Vermont Rules of Professional Conduct
Rule 1.10 – Imputation of Conflicts – General Rule

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Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- Rule 1.10 has not been amended since 2012.
- Lateral Transfers: is Vermont's rule too strict?

Rule 1.10. Imputation of Conflicts – General Rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm in a matter in which the disqualified lawyer did not participate personally or substantially, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other entity or association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student, including work as a judicial intern or in a law school clinic. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client
and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires in language adapted from Rule 1.11 that a lawyer disqualified under Rule 1.9 be one who "did not participate personally and substantially" in the matter giving rise to the conflict and that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely

implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed under Rule 1.11(b) and (c), not this rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that rule, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Reporter's Notes—2012 Amendment

Rule 1.10(a) of the Vermont Rules of Professional Conduct is amended to incorporate in slightly revised form an amendment of ABA Model Rule 1.10(a) adopted in February 2009. The amended rule permits screening of lawyers whose former representation, or whose former firm's previous representation, of a client would bar the lawyer's present firm from representation. Simultaneous ABA amendments to the Comments to Model Rules 1.10 and 1.0 are also adapted for Vermont.

The amendment reflects growing awareness that large law firms face difficult or intractable conflict issues when an attorney proposes to move from one such firm to another under the present strict rule that all such prior conflicts are imputed to all lawyers in the new firm. There are now several relatively large Vermont firms that are increasingly in this position. A realistic screening procedure facilitates freedom of movement by individual lawyers. Without such a procedure, a lawyer wishing to move from one Vermont firm to another may be denied his or her choice simply because of the unamended Rule 1.10. Large firms unable to hire a particular lawyer can always hire someone else. The one most impacted by the prohibition of the rule is the individual lawyer. A recent survey indicates that 24 states have adopted a screening rule.

Amended Rule 1.10(a)(2) has three salient provisions: (1) Screening of a disqualified lawyer must be timely, must extend to any participation in the matter involving the conflict, and must receive no part of the fee that the firm receives from the matter. (2) Any affected former client must be given prompt written notice that will enable the client to evaluate the degree of compliance with the rule and pursue objections to the representation. (1) The screened lawyer and the firm must provide periodic certifications of compliance to the client upon request and upon termination of the screening. Additionally, amended V.R.Pr.C. 1.10(a)(2) provides a further safeguard, adapted from the existing screening provisions of Rules 1.11(a)(2), (d)(2)(i) concerning lawyers moving between government and private practice and not found in the Model Rule: The prohibition to which screening will be applied must arise out of a matter "in which the disqualified lawyer did not participate personally and substantially."

New Comments [7] and [8] added by the amendment emphasize that client consent is not required but that compliance is to be measured by the three provisions summarized above, that screening is defined in Rule 1.0(k), and that the rule does not prohibit compensation of the screened lawyer under a general employment agreement not tied to the matter in question. Comment [7] also emphasizes the effect of the Vermont substantial-participation qualification described above. New Comments [9] and [10] elaborate on the notice and certification provisions of the rule.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.10 is amended to conform to changes in Model Rule 1.10.

In *State v. Baker*, 2007 Vt. 84, 182 Vt. 583, 934 A.2d 820 (mem.), the Court held that where there was no basis to disqualify a deputy state's attorney under V.R.P.C. 1.9, there was no basis for disqualifying the entire state's attorney's office under V.R.P.C. 1.10.

The ABA Reporter's Explanation of the changes is as follows in pertinent part:

TEXT:

1. Paragraph (a): Eliminate imputation of conflicts under Rule 1.8(c) and [former Rule] 2.2

The reference to [former] Rule 2.2 has been deleted because the Commission is recommending elimination of that Rule. The reference to Rule 1.8(c) has been deleted because the Commission is recommending that imputation of the prohibitions in Rule 1.8 be addressed by Rule 1.8 rather than by Rule 1.10. Under [proposed] Rule 1.8(k) the prohibitions set forth in paragraphs 1.8(a) through (i), but not (j), are imputed to other lawyers with whom the personally disqualified lawyer is associated.

