this draft assumes that this risk to the law firm should not weigh in how we write the screening requirements. My current feeling is that notice to the affected clients or former clients is important not just for the reasons given by the Restatement Comment, but also because it likely will increase the firm’s resolve. Notice that the requirements of various writings means that the affected clients or former clients will know what the procedures are, when they were imposed, and which individuals in the law firm are involved (which means that outsiders will now know how a matter is being staffed). I would appreciate your thoughts on the requirement of notice to the former client.¹⁴

There are various other possibilities that I haven’t included in this initial draft. These include the imposition of sanctions for violating the procedures and continuing professional education (suggested by *Henriksen*) and examples of improper communications with the screened lawyer such as not asking hypothetical questions (this was part of the O’Melveny procedure discussed in *UMG*).

One final thought. This drafting is built on the premise of this being a non-consensual screen. Do you have any thoughts on whether the same standards – or minimum standards – should apply to consensual screens?

September 16, 2009 Kehr E-mail to Drafters (Julien, Sapiro & Voogd), cc Chair & Staff:

JoElla, Jerry, and Tony: I have attached a draft of Rule 1.0.1 that includes all of the MR definitions but none of the other terms that have been suggested for inclusion among the definitions. I thought it would make things a good deal easier on you if I were to get this partial draft to you sooner so that you will have more lead time.

I also have attached a sheet that places the MR and Evidence Code definitions of “writing” side by side for ease of comparison.

As has been my practice, all of my thoughts are expressed here as the drafters recommendations, but that is intended only as a place holder that will be revised to accurately capture the thoughts of all of the co-drafters.

I hope you all will carefully critique my draft. Much of it was done when I was tired or distracted. Make no assumptions.

¹⁴ Please note that our Draft 4 of Rule 1.11 includes in paragraph (b)(2) requirement that “written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.”

Kevin: Your charts were invaluable.

September 17, 2009 Kehr E-mail to KEM, cc Chair & Staff:

I would appreciate your double checking this list of suggested additions to the list of definitions (other than “consult”, which the Commission dealt with at the September 11 meeting). Most of these are in ¶¶ III.A.1 and 2 of your August meeting notes but others are from my notes of the meeting. Am I overlooking any? (not that I’m trying to maximize the list, but I don’t want to fail to address anyone’s concerns) ---

- “advance fee” or “advances for fee”
- “client”
- “confidential information”
- “independent lawyer”
- “law clerk”
- “lawyer”
- “matter”
- “person”
- “personally and substantially”
- “primary responsibility”
- “public official” or “public officer”
- “retainer” or “true retainer”
- “substantially related”

September 19, 2009 KEM E-mail #1 to Kehr, cc Chair & Staff:

I've carefully gone through my notes from the meetings, recent drafts of rules in Batch 1 we've been preparing for consideration by BOG at its November meeting, and previous research I've done in compiling the charts I sent the drafters, and agree w/ the list of terms you have identified below, with the following comments:

1. Shouldn't "confidential information" be "confidential information relating to the representation of a client"? The latter is the defined term in 1.6 and used consistently throughout the Rules.
2. Concerning "primary responsibility," note that the Model Rules (and in our proposed Rules so far, i.e., 1.11 and 1.12) use "personally and substantially". Note also that we have included a

definition in of "personally and substantially" in Comment [1] of proposed Rule 1.12 (out for public comment in Batch 5), but it is a relatively narrow definition applicable only in the context of judicial officers. I think "primary responsibility" is used only in those states that permit private-to-private screening in limited situations. Neither "primary responsibility" nor "primarily responsible" is used in the MR's, but "personally and substantially" is (in MR 1.11 an 1.12).

3. "Member" is still used in some proposed rules, e.g., 5.3.1 [1-311], 5.1, 1.0.1 ("law firm" definition, "partner" definition") to mean different things. It is currently defined in rule 1-100(B)(2) to mean member of the State Bar. I don't think it's susceptible to a global definition but we should probably explain why we no longer define it in our final BOG submission or even in the Introduction to the comparison charts.

Please let me know if you have any questions.

September 19, 2009 KEM E-mail #2 to Kehr, cc Chair & Staff:

Just to be sure you're aware, proposed Rule 1.0.1 has been put in Batch 6 and kicked to the November 2009 meeting to give the Commission members time to work on the Batch 1, 2 and 3 Rules that we are scheduled to submit to RAC and BOG for adoption at their mid-November 2009 meeting. This Rule is not a priority item for the October 16-17 meeting.

