

E-mails, et

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

Jerry,

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 synopsisizing 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):

1.11 (Agenda Item III.Y)
3.10 (Agenda Item III.TT)

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 - SAPIRO - DFT1 (06-09-10).pdf
RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 5-100 [3-10] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 5-100 [3-10] - Rule - PCD [4] (08-12-08) - CLEAN-LAND.pdf
RRC - 5-100 [3-10] - Rule - PCD [4] (08-12-08) - CLEAN-LAND.doc
RRC - 3-310 [1-11] - Rule - PCD [11.2] (05-17-10) - CLEAN-LAND.pdf
RRC - 3-310 [1-11] - Rule - PCD [11.2] (05-17-10) - CLEAN-LAND.doc

June 13, 2010 Kehr E-mail to Difuntorum, McCurdy & Lee & KEM:

I've just noticed two glitches in Rule 1.11, Comment [4]. It contains a sentence that begins with the word “thus”, but it lacks a comma. The very next sentence begins: “The provisions for screening and waiver in paragraph (b) *is*”

June 14, 2010 Sapiro E-mail to Drafters (Kehr, Melchior & KEM):

Attached is my suggested revision of the spreadsheet for 1.11. San Diego merely repeated its earlier comments, three of which became moot when RAC deleted original paragraph (e). The fourth disagrees with the majority position.

Please let me know whether you agree with my proposed revisions to the spreadsheet.

Attached:

RRC - [1-11] - Public Comment Chart - By Commenter - XDFT2 (06-14-10).doc

June 14, 2010 Difuntorum E-mail to Sapiro, cc Chair, Vice-Chairs & Staff:

Bob Kehr found two nits in Comment [4] to Rule 1.11. His message is pasted below. A revised clean version of the rule is attached and includes the corrections (see yellow highlights). Comment [4] also is pasted below with redline/strikeout markings.

On the assumption these edits are acceptable and that the Rule 1.11 drafters will not be recommending any other changes to the rule, staff will make edits, as needed, to the Rule 1.11 documents for the agenda distribution. However, if you are recommending other changes to the rule, then please incorporate these corrections to Comment [4] in your proposed revised draft.

Attached:

RRC - 3-310 [1-11] - Rule - DFT11.3 (06-14-10)RD - CLEAN-LAND.doc

June 14, 2010 Sapiro E-mail to Drafters, cc Difuntorum:

After I sent my last email to you regarding 1.11, Randy sent me Bob's suggested changes to Comment [4]. I apologize to Bob for overlooking them. I think they are [as usual with Bob] improvements and would support them.

Please let me know whether you agree.

Attached:

RRC - 3-310 [1-11] - Rule - DFT11.3 (06-14-10)RD - CLEAN-LAND.doc

June 14, 2010 KEM E-mail to Drafters, cc Difuntorum, McCurdy & Lee:

I've attached revised XDFT2.1 (6/14/10), which accepts Jerry's first three changes, except that I have substituted "Board of Governors" for "RAC," because the Board ratified RAC's decision. Changes are highlighted in yellow.

I have also deleted the reference to "majority of the Commission" in paragraph 4 and substituted "Commission." Whether the vote has been 13 to 0 or 7 to 6 (or 5 to 4, etc.), we have consistently referred to the Commission having made the decision or reached the particular conclusion in all of our submissions to RAC/BOG. We have not referred to a "majority of the Commission". It is the Commission's decision so long as a majority approved when the vote was taken.

Commission members are free to refer to a "majority of the Commission" in their dissents, but all submissions made on behalf of the Commission have simply referred to the "Commission."

Please let me know if you have any questions.

