

McCurdy, Lauren

RE: Rule 1.9
6/25&26/10 Commission Meeting
Open Session Agenda Item III.W.

From: Robert L. Kehr [rlkehr@kscllp.com]
Sent: Thursday, June 17, 2010 7:45 PM
To: Lamport, Stanley W.; Difuntorum, Randall; Kurt Melchior (E-mail)
Cc: Kevin Mohr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); McCurdy, Lauren
Subject: RE: Rule 1.9

My thanks to Stan for moving this forward by commenting in his email of late this afternoon on the OCTC comments. This was one too many rules for me to get to by yesterday's deadline. I think the simplest way for me to add my thoughts is to interlineate in Stan's message, below.

rlk

From: Lamport, Stanley W. [mailto:SLamport@coxcastle.com]
Sent: Thursday, June 17, 2010 5:10 PM
To: Difuntorum, Randall; Robert L. Kehr; Kurt Melchior (E-mail)
Cc: Kevin Mohr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); McCurdy, Lauren
Subject: RE: Rule 1.9

I looked at the OCTC comment. I would recommend one change to this Rule in light of OCTC's comment.

[what follows related to ¶5 of the OCTC letter] OCTC reiterates its concern about the "generally known" language in (c)(1). We responded to this last time. Personally, I am still very concerned about this language. I don't think that Comment [11] really clears this up. The information is either confidential or it is not. If it is information that the client wants the lawyer to hold inviolate or the disclosure of which is embarrassing or detrimental to the client, it is confidential. "Generally known" should mean that it does not meet the test. It is information that is known to just about everyone and for which there is no consequence from using it, because it is already known. I have voted in the past to delete "generally known" and have lost. I don't propose to rehash it. I would not mind seeing something in Comment [11] that addresses this better than we do now. I recommend the following

"[11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Information is generally known only if it would not meet the criteria for information that is protected from disclosure under Business and Professions Code section 6068(e) and Rule 1.6. (See Rule 1.6 Cmt. [3].) The fact that information can be discovered in a public record does not, by itself, render that information generally known. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct.Rptr. 179.)

I disagree with Stan's suggestion, which is circular. The point is not that a fact is generally known if it doesn't qualify for protection under 6068(e), but that a fact that is generally known does not qualify for protection. I continue to believe that our Response to OCTC's prior comment on this point is correct and complete. See Rule 1.6, Comment [6]. The *Johnson* opinion understands that a fact is not generally known simply b/c an energetic person might be able to locate it. A fact is generally known if it is widely and generally available. I would make no change and no further comment on this.

OCTC's has 7 other comments. My thoughts on those comments are as follows:

1. OCTC is concerned about the phrase "materially adverse" in paragraph (a). It is concerned that the term is not defined. We addressed this in Comment [7], which ironically OCTC wants deleted as the subject for a treatise. The point of Comment [7] was to define "materially adverse," so we have addressed OCTC's concern.

I agree that we should not change the Rule, but I do think we could more fully explain our recommendation. The last time around we only said that there should be no trouble with "materially adverse" b/c it is used elsewhere without apparent problem. However, OCTC's comment also says that our current standard is "adverse" rather than "materially adverse", so it argues that we are changing the standard. OCTC is entitled to an answer on this. My view is that OCTC is not right. It is correct that rule 3-310(E) uses "adverse" rather than "materially adverse", but it does so with respect to the lawyer's position *vis-à-vis* the lawyer's former client. Proposed 1.9(a) and (b)(1) change this by removing reference to the lawyer's conflict – the perspective that is in conflicts analysis – to focus only on two things. The first of these is that the two representations are in the same or substantially related matters. If so, the new representation is adverse to the former client ("adverse" does not need to be used in the rule to get to the same place). The second is that the information be "material to the employment", which is the phrase contained in 3-310(E). My view is that we end up in the same place, except that our proposed 1.9 is more detailed and complete than is 3-310(E). I think we should provide an explanation along these lines.

2. OCTC is concerned about the word "knowingly" in (b). OCTC thinks this would sanction a lack of conflicts checking. This part of the Rule concerns a lawyer who has changed firms and is involved in a matter substantially related to a matter handled by the prior firm. A knowledge standard is appropriate here and consistent with the current state of the law. A conflicts check in the new firm's system is not likely to reveal the conflict. We would not want to create a duty to contact the prior firm and investigate a conflict.