The first e-mail Lauren sent to the Commission yesterday included two attachments: The 10/16-17/09 meeting Supplemental Agenda, which carried forward those agenda items that were not submitted for September (e.g., 3.1, 3.2, 5.3, 5.3.1, etc.), as well as those items that were discussed but which Harry has designated for a 10-day ballot (the 10-day ballots are scheduled to be circulated on Monday). It also included a revised Rolling Agenda. Rule 1.0.1 is set as Item J. on the last page and has been given a submission date of 10/28/09.

Please let me know if you have any questions.

September 20, 2009 Kehr E-mail to Drafters, cc Chair & Staff re 1.16:

JoElla, Raul, and Tony: You might remember that the public comment we received on Rule 1.16 included concerns that the references to the client materials a lawyer is obligated to make available to a client upon the termination of a representation is not broad enough to cover virtual materials. These concerns presumably were triggered by the COPRAC opinion about a lawyer's duties with respect to materials held by a lawyer in electronic form. We discussed alternatives to the Model Rule phrase, which is "papers and property" and settled on "materials and property". We also included a more elaborate explanation in 1.16(e)(1).

In reading Kevin's meeting notes while preparing the Rule 1.16 materials for the October meeting, I've come across a note that we should consider including "materials and property" in the global definition section. When the October materials arrive, please look at 1.16(e)(1) and the related Comment paragraphs. My view is that they are sufficient and that nothing needs to be added to 1.0.1. Also, I don't think the phrase is used in any other Rule. My recommendation is to not include "materials and property" in 1.0.1. We should discuss this in preparation for the November meeting.

September 22, 2009 Julien E-mail to Drafters, cc Chair & Staff:

In the discussion of our charge many years ago, I seem to recall that our rewriting the rules was also to be done in light of this electronic age we are currently experiencing. Therefore, even though we don't use the phrase elsewhere, I think it is appropriate that the definition of virtual materials/materials and property. Such a definition would bring us into the 21st century and set a stage for the next commission which rewrites rules and includes more virtual thinking.

September 24, 2009 McCurdy E-mail #1 to Voogd, cc Chair, Difuntorum & KEM:

I'm resending the assignment message I sent you for the September meeting, with all of the various materials for your upcoming assignments. In addition to a submission on Rule 1.8.5, (III.DD.) (assignment background materials sent to you by e-mail on Sept. 18th), we are also looking for materials for the following assignments that were carried over from the September meeting, to be submitted by September 30th for the October meeting:

Rule 3.1

Rule 3.2

Rule 5.3.1

I have also attached the most current Dashboard template for you to use. You can copy and paste any entries from the Dashboards sent out earlier into the revised Dashboard template provided (the last attachment to this message – named “Dashboard Template for Adoption V4 rev. 9-14-09.doc (43 KB).”

Attachments:

Rule 1.0.1

- Dashboard for Law Firm Definition (8/27/09)
- Introduction Template (8/27/09)
- Rule Chart Template (8/27/09)
- Comment Chart Template (8/27/09)
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Cf. to MR 1.0(c).
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Annotated
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Clean
- Rule 1.0.1 [Law Firm], Post-PCD (6/16/07), Cf. to PCD

Rule 3.1 [3-200]

- Dashboard (8/27/09)
- Introduction, Draft 2 (6/1/09)
- Rule Chart, Draft 2 (6/1/09)
- Comment Chart, Draft 2 (6/1/09)
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)

Rule 3.2 [3-200]

- Dashboard (8/27/09)
- Introduction, Draft 3 (12/14/08)KEM
- Rule Chart, Draft 3 (12/14/08)KEM
- Comment Chart, Draft 3 (12/14/08)KEM
- Public Comment Chart, Draft 1 (8/27/09)
- State Variations (2009)

Rule 5.3.1 [1-311]

- Dashboard (8/27/09)
- Introduction, Draft 3.1 (12/17/08)KEM
- Rule Chart, Draft 3.1 (12/17/08)KEM
- Comment Chart, Draft 3.1 (12/17/08)KEM
- Public Comment Chart, Draft 1 (8/27/09)

September 24, 2009 McCurdy E-mail #2 to Voogd, cc Chair, Difuntorum & KEM:

Please read the following excerpt from a message from Kevin to Bob concerning the Rule 1.0.1 assignment that Bob & Kevin worked on in your absence. We’re still looking for you to take the lead on this, but consideration of this rule can be postponed until you complete the October meeting assignments.