Attached:

RRC - [1-11] - Public Comment Chart - By Commenter - XDFT2.1 (06-14-10).doc

June 14, 2010 KEM E-mail to Difuntorum, McCurdy & Lee:

Sorry for my compulsiveness, but I've renumbered and attached the rule draft. Because it's a post-PCD and a new meeting, it should be numbered as Draft 12, not 11.3. Please use the attached. Thanks,

Attached:

RRC - 3-310 [1-11] - Rule - DFT12 (06-14-10)RD - CLEAN-LAND.doc

June 14, 2010 Sapiro E-mail to KEM, cc Drafters & Staff:

Thanks for correcting my faux pas, Kevin.

There is a typo in response 3. Should not be an “n” in “impliendly.”

Bob and Kurt: Do you agree with the approach?

June 14, 2010 Kehr E-mail to Drafters, cc Staff:

All this works for me.

June 15, 2010 Sapiro E-mail to Drafters, cc Staff:

Kurt has now signed off on yesterday's exchange regarding 1.11. That makes it unanimous.

June 15, 2010 Difuntorum E-mail to RRC:

More public comments keep arriving. Here's another one that you can begin addressing. It is from the DOJ. The four rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

1.11 = **SAPIRO** (Kehr, Melchior, Mohr)

3.8 = **FOY** (Peck, Tuft)

8.4 = **VAPNEK/PECK** (Tuft)

8.5 = **MELCHIOR** (Lampert, Peck)

Attached:

RRC - 3-310 [1-11] - 06-14-10 DOJ [Cardona] Comment.pdf

RRC - 5-110 [3-8] - 06-14-10 DOJ [Cardona] Comment.pdf

RRC - 1-120X [8-4] - 06-14-10 DOJ [Cardona] Comment.pdf

RRC - 1-100 [8-5] - 06-14-10 DOJ [Cardona] Comment.pdf

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

Jerry,

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 is also up-to-date (<http://sites.google.com/site/commentstrrc/byrule>).

1.11 (Agenda Item III.Y) 2 Comments: **COPRAC (attached)**; and, OCTC (sent with Randy's 6/15/10 e-mail)

1.17 (Agenda Item III.EE) Co-Lead w/Kehr – 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

3.10 (Agenda Item III.TT) 1 Comment: OCTC (sent with 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 - 3-310 [1-11] - 06-14-10 COPRAC Comment.pdf

June 17, 2010 Sapiro E-mail to Drafters (Kehr, Melchior & KEM):

In this email, I will address two comments about Rule 1.11. The first is from the U.S. Department of Justice ("DOJ"). The second is from the Office of the Chief Trial Counsel ("OCTC").

1. DOJ criticizes the last sentence of Comment [2] and Comments [9B] and [9C], arguing that they confuse imputation and disqualification and suggest that disqualification because of imputed conflicts is not unusual when it is extraordinary. They suggest rewording [9C] and merging it into Comment [2] and rewording Comment [9B]. I will address their suggestions separately.
2. First, I do not agree that the comments confuse imputation and disqualification. We kept the two distinct in the drafting process and physically located Comments [9B] and [9C] separately from [2] to avoid such confusion. Disqualification of prosecutors' offices because of imputed conflicts might be unusual in criminal cases, but that is not the limit of our rule,

which also applies to civil and nonlitigation matters. Whether disqualification of prosecutors' offices is or is not unusual should not be the subject of our Comments. Prosecutors have successfully lobbied the Legislature to make disqualification unusual, and court decisions express reluctance to disqualify prosecutors' offices, but the former client of the side-shifting prosecutor is still aggrieved, and our Comments should not recommend absolution of the office in such cases.