Agreed. I only would add that the lawyer and the lawyer's new firm normally will have no ability to do a conflicts check in the old firm's system.

3. OCTC reiterates its previous comment requesting clarification regarding when (c)(1) and (c)(2) apply. I think our prior response still stands.

Agreed.

4. [OCTC ¶5] OCTC reiterates its objection to Comment [5] and the substantial relationship test. I think our prior response is still the case. I think more can and should be said in response to the comment than we said last time. First, this is not a change in the law. In a dispute involving a breach of duty arising out of the professional relationship, Evidence Code section 958 applies. Courts have the ability to issue protective orders and other remedies to protect disclosure of information outside the proceeding. Confidential information is disclosed in malpractice cases all the time, as well as in disciplinary cases.

Second, while we would agree that the substantial relationship test is a rule of necessity in disqualification cases (which are the only cases OCTC cites for this proposition), it is not the only consideration in other types of proceedings. If a lawyer can prove that no confidential information was imparted, why use a substantial relationship test to presume otherwise? We are not saying the substantial relationship test would not apply at all. We are saying that there is an opportunity for the courts to consider what was actually communicated and that proof could overcome the presumption of the substantial relationship test. The rule should not preclude such proof where the rules of the proceeding allow for it.

Agreed.

5. [OCTC ¶6] OCTC would like Comments [8] and [9] removed if we agree with its position on "knowingly" in (b), which we don't.

Right.

6. [OCTC ¶7] OCTC thinks there are too many comments. It would like Comments [1]-[4] and [7] deleted. It wants Comment [10] in Rule 1.6. It raises concerns with Comment [11], which I have addressed above. I think that we should respond by summarizing why we added each of the Comments. Comment [1] explains that basic duties involved and the reasons for those duties. It helps lawyers understand what they should be addressing in the Rule. Comments [2] and [3] explain how the two basic duties involved in the Rule apply in paragraph (a), again so the practitioner will understand what to address when seeking a client's informed consent under the Rule and what to think about in terms of the conflict. Comment [4] explains what the term "matter" means in the Rule. Comment [7] explains what materially adverse means. I think we can say that the Comments explain why the rule exists, what it addresses and what a lawyer should be thinking about. In addition, since we are importing an ABA rule that exists in other jurisdictions, we need to be mindful that we are going to import the case law from other jurisdictions along with it. Since there is a significant difference in the treatment of confidential information between California and the ABA, it is important to make sure the Rule is couched in terms of California principles, which is one of the primary purposes of the Rule 1.9 comments.

I would be inclined to say that we have considered each of the questioned Comment paragraph and believe that each serves an important purpose in guiding lawyers with respect to the new rule.

7. [OCTC ¶8] OCTC opposes advance waivers and wants the second sentence of Comment [12] deleted. Case law does not support OCTC's objection, particularly in light of *Zador*.

We have covered this in 1.7 and don't need to repeat here.

STAN

Stan seems to have skipped over OCTC ¶4. It argues there is a conflict between (c)(1) and (2) b/c the former has an exception for information that is generally known but the latter does not. The answer to this qualifies as

recondite. Here is my recollection of the Commission's discussion on this very point (Kevin might find something more of different in his meeting notes). Paragraph (c)(2) address the disclosure of confidential information, which is the topic of Rule 1.6. We have said in Rule 1.6, Comment [6], that what is protected by that Rule does not included generally known information. Thus, we don't need to have an exception for generally known information in (c)(2). However, (c)(1) deals with use of confidential information of a former client, and we therefore need to have the exception in that subparagraph. I am not comfortable with this, and I think we should reconsider how we handle it. The apparent conflict would be eliminated by stating the exception in both subparagraphs and referring to Rule 1.6, Comment [6] for the discussion of "generally known".

My thanks again to Stan.

rlk

From: Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]
Sent: Thursday, June 17, 2010 3:07 PM
To: rlkehr@kscllp.com; Lampport, Stanley W.; Kurt Melchior (E-mail)
Cc: Kevin Mohr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); McCurdy, Lauren
Subject: Rule 1.9

Bob, Stan & Kurt:

I apologize in advance if I am overlooking a message on this. There are so many.

OCTC commented on Rule 1.9 (see attached). San Diego supports the rule. Do you recommend any revisions in response to OCTC's comment. Let me know. Thanks. -Randy D.