“Proposed Rule 1.0.1 has been put in Batch 6 and kicked to the November 2009 meeting to give the Commission members time to work on the Batch 1, 2 and 3 Rules that we are scheduled to submit to RAC and BOG for adoption at their mid-November 2009 meeting. This Rule is not a priority item for the October 16-17 meeting.”

When the time comes, you should coordinate with Bob and Kevin for the most recent status of this assignment. This agenda item has been reordered to agenda item IV.J. on the rolling assignments agenda.

October 20, 2009 Kehr E-mail to KEM, cc Melchior, Tuft, Chair & Staff:

Under the assumption that we have the October meeting work behind us, I have two questions for you for what I presume will be on the November agenda.

First: Now that the Commission has removed “disclosure” from Rule 1.7(d), is there any other proposed Rule that uses that term in California’s traditional defined sense? If not, I probably need to remove the term from the Rule 1.0.1 definitions and place it, if at all, in the Comment.

Second: You attempted to convince me that we could use “informed consent” rather than California’s traditional “informed written consent”, with the reference to a writing in the Comment. Given the fact that the just-completed Rule 1.7 uses the full phrase in each of its four paragraphs, and that the full phrase is used in other conflicts rules, do you remain of the same mind? Are you satisfied that the requirement of a writing can be in the Comment and still have the intended disciplinary consequences in the post-Dale era?

Do you or the others receiving this have any thoughts or suggestions on either of these points? I know that Mark expressed an opinion at the August 2009 meeting that was contrary to your recommendation regarding “informed written consent”, but I think the discussion was cut off so I’m not certain what he had in mind. See 8/28-29/09 KEM Meeting Notes, III.A., at ¶10.c.

October 20, 2009 Sondheim E-mail to Kehr, cc Melchior, Tuft, KEM & Staff:

Maybe I am missing something, but I do not understand how “informed consent” can be deemed to encompass “informed written consent.” If the rule says “informed consent,” a comment cannot convert the consent to a written consent.

October 20, 2009 Kehr E-mail to KEM, cc Melchior, Tuft, Chair & Staff:

That was my concern, but perhaps I misunderstand Kevin’s recommendation. According to my notes, his view was expressed at 8/10/09 KEM E-mail to Drafters, #3, but I cannot check the accuracy of this reference at the moment.

October 20, 2009 Kehr E-mail to KEM, cc Voogd, Sapiro, Chair & Staff re “Independent Lawyer”:

I don’t think you replied on this since your 9/6/09 message. I misplaced it if you did. Any help would be appreciated.

See September 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

October 24, 2009 Kehr E-mail to Vapnek & KEM, cc Drafters, Chair & Staff:

Paul and Kevin: As the two with knowledge of patent practice, I would appreciate your thoughts on a point that has come up in my drafting of the definition of “tribunal”.

The Texas definition, which is a pretty complete rewrite of the Model Rule definition, includes a reference to special masters. It occurs to me that this implicitly recognizes that, when a court uses an outside interim decision maker or fact finder, the work of that person should be treated as part of the judicial process and should be subject to the requirements of Rule 3.3. This might happen, for example, in patent litigation when a district court uses a distinguished patent lawyer as a special master. I have no personal knowledge of this situation, but my general understanding is that the district court in effect subcontracts out part of its work, that is, the work of the special master becomes part of the court’s ultimate decision to the extent ratified or relied on by the district judge. I wonder if either of you has any thoughts or suggestions about including this special master situation in the definition of “tribunal” and subjecting it to the requirements of Rule 3.3. Any guidance would be much appreciated.

October 24, 2009 Kehr E-mail to Drafters, cc Lamport, Chair & Staff:

I have prepared the attached memo on the definition of screening, separate from the draft Rule, because there is more to say than will fit into a footnote. Please review my work carefully. I am working from Colorado and don’t have access to a printer, so I cannot print out a draft and edit with pen in hand as I normally would. I will be back in L.A. late tomorrow afternoon.

I have copied Stan on this b/c I have a note that he wanted to be included.