3. Second, I do not recommend the revisions to Comments [2] and [9C] DOJ suggests. The effect of their changes would be to change the neutral wording of [9C] ("This Rule leaves open the issues of . . .") to wording that would be used by DOJ to argue that Rule 1.11 prohibits imputation of conflicts within government offices ("This Rule does not impute . . .") . We should not give in to lobbying that would change the analysis of conflicts cases. Our rule should either define when conflicts will be imputed within government offices or remain neutral. Because the Board deleted paragraph (e), Rule 1.11 should remain neutral. In addition, I think moving [9C] to Comment [2] and merging them would change the significance of both comments. Now, they separately address or decline to address conflicts for discipline purposes and conflicts for disqualification purposes. We should keep the distinction clear.
4. Third, I do not recommend all the revisions DOJ suggests for Comment [9B], but I would agree to one of them. DOJ recommends deleting *Younger* and adding a citation to *In re Charlissee C*, 45 Cal. 4th 145(2008). I would not delete *Younger*, because it still states valid analyses of disqualification standards. In *Cobra*, 38 Cal 4th 839, 850(2006), the Court stated that the principles discussed in *Younger* "have not lost their relevance." We could add *Charlissee*, because it adds a possible distinction to the analysis, but the Children's Law Center , while publicly funded, is not a government law office. I therefore think it is not really in point. If we add that case, shouldn't we also add *Castro v. Los Angeles County Bd. of Supervisors*, 232 Cal App. 3d 1432 (1991), *People v. Christian*, 41 Cal. App. 4th 986 (1996), *People v. superior Court (Greer)*, 19 Cal. 3d 255 (1977), and *People v. Lepe*, 164 Cal. App. 3d 685 (1985)? There are also cases from other states and federal decisions recusing prosecutorial offices because of imputed conflicts. I do not recommend that we discuss those pro or con. And should we add a discussion about why a screening precedent in a nongovernment law firm should or should not apply to a prosecutor's office? I don't recommend that we go in that direction.
5. DOJ would reword the last sentence of Comment [9B]. It now says, "Regarding prosecutors in criminal matters, see Penal Code section 1424." That is the code section prosecutors obtained from the Legislature to offset *Younger* and its sequellae. Instead of the neutral wording of the last sentence of Comment [9B], DOJ would say, "Standards for disqualification of criminal prosecutors are set forth in Penal Code Section 1424." I find it ironic that DOJ wants to characterize themselves as "criminal." I do not recommend that we accept that suggestion. We added the sentence to call to the attention of a reader the need to consult the code section. However, the code section is not the limit of a court's consideration of a disqualification motion. I seem to recall some things called due process, right to counsel, confidentiality, loyalty and other concepts that are arguably relevant in a given case. The rewording is part of the theme of DOJ oppositions to disqualification motions, where they have argued that the standards stated in *Younger* have been repealed by 1424, which I think is incorrect. Even if 1424 would bar a disqualification in a given case in a California court, federal courts are not bound by it, and we should not draft a rule so it can become a tool for changing the premises of disqualification decisions.

6. The first OCTC suggestion is to add to paragraphs (a), (c) and (d) the phrase “or prohibit.” I do not recommend that change because it would make the wording of those paragraphs illogical. Those paragraphs prohibit representation in defined circumstances. They contain an exception [“Except as law may otherwise expressly permit,”].

OCTC would add to that phrase the phrase “or prohibit.” That would mean, to paraphrase, that, “Except as law may otherwise expressly . . . prohibit, . . . a lawyer shall not represent a client.” That would be a double negative. Its effect would be the opposite of what the rule intends. The exception would negate the law. In plain English, it would mean, “If the law prohibits you from representing a client, you may represent that client.”

7. The second OCTC suggestion is that paragraph (b) should not be limited to “knowingly” because it would immunize attorneys who do not bother to check for conflicts of interest and would be inconsistent with Rule 1.7 Comment [4], which says that ignorance caused by failure to check conflicts does not excuse a violation. I agree with OCTC and was one of the minority. Should we use this opportunity to raise the issue with the Commission again?
8. OCTC says we “might want to tighten the language of paragraph (c). They do not point to any particular rewording they want. Maybe I am too tired, but on rereading the paragraph this morning, I do not see flaws in it. Do you think we should reword it?”
9. Paragraph (d)(2)(ii) prohibits government lawyers from negotiating for “private” employment with a party, lawyer or law firm on the other side. OCTC says it “might be too broad” because it might prohibit a prosecutor from negotiating with the public defender for a job. That raises an interesting question about whether a prosecutor should be permitted to switch sides, but I think it misreads and is beyond the scope of the rule. The paragraph is limited to a prosecutor who seeks “private” employment. I do not think it applies to the situation OCTC poses.
10. OCTC criticizes the comments as too many and more appropriate for treatises, law review articles, and ethics opinions. That may be, but because we are forced to adhere to the Restatement style used in the Model Rules, we are stuck with it.