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Rule 1.9 Duties to Former Clients
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a law firm with which the lawyer formerly was associated had previously represented a client
- (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer, while at the former law firm, had acquired information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed written consent.
- (c) A lawyer who formerly represented a client in a matter or whose present or former law firm has formerly represented a client in a matter shall not thereafter:
- (1) use information relating to a former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known; or

- (2) reveal information relating to a former client except as these Rules or the State Bar Act would permit with respect to a current client.

Comment

- [1] After termination of a lawyer-client relationship, the lawyer owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]) These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide information to the lawyer that will be protected as required by Rule 1.6 and Business and Professions Code section 6068(e) without fear that any such information later will be used against the client. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.
- [2] Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client with respect to a matter in which the lawyer represented the former client. For example, a lawyer could not properly seek to rescind on behalf of a new client a contract the lawyer drafted on behalf of the former client. A lawyer who has

prosecuted an accused person could not represent the accused in a subsequent civil action against the government concerning the same matter.

- [3] Paragraph (a) also addresses the second of the two duties owed to a former client. It applies when there is a substantial risk that information protected by Rule 1.6 and Business and Professions Code section 6068(e) that was obtained in the prior representation would be used or disclosed in a subsequent representation in a manner that is contrary to the former client's interests and without the former client's informed written consent. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person ordinarily may not later represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in connection with the environmental review associated with the land use approvals to build a shopping center ordinarily would be precluded from later representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations that existed when the lawyer represented the client; however, paragraph (a) would not apply if the lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent if there is no substantial relationship between the land use and eviction matters.
- [4] Paragraph (a) applies when the lawyer's representation is in the same matter as, or in a matter substantially related to, the lawyer's representation of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent

representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation) and Rule 1.7, Comment [15].

- [5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney. (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454 [280 Cal.Rptr. 614]) This disqualification application exists, at least in part, to protect the former client by avoiding an inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. (See *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 592 [283 Cal.Rptr. 732]; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185].) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes does not apply and the lawyer can provide evidence concerning the information actually received in the prior representation.
- [6] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior

representation that is protected by Rule 1.6 and Business and Professions Code section 6068(e), and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

- [7] Paragraph (a) applies when the new client's interests are materially adverse to the former client's interests. In light of the overall purpose of the Rule to protect candor and trust during the lawyer-client relationship, the term "materially adverse" should be applied with that purpose in mind. Accordingly, a client's interests are materially adverse to the former client if the lawyer's representation of the new client creates a substantial risk that the lawyer either (i) would perform work for the new client that would injuriously affect the former client in any manner in which the lawyer represented the former client, or (ii) would use or reveal information protected by Rule 1.6 and Business and Professions Code section 6068(e) that the former client would not want disclosed or in a manner that would be to the disadvantage of the former client.

Lawyers Moving Between Firms

- [8] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer has actual knowledge of information protected by Rules 1.6, 1.9(c), and Business and Profession Code 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

- [9] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm to which this Rule applies.

- [10] A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c), and Business and Professions Code section 6068(e).

- [11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

Client Consent

- [12] The provisions of this Rule are for the protection of former clients and can be waived if the former client gives informed written consent. See Rule 1.0.1(e). With regard to the effectiveness of an advance consent, see Comment [22] to Rule 1.7. With regard to the application of a lawyer's conflict to a firm with which a lawyer is or was formerly associated, see Rule 1.10.

June 9, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

1.0.1 (Agenda Item III.B)

1.7 (Agenda Item III. J) Co-Lead w/Mohr

1.8.7 (Agenda Item III.S)
1.16 (Agenda Item III.DD)
8.3 (Agenda Item III.VVV)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - KEHR - DFT1 (06-09-10).pdf
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM.doc
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).pdf
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).doc
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.pdf
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.doc
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.pdf
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.doc
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.pdf
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.doc
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).pdf
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).doc

June 16, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:

Bob,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site should be up-to-date shortly (<http://sites.google.com/site/commentsrrc/byrule>).

