

1 Rule 1.10. ~~Imputed disqualification: general rule.~~Imputation of Conflicts of Interest:  
2 General Rule.

3 (a) While lawyers are associated in a firm, none of them shall knowingly represent a  
4 client when any one of them practicing alone would be prohibited from doing so by ~~Rule~~  
5 ~~1.7, 1.8(c), 1.9 or 2.2.~~ (b) ~~When a lawyer becomes associated with a firm, the firm may~~  
6 ~~not knowingly represent a person in the same or a substantially factually related matter~~  
7 ~~in which that lawyer, or a firm with which the lawyer has associated, had previously~~  
8 ~~represented a client whose interests are materially adverse to that person and about~~  
9 ~~whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is~~  
10 ~~material to the matter.~~ (c) ~~Rules 1.7 or 1.9, unless the prohibition is based on a~~  
11 ~~personal interest of the prohibited lawyer and does not present a significant risk of~~  
12 ~~materially limiting the representation of the client by the remaining lawyers in the firm.~~

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

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

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

21 (d)(c) When a lawyer becomes associated with a firm, no lawyer associated in the  
22 firm shall knowingly represent a person in a matter in which that lawyer is disqualified  
23 under Rule 1.9 unless:

24 (c)(1) the personally disqualified lawyer is timely screened from any participation in  
25 the matter and is apportioned no part of the fee therefrom, and

26 (c)(2) written notice is promptly given to any affected former client.

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

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

31 Comment

32 Definition of "Firm"

33 [1] For purposes of the Rules of Professional Conduct, the term "firm" includes  
34 "firm" denotes lawyers in a private firm and law partnership, professional corporation,  
35 sole proprietorship or other association authorized to practice law; or lawyers employed  
36 in a legal services organization or the legal department of a corporation or other  
37 organization, ~~or in a legal services organization.~~ See Rule 1.0(c). Whether two or more  
38 lawyers constitute a firm within this definition can depend on the specific facts. ~~For~~  
39 ~~example, two practitioners who share office space and occasionally consult or assist~~  
40 ~~each other ordinarily would not be regarded as constituting a firm. However, if they~~  
41 ~~present themselves to the public in a way suggesting that they are a firm or conduct~~  
42 ~~themselves as a firm, they should be regarded as a firm for purposes of the Rules. The~~  
43 ~~terms of any formal agreement between associated lawyers are relevant in determining~~  
44 ~~whether they are a firm, as is the fact that they have mutual access to confidential~~  
45 ~~information concerning the clients they serve. Furthermore, it is relevant in doubtful~~  
46 ~~cases to consider the underlying purpose of the rule that is involved. A group of lawyers~~  
47 ~~could be regarded as a firm See Rule 1.0, Comments [2] - [4].~~

48 Principles of Imputed Disqualification

49 [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the  
50 principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such  
51 situations can be considered from the premise that a firm of lawyers is essentially one  
52 lawyer for purposes of the ~~rule~~ rules governing loyalty to the client, or from the premise  
53 that the same each lawyer should not represent opposing parties in litigation, while it  
54 might not be so regarded for purposes of the rule that information acquired by one  
55 lawyer is attributed to another.

56 ~~With respect to the law department of an organization, there is ordinarily no question~~  
57 ~~that the members of the department constitute a firm within the meaning of the Rules of~~  
58 ~~Professional Conduct. However, there can be uncertainty as to the identity of the client.~~  
59 ~~For example, it may not be clear whether the law department of a corporation~~  
60 ~~represents a subsidiary or an affiliated corporation, as well as the corporation by which~~  
61 ~~the members of the department are directly employed. A similar question can arise~~  
62 ~~concerning an unincorporated association and its local affiliates.~~

63 Similar questions can also arise with respect to lawyers in legal aid. Lawyers  
64 employed in the same unit of a legal service organization constitute a firm, but not  
65 necessarily those employed in separate units. As in the case of independent  
66 practitioners, whether the lawyers should be treated as associated with each other can  
67 depend on the particular rule that is involved and on the specific facts of the situation.

68 Where the lawyer has joined a private firm after having represented the government  
69 is vicariously bound by the obligation of loyalty owed by each lawyer with whom the  
70 lawyer is associated. Paragraph (a) operates only among the lawyers currently  
71 associated in a firm. When a lawyer moves from one firm to another, the situation is  
72 governed by Rules 1.119(ab) and (b); where a lawyer represents the government after  
73 having served private clients, the situation is governed by Rule 1.11(c)(1). The  
74 individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and  
75 1.9.

76 Different provisions are thus made for movement of a lawyer from one private firm to  
77 another and for movement of a lawyer between a private firm and the government. The  
78 government is entitled to protection of its client confidences and therefore to the  
79 protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive 1.10(b).