Please let me know whether you agree or disagree with my reactions to these comments.

June 17, 2010 Sapiro E-mail to Drafters:

After my last email on 1.11, I read the COPRAC letter. It advocates restoration of paragraph (e). Because the deletion of (e) was by the Board, I think that issue is out of our hands. Ultimately in the spreadsheet, will we have to find a diplomatic way of stating that the Commission might have agreed but is stopped to do so? Or should we bring it before the Commission again?

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

I have not looked at comment or draft, but my view is that the Commission should provide the Board with its best advice. If the Commission believes that paragraph (e) should be there, the commenter chart should say so. I think the Court is entitled to know what the facts are.

June 17, 2010 KEM E-mail to Drafters:

I join with Bob on this. If there is still a majority of the Commission that favors 1.11(e), then we should so state. However, the statement should be made not only in the public commenter chart, but also in the Dashboard and the Introduction, as well as in the final report/memo that is sent to the Court with all the Rule materials. Simply putting it in an isolated response to a public comment, even if the comment is from COPRAC, does not assure the Supreme Court will be aware of the Commission's position.

I also think that the Commission should discuss (and vote on?) whether it should request RAC/BOG to reconsider its decision concerning 1.11(e).

I too haven't had a chance to review Jerry's e-mails but will do so today.

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

I've finally had time to look at the DOJ and OCTC comments and your take on them. I've numbered your paragraphs below and have stated my position, which pretty much is to agree with you. Note that OCTC has simply resubmitted most of their comments from the initial public comment period and we already have responses. Most of their comments do not warrant a revisit; we should simply use what we did before. Nothing has changed since the last time around.

Thanks for your careful consideration of the comments.

Finally, I've copied Randy and Lauren so they have some idea where we stand on this.

Attached:

Jerome Sapiro Jr. wrote:

In this email, I will address two comments about Rule 1.11. The first is from the U.S. Department of Justice ("DOJ"). The second is from the Office of the Chief Trial Counsel ("OCTC").

1. DOJ criticizes the last sentence of Comment [2] and Comments [9B] and [9C], arguing that they confuse imputation and disqualification and suggest that disqualification because of imputed conflicts is not unusual when it is extraordinary. They suggest rewording [9C] and merging it into Comment [2] and rewording Comment [9B]. I will address their suggestions separately.

I would not move [9C] into Comment [2]. As you have observed, it will completely undermine the distinction we've been so careful to construct in our organization of the Rule.

2. First, I do not agree that the comments confuse imputation and disqualification. We kept the two distinct in the drafting process and physically located Comments [9B] and [9C] separately from [2] to avoid such confusion. Disqualification of prosecutors' offices because of imputed conflicts might be unusual in criminal cases, but that is not the limit of our rule, which also applies to civil and nonlitigation matters. Whether disqualification of prosecutors' offices is or is

not unusual should not be the subject of our Comments. Prosecutors have successfully lobbied the Legislature to make disqualification unusual, and court decisions express reluctance to disqualify prosecutors' offices, but the former client of the side-shifting prosecutor is still aggrieved, and our Comments should not recommend absolution of the office in such cases.

Agreed.