1.0.1 (Agenda Item III.B) – **2 Comments: Balin/Dilworth; and, LA Public Defender-Michael Judge (attached)**

1.8.5 (Agenda Item III.Q) – OCTC (comment sent by Randy's 6/15/10 e-mail)

**RRC – Rule 1.9 [3-310(E)]
E-mails, etc. – Revised (6/21/2010)**

- 1.8.6 (Agenda Item III.R) – OCTC (comment sent by Randy's 6/15/10 e-mail)
- 1.9 (Agenda Item III.W) – OCTC (comment sent by Randy's 6/15/10 e-mail)
- 1.17 (Agenda Item III.EE) Co-Lead w/Sapiro – OCTC (comment sent by Randy's 6/15/10 e-mail)
- 5.7 (Agenda Item III.GGG) – Zitrin/Law Professors (comment sent by Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 1-100 [1-0-1] - BASF (Balin, Dilworth) re Tribunal (06-14-10).pdf
RRC - 1-100 [1-0-1] - 06-14-10 LAPD (Judge) Comment.pdf

June 17, 2010 Difuntorum E-mail to Drafters (Kehr, Lamport, Melchior, KEM), cc Staff:

OCTC commented on Rule 1.9 (see attached). San Diego supports the rule. Do you recommend any revisions in response to OCTC's comment. Let me know.

Attached:

RRC - 3-310 [1-9] - Public Comment Complete - REV (06-17-10).pdf

June 17, 2010 KEM E-mail to Drafters, cc Staff:

I've attached an excerpt of the Commission's previous responses to OCTC, many of which are still relevant.

Attached:

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT3.1 (02-22-10)-EXC.pdf

June 17, 2010 Lamport E-mail to Drafters, cc Staff:

I looked at the OCTC comment. I would recommend one change to this Rule in light of OCTC's comment.

OCTC reiterates its concern about the "generally known" language in (c)(1). We responded to this last time. Personally, I am still very concerned about this language. I don't think that Comment [11] really clears this up. The information is either confidential or it is not. If it is information that the client wants the lawyer to hold inviolate or the disclosure of which is embarrassing or detrimental to the client, it is confidential. "Generally known" should mean that it does not meet the test. It is information that is known to just about everyone and for which there is no consequence from using it, because it is already known. I have voted in the past to delete "generally known" and have lost. I don't propose to rehash it. I would not mind seeing something in Comment [11] that addresses this better than we do now. I recommend the following

"[11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Information is generally known only if it would not meet the criteria for information that is protected from disclosure under Business and Professions Code section 6068(e) and Rule 1.6. (See Rule 1.6 Cmt. [3].) The fact that information can be discovered in a public record does not, by itself, render that information generally known. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct.Rptr. 179.)

OCTC's has 7 other comments. My thoughts on those comments are as follows:

1. OCTC is concerned about the phrase "materially adverse" in paragraph (a). It is concerned that the term is not defined. We addressed this in Comment [7], which ironically OCTC wants deleted as the subject for a treatise. The point of Comment [7] was to define "materially adverse," so we have addressed OCTC's concern.
2. OCTC is concerned about the word "knowingly" in (b). OCTC thinks this would sanction a lack of conflicts checking. This part of the Rule concerns a lawyer who has changed firms and is involved in a matter substantially related to a matter handled by the prior firm. A knowledge standard is appropriate here and consistent with the current state of the law. A conflicts check in the new firm's system is not likely to reveal the conflict. We would not want to create a duty to contact the prior firm and investigate a conflict.
3. OCTC reiterates its previous comment requesting clarification regarding when (c)(1) and (c)(2) apply. I think our prior response still stands.
4. OCTC reiterates its objection to Comment [5] and the substantial relationship test. I think our prior response is still the case. I think more can and should be said in response to the comment than we said last time. First, this is not a change in the law. In a dispute involving a breach of duty arising out of the professional relationship, Evidence Code section 958 applies. Courts have the ability to issue protective orders and other remedies to protect disclosure of

information outside the proceeding. Confidential information is disclosed in malpractice cases all the time, as well as in disciplinary cases.

Second, while we would agree that the substantial relationship test is a rule of necessity in disqualification cases (which are the only cases OCTC cites for this proposition), it is not the only consideration in other types of proceedings. If a lawyer can prove that no confidential information was imparted, why use a substantial relationship test to presume otherwise? We are not saying the substantial relationship test would not apply at all. We are saying that there is an opportunity for the courts to consider what was actually communicated and that proof could overcome the presumption of the substantial relationship test. The rule should not preclude such proof where the rules of the proceeding allow for it.

