

To: Rules Revision Commission
From: Rule 3-310 Drafting Team (Martinez (lead), Cardona, Eaton, Harris & Stout)
Re: Overview of Materials Provided for Consideration of Proposed Rules
Date: February 5, 2016
For February 19-20, 2016 Meeting

The materials included for this Agenda Item are:

1. This cover memo
2. ATT1 – Report & Recommendation for proposed Rule 1.7 – DFT1.6 (02-04-16)
 - Including the Revised Rule Assignment Memo distributed to Rule 3-310 Drafting Team – DFT3.1 (01-19-16)
 - Assignment Memo Attachment 1 – Redline Mockups of Rules 1.7, 1.8.6, 1.8.7, and 1.9 to the Current California Rule 3-310
 - Assignment Memo Attachment 2 – Public Comment Notice for Proposed Amendment to Rule 3-310 (1998), including Public Comment Notice Attachments
3. ATT2 – Report & Recommendation for proposed Rule 1.8.6 – DFT1.2 (02-02-16)
4. ATT3 – Report & Recommendation for proposed Rule 1.8.7 – DFT1.4 (02-05-16)
5. ATT4 – Report & Recommendation for proposed Rule 1.9 – DFT1.7 (02-04-16)

Background

As part of its assignment to consider current rule 3-310, the drafting team was asked to also consider the Model Rules that address conflicts of interest, including not only those Model Rules that correspond to the concepts in rule 3-310, but also other Model Rules that have no California rule counterpart.

Model Rules that are direct counterparts to current rule 3-310 provisions are:

| California Rule Provision | Model Rule Counterpart |
|----------------------------------|--|
| 3-310(B), (C) | Model Rule 1.7 [Conflict of Interest; Current Clients] |
| 3-310(F) | Model Rule 1.8(f) [Third Party Payor] |
| 3-310(D) | Model Rule 1.8(g) [Aggregate Settlement] |
| 3-310(E) | Model Rule 1.9 [Duties To Former Clients] |

Model Rules that have no California Rule counterpart, although the concepts have been addressed in case law or statute, include:

Model Rule

- 1.10 [Imputation; Ethical Screens]
- 1.11 [Special Conflicts Rules for Government Lawyers]
- 1.12 [Special Conflicts Rules for Former Judges & Third Party Neutral]

In addition to the foregoing, the drafting team learned during its first telephone conference that the 3-100 drafting team has referred consideration of Model Rule 1.18 [Duties to Prospective Clients] to it.

The Drafting Team’s Strategy & Summary of Proposed Rules

Given the time constraints for preparing materials for the February meeting, the drafting team decided at the outset of its deliberations to limit its considerations to the conflicts concepts in current rule 3-310 and to defer consideration of the other Model Rule concepts until it had an opportunity to hear from the full Commission on its four proposed Rules. Consequently, the team has prepared four rules that address the concepts in rule 3-310 but correspond to the Model Rules’ numbers, format and style:

| Proposed Rule | California Rule | Model Rule Counterpart |
|----------------------|------------------------|--|
| Rule 1.7 | 3-310(B), (C) | Model Rule 1.7 [Conflict of Interest; Current Clients] |
| Rule 1.8.6 | 3-310(F) | Model Rule 1.8(f) [Third Party Payor] |
| Rule 1.8.7 | 3-310(D) | Model Rule 1.8(g) [Aggregate Settlement] |
| Rule 1.9 | 3-310(E) | Model Rule 1.9 [Duties To Former Clients] |

Proposed Rule 1.7 takes a hybrid approach, i.e., it retains elements of current rule 3-310(B) and (C) (i.e., that rule’s “checklist approach” and bifurcated disclosure/consent requirements) and imports some elements from the Model Rule (statement of general principles governing conflicts as found in MR 1.7(a) and a provision, derived from MR 1.7(b), that sets forth in the black letter conflicts situations to which a client cannot consent).

Proposed Rule 1.8.6 carries forward the substance of current rule 3-310(F), which largely tracks Model Rule 1.8(f), but expands the scope of the rule, similar to proposed Rule 1.5 [4-200], to cover situations when a lawyer enters into an agreement for, or charges a third person for payment of legal fees. It also adds a timing requirement, similar to proposed Rule 1.5.1 [2-200], for obtaining the client’s informed consent.

Proposed Rule 1.8.7 carries forward the substance of current rule 3-310(D), the first sentence of which tracks Model Rule 1.8(g), concerning aggregate settlements, but expands its scope to cover aggregate criminal pleas. It also adds a second sentence, based on the second sentence of MR 1.8(g), which specifies certain disclosures that must be made in obtaining the clients’ informed written consent.

Proposed Rule 1.9, which concerns former clients, incorporates the structure of Model Rule 1.9 instead of current rule 3-310(E). The Model Rule is divided into three paragraphs, the first two addressing a lawyer’s duties owed a former client of the lawyer or of the lawyer’s former law firm. The third paragraph sets out a lawyer’s duty of confidentiality owed a former client. Unlike the Model Rule, proposed Rule 1.9 incorporates duties recognized by the Supreme Court in *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505].

Issues Not Addressed

The drafting team did not address the following issues in a proposed rule:

1. Imputation [MR 1.10]
2. Non-consensual Ethical Screens [MR 1.10]
3. Special Conflicts Rules for Current and Former Government Employees [MR 1.11]
4. Special Conflicts Rules for Judges & Third Party Neutrals [MR 1.12]
5. Advance Consents to Conflicts of Interest

As noted, before the drafting team embarks on drafting such rules, it would like to receive insights from Commission members on these topics during the February meeting.

Finally, as for Model Rule 1.18 [Prospective Clients], the drafting team is unsure whether this Rule is more appropriately considered by the Rule 3-100 drafting team, as the duties owed a prospective client relate primarily to the duty of confidentiality.