3. Second, I do not recommend the revisions to Comments [2] and [9C] DOJ suggests. The effect of their changes would be to change the neutral wording of [9C] ("This Rule leaves open the issues of . . .") to wording that would be used by DOJ to argue that Rule 1.11 prohibits imputation of conflicts within government offices ("This Rule does not impute . . ."). We should not give in to lobbying that would change the analysis of conflicts cases. Our rule should either define when conflicts will be imputed within government offices or remain neutral. Because the Board deleted paragraph (e), Rule 1.11 should remain neutral. In addition, I think moving [9C] to Comment [2] and merging them would change the significance of both comments. Now, they separately address or decline to address conflicts for discipline purposes and conflicts for disqualification purposes. We should keep the distinction clear.

I agree that we should retain our neutral language which, by the way, was expressly endorsed by RAC/BOG. DOJ wants the Model Rule comment [2]. Our courts have not bought into that position and neither should the Commission.

4. Third, I do not recommend all the revisions DOJ suggests for Comment [9B], but I would agree to one of them. DOJ recommends deleting *Younger* and adding a citation to *In re Charlisse C*, 45 Cal. 4th 145(2008). I would not delete *Younger*, because it still states valid analyses of disqualification standards. In *Cobra*, 38 Cal 4th 839, 850(2006), the Court stated that the principles discussed in *Younger* "have not lost their relevance." We could add *Charlisse*, because it adds a possible distinction to the analysis, but the Children's Law Center, while publicly funded, is not a government law office. I therefore think it is not really in point. If we add that case, shouldn't we also add *Castro v. Los Angeles County Bd. of Supervisors*, 232 Cal App. 3d 1432 (1991), *People v. Christian*, 41 Cal. App. 4th 986 (1996), *People v. superior Court (Greer)*, 19 Cal. 3d 255 (1977), and *People v. Lepe*, 164 Cal. App. 3d 685 (1985)? There are also cases from other states and federal decisions recusing prosecutorial offices because of imputed conflicts. I do not recommend that we discuss those pro or con. And should we add a discussion about why a screening precedent in a nongovernment law firm should or should not apply to a prosecutor's office? I don't recommend that we go in that direction.

I would NOT add any more citations to the Comment. The citations we have included do the trick and to start including simply work to make the comment unfathomable. By stating that DQ questions are decided by the relevant tribunal, we are signaling to the reader that they had better look to case law and, if readers don't get that by reading [9B], we expressly clue them in with [9C]. Besides, to include all of the foregoing citations would confirm OCTC's belief that we are writing a treatise. These are lawyers we are dealing with; presumably they have not forgotten how to research case law.

5. DOJ would reword the last sentence of Comment [9B]. It now says, "Regarding prosecutors in criminal matters, see Penal Code section 1424." That is the code section prosecutors obtained from the Legislature to offset *Younger* and its sequellae. Instead of the neutral wording of the last sentence of Comment [9B], DOJ would say, "Standards for disqualification of criminal prosecutors are set forth in Penal Code Section 1424." I find it ironic that DOJ wants to characterize themselves as "criminal." I do not recommend that we accept that suggestion. We added the sentence to call to the attention of a reader the need to consult the code section. However, the code section is not the limit of a court's consideration of a disqualification motion.

I seem to recall some things called due process, right to counsel, confidentiality, loyalty and other concepts that are arguably relevant in a given case. The rewording is part of the theme of DOJ oppositions to disqualification motions, where they have argued that the standards stated in *Younger* have been repealed by 1424, which I think is incorrect. Even if 1424 would bar a disqualification in a given case in a California court, federal courts are not bound by it, and we should not draft a rule so it can become a tool for changing the premises of disqualification decisions.

Agreed.

6. The first OCTC suggestion is to add to paragraphs (a), (c) and (d) the phrase “or prohibit.” I do not recommend that change because it would make the wording of those paragraphs illogical. Those paragraphs prohibit representation in defined circumstances. They contain an exception [“Except as law may otherwise expressly permit,”].