5. OCTC would like Comments [8] and [9] removed if we agree with its position on "knowingly" in (b), which we don't.

6. OCTC thinks there are too many comments. It would like Comments [1]-[4] and [7] deleted. It wants Comment [10] in Rule 1.6. It raises concerns with Comment [11], which I have addressed above. I think that we should respond by summarizing why we added each of the Comments. Comment [1] explains that basic duties involved and the reasons for those duties. It helps lawyers understand what they should be addressing in the Rule. Comments [2] and [3] explain how the two basic duties involved in the Rule apply in paragraph (a), again so the practitioner will understand what to address when seeking a client's informed consent under the Rule and what to think about in terms of the conflict. Comment [4] explains what the term "matter" means in the Rule. Comment [7] explains what materially adverse means. I think we can say that the Comments explain why the rule exists, what it addresses and what a lawyer should be thinking about. In addition, since we are importing an ABA rule that exists in other jurisdictions, we need to be mindful that we are going to import the case law from other jurisdictions along with it. Since there is a significant difference in the treatment of confidential information between California and the ABA, it is important to make sure the Rule is couched in terms of California principles, which is one of the primary purposes of the Rule 1.9 comments.

7. OCTC opposes advance waivers and wants the second sentence of Comment [12] deleted. Case law does not support OCTC's objection, particularly in light of *Zador*.

June 17, 2010 Kehr E-mail to Drafters, cc Staff:

My thanks to Stan for moving this forward by commenting in his email of late this afternoon on the OCTC comments. This was one too many rules for me to get to by yesterday's deadline. I think the simplest way for me to add my thoughts is to interlineate in Stan's message, below.

Lamport Message (in blue) w/ Kehr response in black, indented:

I looked at the OCTC comment. I would recommend one change to this Rule in light of OCTC's comment.

[what follows related to ¶5 of the OCTC letter] OCTC reiterates its concern about the "generally known" language in (c)(1). We responded to this last time. Personally, I am still very concerned about this language. I don't think that Comment [11] really clears this up. The information is either confidential or it is not. If it is information that the client wants the lawyer to hold inviolate or the disclosure of which is embarrassing or

detrimental to the client, it is confidential. "Generally known" should mean that it does not meet the test. It is information that is known to just about everyone and for which there is no consequence from using it, because it is already known. I have voted in the past to delete "generally known" and have lost. I don't propose to rehash it. I would not mind seeing something in Comment [11] that addresses this better than we do now. I recommend the following

"[11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Information is generally known only if it would not meet the criteria for information that is protected from disclosure under Business and Professions Code section 6068(e) and Rule 1.6. (See Rule 1.6 Cmt. [3].) The fact that information can be discovered in a public record does not, by itself, render that information generally known. (See In the Matter of Johnson (Rev. Dept. 2000) 4 Cal. State Bar Ct.Rptr. 179.)

I disagree with Stan's suggestion, which is circular. The point is not that a fact is generally known if it doesn't qualify for protection under 6068(e), but that a fact that is generally known does not qualify for protection. I continue to believe that our Response to OCTC's prior comment on this point is correct and complete. See Rule 1.6, Comment [6]. The *Johnson* opinion understands that a fact is not generally known simply b/c an energetic person might be able to locate it. A fact is generally known if it is widely and generally available. I would make no change and no further comment on this.

OCTC's has 7 other comments. My thoughts on those comments are as follows:

1. OCTC is concerned about the phrase "materially adverse" in paragraph (a). It is concerned that the term is not defined. We addressed this in Comment [7], which ironically OCTC wants deleted as the subject for a treatise. The point of Comment [7] was to define "materially adverse," so we have addressed OCTC's concern.

I agree that we should not change the Rule, but I do think we could more fully explain our recommendation. The last time around we only said that there should be no trouble with "materially adverse" b/c it is used elsewhere without apparent problem. However, OCTC's comment also says that our current standard is "adverse" rather than "materially adverse", so it argues that we are changing the standard. OCTC is entitled to an answer on this. My view is that OCTC is not right. It is correct that rule 3-310(E) uses "adverse" rather than "materially adverse", but it does so with respect the lawyer's position *vis-à-vis* the lawyer's former client. Proposed 1.9(a) and (b)(1) change this by removing reference to the lawyer's conflict – the perspective that is in conflicts analysis – to focus only on two things. The first of these is that the two representations are in the same or substantially related matters. If so, the new representation is adverse to the former client ("adverse" does not need to be used in the rule to get to the same place). The second is that the information be "material to the employment", which is the phrase contained in 3-310(E). My view is that we end

up in the same place, except that our proposed 1.9 is more detailed and complete than is 3-310(E). I think we should provide an explanation along these lines.