80 [3] The rule in paragraph (a) does not prohibit representation where neither  
81 questions of client loyalty nor protection of confidential information are presented.  
82 Where one lawyer in a firm could not effectively represent a given client because of  
83 strong political beliefs, for example, but that lawyer will do no work on the case and the  
84 personal beliefs of the lawyer will not materially limit the representation by others in the  
85 firm, the firm should not be disqualified. On the other hand, if an opposing party in a  
86 case were owned by a lawyer in the law firm, and others in the firm would be materially  
87 limited in pursuing the matter because of loyalty to that lawyer, the personal  
88 disqualification in Rule 1.10 were applied to former government lawyers, the potential  
89 effect on the government would be unduly burdensome. The government deals with all  
90 private citizens and organizations and thus has a much wider circle of adverse legal  
91 interests than does any private law firm. In these circumstances, the government's  
92 recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the

93 ~~government. On balance, therefore, the government is better served in the long run by~~  
94 ~~the protections stated in Rule 1.11.~~

95 ~~Principles of Imputed Disqualification~~

96 ~~The rule of imputed disqualification stated in paragraph (a) gives effect to the~~  
97 ~~principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such~~  
98 ~~situations can be considered from the premise that a firm of lawyers is essentially one~~  
99 ~~lawyer for purposes of the rules governing loyalty to the client or from the premises that~~  
100 ~~each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with~~  
101 ~~whom the lawyer is associated. Paragraph (a) operates only among lawyers currently~~  
102 ~~associated in a firm. When a lawyer moves from one firm to another, the situation of the~~  
103 ~~lawyer would be imputed to all others in the firm.~~

104 [4] The rule in paragraph (a) also does not prohibit representation by others in the  
105 law firm where the person prohibited from involvement in a matter is a nonlawyer, such  
106 as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the  
107 lawyer is prohibited from acting because of events before the person became a lawyer,  
108 for example, work that the person did while a law student. Such persons, however,  
109 ordinarily must be screened from any personal participation in the matter to avoid  
110 communication to others in the firm of confidential information that both the nonlawyers  
111 and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

112 [5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to  
113 represent a person with interests directly adverse to those of a client represented by a  
114 lawyer who formerly was associated with the firm. The Rule applies regardless of when  
115 the formerly associated lawyer represented the client. However, the law firm may not  
116 represent a person with interests adverse to those of a present client of the firm, which  
117 would violate Rule 1.7. Moreover, the firm may not represent the person where the  
118 matter is the same or substantially related to that in which the formerly associated  
119 lawyer represented the client and any other lawyer currently in the firm has material  
120 information protected by Rules 1.6 and 1.9(c).

121 [5a] The Utah rule differs from the ABA Model Rule in allowing lawyers disqualified  
122 under Rule 1.9 to be screened from participation in a matter under certain  
123 circumstances. If the conditions of paragraph (c) are met, imputation is removed, and

124 consent to the new representation is not required. Lawyers should be aware, however,  
125 that courts may impose more stringent conditions in ruling upon motions to disqualify a  
126 lawyer from pending litigation.

127 [5b] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph  
128 (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share  
129 established by prior independent agreement, but that lawyer may not receive  
130 compensation directly related to the matter in which the lawyer is disqualified.

131 [5c] Notice, including a description of the screened lawyer's prior representation and  
132 of the screening procedures employed, should be given as soon as practicable after  
133 the need for screening becomes apparent.

134 [6] Rule 1.10(d) removes imputation with the informed consent of the affected client  
135 or former client under the conditions stated in Rule 1.7. The conditions stated in Rule  
136 1.7 require the lawyer to determine that the representation is not prohibited by Rule  
137 1.7(b) and that each affected client or former client has given informed consent to the  
138 representation, confirmed in writing. In some cases, the risk may be so severe that the  
139 conflict may not be cured by client consent. For a discussion of the effectiveness of  
140 client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For  
141 a definition of informed consent, see Rule 1.0(e).

142 [7] Where a lawyer has joined a private firm after having represented the  
143 government, imputation is governed by paragraphs (b) and (c).

144 Lawyers Moving Between Firms

145 When lawyers have been Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d),  
146 where a lawyer represents the government after having served clients in private  
147 practice, nongovernmental employment or in another government agency, former-client  
148 conflicts are not imputed to government lawyers associated with the individually  
149 disqualified lawyer.

150 [8] Where a lawyer is prohibited from engaging in certain transactions under Rule  
151 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition  
152 also applies to other lawyers associated in a firm but then end their association,  
153 however, the problem is more complicated. The fiction that the law firm is the same as a  
154 single lawyer is no longer wholly realistic. There are several competing considerations.