OCTC would add to that phrase the phrase “or prohibit.” That would mean, to paraphrase, that, “Except as law may otherwise expressly . . . prohibit, . . . a lawyer shall not represent a client.” That would be a double negative. Its effect would be the opposite of what the rule intends. The exception would negate the law. In plain English, it would mean, “If the law prohibits you from representing a client, you may represent that client.”

Agreed.

7. The second OCTC suggestion is that paragraph (b) should not be limited to “knowingly” because it would immunize attorneys who do not bother to check for conflicts of interest and would be inconsistent with Rule 1.7 Comment [4], which says that ignorance caused by failure to check conflicts does not excuse a violation. I agree with OCTC and was one of the minority. Should we use this opportunity to raise the issue with the Commission again?

You know how I feel about the knowingly issue -- it belongs in a rule of discipline; courts can resolve the issue however they like. We have been around the block several times on this. Of course you are free to raise this issue, but I don't see how OCTC's comment on this gives you any further support. They made the identical argument during the initial public comment period and it had no effect on how the Commission voted. I've attached the previous public comment chart for your review and you will see that nearly all of their comments are identical to the comments previously submitted. Nothing has changed since then that warrants a reconsideration of the issue.

8. OCTC says we “might want to tighten the language of paragraph (c). They do not point to any particular rewording they want. Maybe I am too tired, but on rereading the paragraph this morning, I do not see flaws in it. Do you think we should reword it?

We have already done so in the last go-through! Have they even read the rule since the last time? See attached public comment chart on page page 12, para. 3. Let's move on.

9. Paragraph (d)(2)(ii) prohibits government lawyers from negotiating for “private” employment with a party, lawyer or law firm on the other side. OCTC says it “might be too broad” because it might prohibit a prosecutor from negotiating with the public defender for a job. That raises an interesting question about whether a prosecutor should be permitted to switch sides, but I think it misreads and is beyond the scope of the rule. The paragraph is limited to a prosecutor who seeks “private” employment. I do not think it applies to the situation OCTC poses.

See our previous response in the attached public comment chart.

10. OCTC criticizes the comments as too many and more appropriate for treatises, law review articles, and ethics opinions. That may be, but because we are forced to adhere to the Restatement style used in the Model Rules, we are stuck with it.

We've been using a stock response to this stock statement they made about 60 times in their letter/memo to the RRC. I suggest we use it here as well. (i.e., "As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.")

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

I should have attached the previous public comment chart. Sorry. Here it is

Attached:

RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - DFT5 (05-16-10).pdf

June 21, 2010 McCurdy E-mail to Sapiro, cc Drafters, Chair & Staff:

Jerry,

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 - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

RRC - 5-100 [3-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc

RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc

June 22, 2010 Sapiro E-mail to McCurdy, cc Drafters, Chair, Vice-Chairs & Staff re 1.11, 1.17 & 3.10:

Attached are my revisions to the public comment charts. Please note that I changed the footers. I hope I did not mess up your coding by doing so.

I do recommend a change in the wording of one sentence in 1.11.

I send copies of this to drafters of these three rules for their info and criticisms.

Attached:

RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML-JS.doc
RRC - 5-100 [3-10] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)JS.doc
RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)JS.doc

June 22, 2010 KEM E-mail to McCurdy & Sapiro, cc Drafters, Chair, Vice-Chairs & Staff re 1.11, 1.17 & 3.10:

I've restored our footers to the files you just sent in. The footers we use in the charts automatically update whenever the file name is changed so there is no need to change them. It's important that we keep track of the draft numbers in case we have to return to them in the future to make any changes. It's the only way we can efficiently keep track of these in the brief time we have between the end of one of our meetings and the date for submission to the BOG.

I've also put the comments in alphabetical order as is our standard approach. I haven't made any changes to your responses. Thanks,

Attached:

RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - XDFT2.3 (06-22-10)JS-KEM.doc
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)ML-JS-KEM.doc
RRC - 5-100 [3-10] - Public Comment Chart - By Commenter - XDFT2.3 (06-22-10)JS-KEM.doc

P.S. To get the footer to update as you're looking at it on the computer screen, all you need do is go into "Print Preview". Alternatively, the new file name in the footer will automatically update whenever you print the document.