2. OCTC is concerned about the word "knowingly" in (b). OCTC thinks this would sanction a lack of conflicts checking. This part of the Rule concerns a lawyer who has changed firms and is involved in a matter substantially related to a matter handled by the prior firm. A knowledge standard is appropriate here and consistent with the current state of the law. A conflicts check in the new firm's system is not likely to reveal the conflict. We would not want to create a duty to contact the prior firm and investigate a conflict.

Agreed. I only would add that the lawyer and the lawyer's new firm normally will have no ability to do a conflicts check in the old firm's system.

3. OCTC reiterates its previous comment requesting clarification regarding when (c)(1) and (c)(2) apply. I think our prior response still stands.

Agreed.

4. [OCTC ¶5] OCTC reiterates its objection to Comment [5] and the substantial relationship test. I think our prior response is still the case. I think more can and should be said in response to the comment than we said last time. First, this is not a change in the law. In a dispute involving a breach of duty arising out of the professional relationship, Evidence Code section 958 applies. Courts have the ability to issue protective orders and other remedies to protect disclosure of information outside the proceeding. Confidential information is disclosed in malpractice cases all the time, as well as in disciplinary cases.

Second, while we would agree that the substantial relationship test is a rule of necessity in disqualification cases (which are the only cases OCTC cites for this proposition), it is not the only consideration in other types of proceedings. If a lawyer can prove that no confidential information was imparted, why use a substantial relationship test to presume otherwise? We are not saying the substantial relationship test would not apply at all. We are saying that there is an opportunity for the courts to consider what was actually communicated and that proof could overcome the presumption of the substantial relationship test. The rule should not preclude such proof where the rules of the proceeding allow for it.

Agreed.

5. [OCTC ¶6] OCTC would like Comments [8] and [9] removed if we agree with its position on "knowingly" in (b), which we don't.

Right.

6. [OCTC ¶7] OCTC thinks there are too many comments. It would like Comments [1]-[4] and [7] deleted. It wants Comment [10] in Rule 1.6. It raises concerns with Comment [11], which I have addressed above. I think that we should respond by summarizing why we added each of the Comments. Comment [1] explains the basic duties involved and the reasons for those duties. It helps lawyers understand what they should be

addressing in the Rule. Comments [2] and [3] explain how the two basic duties involved in the Rule apply in paragraph (a), again so the practitioner will understand what to address when seeking a client's informed consent under the Rule and what to think about in terms of the conflict. Comment [4] explains what the term "matter" means in the Rule. Comment [7] explains what materially adverse means. I think we can say that the Comments explain why the rule exists, what it addresses and what a lawyer should be thinking about. In addition, since we are importing an ABA rule that exists in other jurisdictions, we need to be mindful that we are going to import the case law from other jurisdictions along with it. Since there is a significant difference in the treatment of confidential information between California and the ABA, it is important to make sure the Rule is couched in terms of California principles, which is one of the primary purposes of the Rule 1.9 comments.

I would be inclined to say that we have considered each of the questioned Comment paragraph and believe that each serves an important purpose in guiding lawyers with respect to the new rule.

7. [OCTC ¶8] OCTC opposes advance waivers and wants the second sentence of Comment [12] deleted. Case law does not support OCTC's objection, particularly in light of *Zador*.

We have covered this in 1.7 and don't need to repeat here.

Stan seems to have skipped over OCTC ¶4. It argues there is a conflict between (c)(1) and (2) b/c the former has an exception for information that is generally known but the latter does not. The answer to this qualifies as recondite. Here is my recollection of the Commission's discussion on this very point (Kevin might find something more of difference in his meeting notes). Paragraph (c)(2) address the disclosure of confidential information, which is the topic of Rule 1.6. We have said in Rule 1.6, Comment [6], that what is protected by that Rule does not include generally known information. Thus, we don't need to have an exception for generally known information in (c)(2). However, (c)(1) deals with use of confidential information of a former client, and we therefore need to have the exception in that subparagraph. I am not comfortable with this, and I think we should reconsider how we handle it. The apparent conflict would be eliminated by stating the exception in both subparagraphs and referring to Rule 1.6, Comment [6] for the discussion of "generally known".