155 ~~First, the client previously represented must be reasonably assured that the principle of~~  
156 ~~loyalty to the client is not compromised. Second, the rule of disqualification should not~~  
157 ~~be as broadly cast as to preclude other persons from having reasonable choice of legal~~  
158 ~~counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from~~  
159 ~~forming new associations and taking on new clients after leaving a previous association.~~  
160 ~~In this connection, it should be recognized that today many lawyers practice in firms,~~  
161 ~~that many to some degree limit their practice to one field or another and that many~~  
162 ~~move from one association to another several times in their careers. If the concept of~~  
163 ~~imputed disqualification were defined with unqualified rigor, the result would be radical~~  
164 ~~curtailment of the opportunity of lawyers to move from one practice setting to another~~  
165 ~~and of the opportunity of clients to change counsel.~~

166 ~~Reconciliation of these competing principles in the past has been attempted under~~  
167 ~~two rubrics. One approach has been to seek per se rules of disqualification. For~~  
168 ~~example, it has been held that a partner in a law firm is conclusively presumed to have~~  
169 ~~access to all confidences concerning all clients of the firm. Under this analysis, if a~~  
170 ~~lawyer has been a partner in one law firm and then becomes a partner in another law~~  
171 ~~firm, there is a presumption that all confidences known by a partner in the first firm are~~  
172 ~~known to all partners in the second firm. This presumption might properly be applied in~~  
173 ~~some circumstances, especially where the client has been extensively represented, but~~  
174 ~~may be unrealistic where the client was represented only for limited purposes.~~  
175 ~~Furthermore, such a rigid rule exaggerates the difference between a partner and an~~  
176 ~~associate in modern law firms.~~

177 ~~The other rubric formerly used for dealing with vicarious disqualification is the~~  
178 ~~appearance of impropriety proscribed in Canon 9 of the Code of Professional~~  
179 ~~Responsibility. This rubric has a twofold problem. First, the appearance of impropriety~~  
180 ~~can be taken to include any new client-lawyer relationship that might make a former~~  
181 ~~client anxious. If that meaning were adopted, disqualification would become little more~~  
182 ~~than a question of subjective judgment by the former client. Second, since "impropriety"~~  
183 ~~is undefined, the term "appearance of impropriety" is question-begging. It therefore has~~  
184 ~~to be recognized that the problem of imputed disqualification cannot be properly~~

185 ~~resolved either by simple analogy to a lawyer practicing alone or by the very general~~  
186 ~~concept of appearance of impropriety.~~

187 ~~A rule based on a functional analysis is more appropriate for determining the~~  
188 ~~question of vicarious disqualification. Two functions are involved: preserving~~  
189 ~~confidentiality and avoiding positions adverse to a client.~~

#### 190 ~~Confidentiality~~

191 ~~Preserving confidentiality is a question of access to information. Access to~~  
192 ~~information, in turn, is essentially a question of fact in particular circumstances, aided by~~  
193 ~~inferences, deductions or working presumptions that reasonably may be made about~~  
194 ~~the way in which lawyers work together. A lawyer may have general access to files of all~~  
195 ~~clients of a law firm and may regularly participate in discussions of their affairs; it should~~  
196 ~~be inferred that such a lawyer in fact is privy to all information about all the firm's clients.~~  
197 ~~In contrast, another lawyer may have access to the files of only a limited number of~~  
198 ~~clients and participate in discussion of the affairs of no other clients; in the absence of~~  
199 ~~information to the contrary, it should be inferred that such a lawyer in fact is privy to~~  
200 ~~information about the clients actually served but not those of other clients.~~

201 ~~Application of paragraphs (b) and (c) depends on a situation's particular facts. In any~~  
202 ~~such inquiry, the burden of proof should rest upon the firm whose disqualification is~~  
203 ~~sought.~~

204 ~~Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved~~  
205 ~~has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer~~  
206 ~~while with one firm acquired no knowledge of information relating to a particular client of~~  
207 ~~the firm and that lawyer later joined another firm, neither the lawyer individually nor the~~  
208 ~~second firm is disqualified from representing another client in the same or a related~~  
209 ~~matter even though the interests of the two clients conflict.~~

210 ~~Independent of the question of disqualification of a firm, a lawyer changing~~  
211 ~~professional association has a continuing duty to preserve confidentiality of information~~  
212 ~~about a client formerly represented. See Rules 1.6 and 1.9.~~

#### 213 ~~Adverse Positions~~

214 ~~The second aspect of loyalty to client is the lawyer's obligation to decline subsequent~~  
215 ~~representations involving positions adverse to a former client arising in substantially~~

216 ~~related matters. This obligation requires abstention from adverse representation by the~~  
217 ~~individual lawyer involved, but does not properly entail abstention of other lawyers~~  
218 ~~through imputed disqualification. Hence, this aspect of the problem is governed by Rule~~  
219 ~~1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude~~  
220 ~~the firms involved from continuing to represent clients with adverse interests in the~~  
221 ~~same or related matters, so long as the conditions of Rule 1.10(b) and (c) concerning~~  
222 ~~confidentiality have been met~~with the personally prohibited lawyer.

223