Attachment:

See **RRC - 1-100 [1-0-1] - 10-24-09 Kehr Memo re Screening.doc**

October 24, 2009 Kehr E-mail to Drafters, cc Lamport, Chair & Staff:

We were requested at the August 2009 meeting to consider adding definitions of terms not included in MR 1.0. Here is my Memo on these possible additions.

Attachment:

See **RRC - 1-100 [1-0-1] - 10-24-09 Kehr Memo re Additional Terms.doc**

October 24, 2009 Kehr E-mail to Drafters, cc Lamport, Chair & Staff:

Here is my redraft of Rule 1.0.1. The footnotes contain recommendations from the drafting team that, as usual, express only my views and are subject to change once I’ve heard from you. I noticed in a quick final review that there is one footnote that speaks in the first person singular, and I’ll need to change that after you have had the chance to look at this.

Attachment:

See **Rule - 1-100 [1-0-1] - Rule - DFT 2.2 (10-24-09) - Cf to MR 1.0.doc**

October 28, 2009 Voogd E-mail to Kehr (forwarded to Staff & Drafters by RLK):

My comments, which do not changes, are a continuing belief that we are over editing the Model Rules. I will discuss this in a more general dissent.

With regard to screening, I would adhere to the Model Rules as well. If I were to make a change, I would include the definition in a new rule which would specify who is responsible for the insuring that screening is done properly and imposing discipline upon that lawyer if the screen fails for reasons within his or her reasonable control.

October 28, 2009 Kehr E-mail to Difuntorum & McCurdy, cc Drafters, Chair & KEM:

Randy and Lauren: The Rule 1.0.1 materials should be the three items I previously sent to you plus this e-mail, including Tony's message below. Unless Harry has a different preference, I would place the three items in the following order --- the revised rule draft, then the screening memo, and then the memo on possible additional defined terms.

The footnotes to the revised rule draft include a number of drafters' recommendations. I don't have time now to revise them to reflect that all recommendations are mine alone. There also is one footnote that refers to me rather than to the drafters as a group, but no different meaning is implied - I simply was inconsistent.

October 28, 2009 Sondheim E-mail to Difuntorum & McCurdy, cc Drafters & KEM:

Bob's order is fine with me.

October 30, 2009 KEM E-mail #1 to Kehr, cc Drafters, Chair & Staff re Special Masters:

My apologies for not responding sooner but there were other fish to fry. I agree with the approach you outlined below. A special master acts on behalf of the court. I don't see it as being any different from a district judge referring a matter to a federal magistrate for settlement, discovery, etc.

Paul: Do you agree?

October 30, 2009 KEM E-mail #2 to Kehr, cc Drafters, Chair & Staff re Special Masters:

A cautionary note. Right after I sent the e-mail, below, I recalled that in California "special master" can have a, well, special meaning. See attached PDF concerning the State Bar of California Special Master Program Rules & Regulations. I think we would have to add a definition of "special master" to distinguish the kind of special master you contemplated in your e-mail and the special masters regulated under the attached, i.e., the lawyers who are appointed to conduct searches of professionals (privileged) files pursuant to Penal Code 1524.

I would therefore not include special masters in the definition of tribunal.

October 30, 2009 Sapiro E-mail to Drafters, cc Chair & Staff re Special Masters:

I agree with Kevin about the unique special special master situation. But in federal court the special master acts as an agent of the court and should be included in the scope of a tribunal. In state court, more often the counterpart is a referee, who is appointed to hear particular aspects of cases.

Why not include both referee and special master but exclude the PC 1524 from the definition of a special master for the purpose of the rule?

October 30, 2009 Kehr E-mail to Drafters, cc Chair & Staff re Special Masters:

As the non-litigator in the group, I was ignorant of these sorts of subtleties, but feared and wanted to avoid them if possible. I therefore drafted the “tribunal” definition as follows ---

“Tribunal” means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity, and authorized to make a decision that can be binding on the parties involved; or (ii) *a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.*

Two thoughts went into my drafting of the italicized language. First, I didn’t want the definition to be sandbagged by unknown or future terminology. Second, I didn’t want it to be sandbagged by variations in the order, stipulation, rule of court, or statute that creates the role for that individual. For these reasons I didn’t attempt to hunt out all possible variations in terminology, and I made that individual’s relationship to the court the key. That is, the individual operates as a “tribunal”, so that Rule 3.3 applies, when the individual’s efforts are at the behest of a court and can be binding on the parties if approved by the court.