2. Paragraph (a): Eliminate imputation of "personal interest" conflicts

The proposed reference to "personal interest" conflicts at the end of Rule 1.10(a) would eliminate imputation in the case of conflicts between a lawyer's own personal interest (not interests of current clients, third parties or former clients) and the interest of the client, at least where the usual concerns justifying imputation are not present. The exception applies only where the prohibited lawyer does not personally represent the client in the matter and no other circumstances suggest the conflict of the prohibited lawyer is likely to influence the others'

work. This is a substantive change in the Rule as written, but the Commission believes that the proposed Rule provides clients with all the protection they need, given that the exception applies only when there is no significant risk that the personal-interest conflict will affect others in the lawyer's firm.

....

6. Paragraph ([d]): Relationship of this Rule to Rule 1.11

This paragraph clarifies that Rule 1.11 is intended to be the exclusive Rule governing the imputation of conflicts of interests of current or former government lawyers.

COMMENT:

Definition of "Firm"

The Commission is recommending adoption of a definition of "firm" in Rule 1.0(c). That definition will apply not only for purposes of imputing conflicts under this Rule, but also for addressing the supervisory obligations of lawyers under Rules 5.1 -5.3. The definition in Rule 1.0(c) and the Comments to that Rule were based on the [former] Comment to Rule 1.10. As a result, the Commission is recommending deleting that material in this Comment.

[1] This Comment modifies the first two sentences in the [former] Comment to reflect what is now in Rule 1.0(c). Cross-references to that Rule and its Comment have been added. The remainder of the Comment is deleted because the material has been moved to the Comment to Rule 1.0.

The material in these Comments has been moved to the Comment to Rule 1.0. Former] Comment [5] has been deleted because the conflicts arising from moving between government and a private firm are discussed in Rule 1.11.

[3] This entirely new Comment deals with the elimination of imputation of a lawyer's ''personal-interest" conflicts to others in the firm because there is no risk to loyal and effective representation of the client. The Comment also provides illustrations of when this exception to imputation might and might not apply.

[4] This entirely new Comment explains how this Rule applies to persons who are nonlawyers, e.g., secretaries, or who obtained their disqualifying information while a nonlawyer, e.g., while a law student. Such persons are disqualified personally, but the conflict is not imputed so long as they are screened from participation in the matter so as to protect the confidential information. This Comment represents a substantive change from the current text of Rule 1.10, but it represents the overwhelming state of the current case law and is intended to give guidance to lawyers about important practical questions.

... .

[6] This entirely new Comment deals directly with the availability of and conditions for consent, a subject heretofore largely ignored in this Rule...

[7] The minor proposed amendments to [former] Comment [4] are designed to make clear that in the case of current and former government lawyers, imputation is governed by Rule 1.11. Under the [former] Rules, the application of Rule 1.10 to such lawyers is unclear.

[8] Historically lawyers have relied on paragraph (a) of Rule 1.10 for a complete list of the conflict Rule numbers and paragraph references that trigger imputed disqualification. All references to Rule 1.8 have been removed from Rule 1.10(a) because none of the Rule 1.8 paragraphs fit logically or grammatically in Rule 1.10(a). The Commission added this new Comment for the assistance of lawyers who look to Rule 1.10 to determine if the prohibitions of Rule 1.8 apply to other lawyers in the firm.

Reporter's Notes

This rule carries forward the imputed disqualifications rule for lawyers currently in a firm as set forth in the Vermont Code, and incorporates additional provisions dealing with lawyers moving from one firm to another. The rule further differs from the Vermont Code by providing specific guidance in given situations.

ANNOTATIONS

1. City attorney. In a breach of fiduciary duty brought by a city manager against the city attorney, the trial court was correct in construing the city charter as obligating the city attorney to represent the city's interests only. Though the charter of Winooski, Vermont, designates the city attorney as legal advisor to the city manager, it is settled in Vermont and other states that the actual client of the city attorney is the municipality. Handverger v. City of Winooski, 2011 VT 134, ___Vt. ___, 38 A.3d. 1158.