

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
RULE OF PROFESSIONAL CONDUCT 1.10**

PETITION OF THE VIRGINIA STATE BAR

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TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of proposed amendments to Rule 1.10, as set forth below. The proposed rule amendment was approved by unanimous vote of the Council of the Virginia State Bar on October 26, 2018 (Appendix, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics (“Committee”) has proposed amendments to Rule 1.10(a), Imputed Disqualification: General Rule, including new Comments 3 and 4. This proposed revision provides that a conflict is not imputed to other lawyers in a firm when the conflict arises from a personal interest of the affected lawyer and does not present a significant risk of materially limiting the representation by other lawyers in the firm. The proposed revision also adds Comment 3, an ABA Model Comment that gives examples of the types of

personal interest conflicts that might or might not affect other lawyers' ability to represent a client. Under the proposed rule, a lawyer's personal relationship with a witness involved in a case, for example, would not create a conflict for other lawyers in that firm unless those lawyers' relationship with the conflicted lawyer would materially limit their own representation of the client.

The proposed amendment to Rule 1.10(a) essentially allows lawyers to apply the Rule 1.7(a)(2) standard a second time; first, under Rule 1.7, to test whether the personally affected lawyer in the firm has a "personal interest" conflict that creates a significant risk of materially limiting the representation of a client, and then under Rule 1.10(a) to test whether other lawyers in the firm who do not share that personal interest conflict may still be materially limited by the affected lawyer's conflict. The proposed amendment does not weaken the standard for determining whether there is a conflict, but it does give law firms the opportunity to evaluate whether a single lawyer's personal interest conflict is at risk of materially limiting the representation of a client by every single lawyer in the law firm.

The proposed amendments also add Comment 4, an ABA Model Comment that is unrelated to the proposed change to Rule 1.10(a). This comment explains the imputation rules for nonlawyers in a firm, and provides helpful guidance that is consistent with existing LEO 1800.

The proposed amendment is included below in Section III.

II. Publication and Comments

The Standing Committee on Legal Ethics approved the proposed amendment at its meeting on May 16, 2018 (Appendix, Page 3). The Virginia State Bar issued a publication release dated May 21, 2018, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 4). Notice of the proposed amendment was also published on the bar's website on the "Rule Changes" page (Appendix, Page 6) and in the bar's E-News on June 1, 2018 (Appendix, Page 10).

One comment was received, from John C. Blair, II on behalf of the Local Government Attorneys (Appendix, Page 13), explaining that they have no comment on the proposed amendment.

III. Proposed Rule Change

RULE 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e) unless 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 other lawyers in the firm.

Comment

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) 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(b).

[2a] A lawyer or firm should maintain and use an appropriate system for detecting conflicts of interest. The failure to maintain a system for identifying conflicts or to use that system when making a decision to undertake employment in a particular matter may be deemed a violation of Rule 1.10(a) if proper use of a system would have identified the conflict.

[3] The rule in paragraph (a) does not prohibit representation when neither questions of client loyalty nor protection of confidential information are presented.
When 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 when 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 as a law student. 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 Rule 5.3 and LEO 1800.

IV. Conclusion

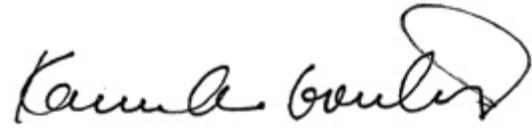
The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910. Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The proposed rule change was developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed amendment to Rule 1.10 and Comments 3 and 4 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

A handwritten signature in blue ink, appearing to read "Leonard C. Heath, Jr.", is written over a faint circular stamp.

Leonard C. Heath, Jr., President

A handwritten signature in black ink, reading "Karen A. Gould". The signature is written in a cursive style with a large, looping flourish at the end of the word "Gould".

Karen A. Gould, Executive Director

Dated this 29th day of October, 2018.