I wonder if the italicized language resolves your concerns (or perhaps intensifies them).

October 30, 2009 Sapiro E-mail to Drafters, cc Chair & Staff re Special Masters:

I like what you wrote. I would insert “referee” after “special master.”

October 31, 2009 Julien E-mail to Drafters, cc Chair & Staff:

I concur with your memo re additional terms (rule 1.0.1) numbers 1, 2, 5, 9, 10, 11, 12, and 13.

November 1, 2009 Sapiro E-mail to RRC List:

I apologize to Bob Kehr for not responding sooner to his work. I should have presented these comments to him before he was required to submit the agenda materials. The press of other work prevented me from doing so.

1. I think the proposed definition of “confidential information relating to the representation” is silly. It exposes a drafting flaw in Rule 1.6 more graphically than any comment I could make

about Rule 1.6. Paragraph (a-1) would say that “confidential information relating to the representation” is not limited to “information that relates to the subject of the representation.” If it is not what it says, what is it? That is like saying that a redwood tree is not just a redwood tree because I have renamed an oak tree to be a redwood tree too. Why don't we just correct proposed Rule 1.6 and stop proffering silly redefinitions of words and phrases?

2. At the end of paragraph (b) there is a close quote that should not appear there.

3. I offer three observations regarding paragraph (e). First, the Model Rule wording requires the lawyer to communicate adequate information about the risks. That misses part of the disclosures that ought to be made. Part of the disclosures should include a disclosure of the relevant circumstances. Second, modifying the word “risks” with the word “material” will raise inherent questions about whether a given risk was not material. It also omits a limitation on the rule that should be included, namely that the risks be disclosed should be those that are reasonably foreseeable. Third, the way the last sentence of paragraph (e) is worded, it creates a second definition of the phrase “informed written consent.” I would reword it along the lines of, “For consent to be informed and written, the lawyer must communicate the information and explanation in writing and obtain the person’s consent in writing.”

4. Here, once again, we use the word “person.” That word appears in several of our proposed rules. However, each time you use that word we create the risk that the relevant rule will not be interpreted to apply to an organization. I recommend that we have a universal definition in Rule 1.0.1 that defines “person” to include organization wherever it appears.

5. I know that I have lost this battle before, but I object to paragraph (f) because requiring actual knowledge creates too many easy loopholes in rules like Rule 1.11, so that a lawyer can escape discipline by consciously avoiding knowledge.

6. Regarding paragraph (k), I think the word “means” should be inserted after the first word in the paragraph. In addition, it seems to me that the screen should work in two directions in many, if not most, cases. It is correct that the information that the isolated lawyer possesses should not be disclosed to others. Conversely, in many circumstances the information that is confidential to the firm’s client should not be disclosed to the isolated lawyer. In addition, at line 48 on page 369 of the agenda materials, I think the phrase “to protect” appears one too many times. I therefore recommend that, after the word “obligated” at line 48, we reword the rest of the sentence to state, “. . . not to disclose under these Rules or other law and to protect from disclosure to the isolated lawyer information that should not be disclosed to him or her.”

7. In paragraph (m), Bob Kehr, Kevin Mohr, and I have exchanged emails about part (ii). I think Bob has an acceptable rewording of that part, but I do not have access to it as I draft this email. I will be satisfied if the concept of a “referee” is worked into line 57 at page 372 of the agenda materials.

8. Regarding proposed paragraph (n), why not just substitute for the first sentence a sentence that adopts by reference the definition of a “writing” in Evidence Code section 250? Then, we could add the proposed second sentence.

9. Regarding proposed Comment [1], I have a question for Kevin. Do we actually use “confirmed in writing” in any of our rules? If not, I would delete the comment.

10. At proposed Comment [4], I suggest we discuss whether to change the phrase “This rule is” to “These rules are.” It seems to me that Rule 1.0.1 is not the only rule as to which we should disclaim any intent to authorize unauthorized practice of law in California.

11. Regarding screening, the definition and Comments omit to state what I think is a material aspect that should be required in any effective screen. Specifically, our rules should prohibit a lawyer from participating, directly or indirectly, in the fees from a matter as to which he or she is personally conflicted. If he or she may indirectly participate in the fees, he or she has every reason to penetrate the screen and maximize gain.

I am grateful to Bob for the work he has done on these definitions. It is a thankless task, so I want to say, “Thanks!”