June 21, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:

Bob,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-21-10).doc
RRC - [5-7] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)-RD.doc
RRC - 3-310 [1-8-6] - Public Comment Chart - By Commenter - XDFT2 0(6-21-10)ML.doc
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 4-210 [1-8-5] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

June 21, 2010 Sapiro E-mail to RRC:

I agree with the substance of Bob's recommendations.

June 22, 2010 Kehr E-mail to Difuntorum & McCurdy, cc Drafters, Chair, Vice-Chairs & Staff:

Randy and Lauren: Sleeplessness has allowed me to get to one more commenter chart. I want to remind everyone that the last point in my 6/17/10 email was a recommendation for a change to eliminate what appears to be (but I think in substance is not) a conflict between paragraphs (c)(1) and (2). This is OCTC point 4. I have not spoken to this in the attached chart as I await the commission's decision.

Attached:

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML-RLK.doc

June 22, 2010 Lamport E-mail to Kehr, cc RRC:

I have been trying to distill what my concern is with the "generally known" issue. Fundamentally, my concern is that it is not tied to the test for what is covered by 6068(e)(1). I don't know that I have an example that captures my concern fully, but the following illustrates my concern in general. Client is subject to a restraining order that everybody knows about. That fact is generally known. She discusses the order with lawyer, who tells her how the order could be used against her in court. Lawyer stops representing client and begins representing new client against client in court. In that matter he uses the order against client in the manner he discussed with client. Lawyer says that since the order is information that is generally known he can use it. Client says, but you are using it in a way we discussed in confidence. In my view, the client justifiably should expect that the lawyer will not use the order against the client in a manner discussed in confidence. I am trying to address this in my proposed comment.

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

TOTAL = 2 Agree = 1
Disagree =
Modify = 1
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Office of Chief Trial Counsel ("OCTC")	M	Yes	1.9(a) & (b)	1. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the Current Rule only requires that it be adverse. This would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules neither the subparagraph nor Proposed Rule 1.0 clarifies what that means and why the lawyer, not the client, should decide whether it is material. Further, it creates uncertainty for lawyers and makes it more difficult to prosecute a violation.	1. The Commission disagrees and has not made the requested change. It is correct that current rule 3-310(E) uses "adverse" rather than "materially adverse", but it does so with respect the lawyer's position <i>vis-à-vis</i> the lawyer's former client. Proposed 1.9(a) and (b)(1) change the format by instead focusing on two things. The first of these is whether the two representations are in the same or substantially related matters. If so, the new representation is deemed to be adverse to the former client (the proposed rule does not use "adverse" in this part of the analysis but nevertheless arrives at that conclusion). The second is whether the information is "material to the employment", which is the phrase contained in 3-310(E). Thus, the proposed rule in this regard arrives at the same place as the current rule while being more detailed and complete than is the current rule.
				1.9(b)(2)	2. OCTC supports the Commission's inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2) and thanks them for making that change.	2. No Response needed.
				1.9(b)	3. OCTC is concerned with the use of the term "knowingly" in subparagraph (b). This appears	3. The Commission disagrees and has not made the requested change. The "knowingly" standard

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

TOTAL = 2 Agree = 1
Disagree =
Modify = 1
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.9(c)(1)	<p>to sanction a lack of conflict procedures regarding an attorney's former clients at another firm and is inconsistent with Comment [4] of Proposed Rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." Although negligence is not a basis for discipline, gross negligence or recklessness is. OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the conflict is the result of excusable negligence or gross negligence. Further, by using the term "knowingly" the Commission may inadvertently also affect disqualification rulings in civil and criminal cases.</p> <p>4. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit...or when the information has become generally known" in subparagraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude</p>	<p>appears in the part of the proposed Rule that concerns a lawyer who has changed firms and is involved in a matter substantially related to a matter handled by the prior firm. A knowledge standard is appropriate here and is consistent with current law. A conflicts check in the new firm's system is unlikely to reveal the conflict, and the lawyer's new firm normally will have no ability to do a conflict check in the prior firm's system.</p> <p>4. The Commission disagrees and has not made the requested change. OCTC misunderstands the <i>Johnson</i> decision and misreads the proposed Rule. It does not say that a lawyer never can disclose public information but rather that a lawyer is not free to disclose information simply because it can be found among public records; information might be in a public record but not generally known. See also Comment [11], the last sentence of which draws a distinction between "generally known" information and "information in the public record," but does not</p>

