

California Bar Recommends Adoption of a Conflicts Imputation Rule But Rejects a Related Screening Rule

Lawyers for the Profession® Alert

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Proposed California Rule of Professional Conduct, Rule 1.10

Brief Summary

The California State Bar Board of Governors has approved a proposed ethical rule on imputation of conflicts of interest based on ABA Model Rule 1.10, but has opted to let the issue of ethical screening be decided on a case-by-case basis. The Board's proposed change is now pending consideration by the California Supreme Court.

Complete Summary

In March 2010, the California State Bar Board of Governors (Board) rejected a proposed ethical rule regarding imputation of conflicts of interest which included a provision that would have allowed screening of lawyers. The rule, which was proposed by the California Commission for the Revision of the Rules of Professional Conduct, was based on ABA Model Rule 1.10, albeit with a narrower screening rule.

The Board subsequently adopted a proposed conflicts imputation rule, but without an attendant screening provision. The comments to that proposed rule state that the issue of ethical screening should be resolved through case law. Shortly thereafter, the California Supreme Court declined to review or depublish a case from the California Court of Appeals that approved a limited screening rule in the prospective client context (*Kirk v. First American Title Ins. Co.*, 183 Cal. App. 4th 776 (2010), 108 Cal. Rptr. 3d 620).

Believing that the California Supreme Court's action signified an implicit approval of the underlying rule articulated in *Kirk*, the Commission asked the Board to reconsider the screening issue. The Commission proposed an even narrower screening rule that would have allowed, in the private firm context, screening without client consent so long as the lawyer did not "substantially participate in the prior representation."

But the Board again rejected the proposed screening rule and stood by its decision to recommend a proposed rule change to the Supreme Court that deals with imputation of conflicts but leaves screening rules to be derived through case law.

Significance of Rule

Although California common law has long recognized that conflicts of interest may be imputed, the new Rule 1.10, if adopted, will codify a rule and add the prospect of disciplinary action for conflicted lawyers. And while lawyers still could attempt to protect against discipline or disqualification with screening mechanisms if the new rule is adopted, the effectiveness of such mechanisms would ultimately be decided on a case-by-case basis in court.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.