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

TOTAL = 2 Agree = 1
Disagree =
Modify = 1
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.9(c)(2)	<p>attorneys from disclosing information they obtained from the client that might be of public record. (See <i>In the Matter of Johnson</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. OCTC opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not "generally known."</p> <p>5. Paragraph (c)(2) applies some exceptions to revealing information of former clients "with respect to current clients." Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language "or when the information is generally known." Although this proposed language is also in the Model Rules version, OCTC is not sure when subparagraph (c)(1) applies or</p>	<p>absolutely prohibit the disclosure of public record information.</p> <p>5. The Commission disagrees and has not made the requested change. OCTC is correct that paragraph (c)(2) does not express an exception for information that is generally known. However, that paragraph prohibits the disclosure of confidential information, and the Commission does not see how a lawyer could be considered to have "disclosed" information that already is generally known.</p>

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

TOTAL = 2 Agree = 1
Disagree =
Modify = 1
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [5]	<p>when subparagraph(c)(2) applies.</p> <p>6. OCTC has problems with some of the Comments to this proposed rule, particularly Comment [5]. Comment [5] states that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. However, the statement in Comment [5] that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to established State Bar decisional law. In <i>In the Matter of Lane</i> (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.) If there is to be a change in the law, it should be in the rule, not a comment. The Comment does not even advise or address the <i>Lane</i> decision. Further, OCTC disagrees with the analysis in Comment [5]. Comment [5] states that the reason for this suggested difference is that in</p>	<p>6. Comment [5] describes a distinction between the application of the substantial relationship test in disqualification and in other contexts. After lengthy deliberations, the Commission concluded that the <i>Lane</i> case’s reliance on the substantial relationship test in the disciplinary context is misplaced, and has revised Comment [5] to reflect that position. The substantial relationship test is a rule of necessity in disqualification cases because a party cannot prove what confidential information a lawyer has disclosed to an adversary. The Rule should not prohibit such proof in a disciplinary matter where the applicable procedures and the circumstances permit proof.</p>

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

TOTAL = 2 Agree = 1
Disagree =
Modify = 1
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>a disciplinary proceeding or civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the conflict rule. (See <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931, 934.) While <i>Woods</i> addresses a disqualification motion, its holding is equally applicable in discipline and civil cases. Further, as previously discussed, the presumption is already in the disciplinary case law. OCTC requests that that portion of Comment [5] implying that the presumption does not apply to discipline cases be stricken.</p>	
				Comments [8] & [9]	7. If the Commission adopts OCTC's position that "knowingly" should be stricken from subparagraph (b) then Comment [8] and [9] should be stricken.	7. The Commission has retained "knowingly" and therefore has not removed Comments [8] and [9].

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

TOTAL = 2 Agree = 1
Disagree =
Modify = 1
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				<p>Comments [1] – [4], [7]</p> <p>Comment [10]</p> <p>Comment [11]</p> <p>Comment [12]</p>	<p>8. Comments [1] – [4], and [7], are more appropriate for treatises, law review articles, and ethics opinions. Comment [10] belongs in Proposed Rule 1.6, not this rule. The first sentence of Comment [11] is unnecessary. Comment [11] refers to subparagraph (c) of Proposed Rule 1.9. OCTC is concerned that, like in proposed subparagraph (c) itself, what is meant by “generally known information” and this Comment appears inconsistent with the established law that B&P Code section 6068(e) is broader than the attorney-client privilege. OCTC opposes any change to the requirement that precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.</p> <p>9. As previously discussed regarding conflict rules, OCTC opposed advanced waivers. (See OCTC’s discussion to Proposed Rule 1.7.) It recommends that the second sentence of this Comment be stricken. The Commission should also consider whether the rest of the Comment is necessary in light of the rules cited in the Comment. (NOTE: no specific Comment was listed, but staff assumes OCTC is referring to Comment [12]).</p>	<p>8. The Commission has considered each of the questioned Comment paragraphs and believes that each serves an important purpose in guiding lawyers with respect to the new rule.</p> <p>9. The Commission’s views on advance conflict consents is stated in the Rule 1.7 commenter chart.</p>
1	San Diego County Bar Association, Legal Ethics	A	Yes		Support as drafted.	No response required.

**Rule 1.9 Duties to Former Clients.
[Sorted by Commenter]**

**TOTAL = 2 Agree = 1
Disagree =
Modify = 1
NI =**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
	Committee					