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 Agree = 0
 Disagree = 0
 Modify = 4
 NI = 0

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|---|---|
| 2 | COPRAC | M | Yes | (e) | <p>COPRAC supports the implementation of screening through the Rules of Professional Conduct and urges reconsideration and adoption of the prior version of the rule permitting screening including the prior version of subsection (e).</p> <p>COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be easily referenced, and easily applied. Accordingly, COPRAC urges the reconsideration, and adoption, of the prior language of the rule permitting screening.</p> <p>In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Absence of a rule</p> | <p>The Commission recommended screening in the situation covered by former paragraph (e). However, the Board of Governors deleted original paragraph (e), which dealt with conflicts and screening if a lawyer moved from other employment into government service.</p> |

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 Agree = 0
 Disagree = 0
 Modify = 4
 NI = 0

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-------------------------------|-----------------------|-----------------------------|----------------|---|---|
| | | | | | could subject a lawyer to discipline even if case law develops to permit screening as a method to avoid disqualification. | |
| 3 | Office of Chief Trial Counsel | M | Yes | 1.11(a) | OCTC thanks the Commission for adding B&P Code section 6131 to the Comments, but we still are concerned that subparagraph (a) is incomplete. OCTC believes it should state: Except as law may otherwise expressly permit <i>or prohibit</i> . The same is true of subparagraphs (c) and (d). | The Commission disagrees. Adding the phrase "or prohibit" to paragraphs (a), (c) and (d) would make the wording of those paragraphs illogical. Those paragraphs prohibit representation in defined circumstances. They contain an exception ["Except as law may otherwise expressly permit, ..."]. Adding the phrase "or prohibit" would mean, to paraphrase, that, "Except as law may otherwise expressly ... prohibit ... a lawyer shall not represent a client." That would be a double negative. Its effect would be the opposite of what is intended by the rule. The exception to the rule would negate the law. In plain English, it would mean, "If the law prohibits you from representing a client, you may represent that client." |
| | | | | 1.11(b) | Subparagraph (b) of the rule prohibits an attorney in a firm from knowingly undertaking or continuing representation in such a matter unless the conflicted attorney is timely and effectively screened and is apportioned no part of the fee and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the | The Commission disagrees. |

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 Agree = 0
 Disagree = 0
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| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|--|---|
| | | | | 1.11(c) | <p>provisions of the Rule. OCTC agrees with the minority of the Commission who objected to the use of the term “<i>knowingly</i>” because it would immunize attorneys who do not bother to check for conflicts of interest. Disciplinary law has long recognized that gross negligence can constitute misconduct. That would be appropriate here. Further, it would be consistent 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.”</p> <p>OCTC does not object to the concept contained in subparagraph (c), but did find it a little confusing as written. It would suggest that the Commission might want to tighten the language.</p> | <p>The Commission considered this objection when the proposed rule was first published for preliminary public comment. Paragraph (c) was modified in light of this comment. The comment is moot.</p> |
| | | | | 1.11(d)(2)(ii) | <p>OCTC is concerned that subparagraph (d)(2)(ii) prohibiting government officers and employees from negotiating for private employment might be too broad. It would appear to prohibit any criminal prosecutor from negotiating with the public defender’s office for a job.</p> | <p>The Commission disagrees. Paragraph (d)(2)(ii) prohibits government lawyers from negotiating for “private” employment with a party, lawyer, or law firm on the other side. That paragraph is limited to a government lawyer who seeks “private” employment. The Commission thinks that OCTC is misreading the paragraph.</p> |
| | | | | | The Comments are too many and most | The Commission disagrees. The comments provide |

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 Agree = 0
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|-----|---|-----------------------|-----------------------------|----------------|--|---|
| | | | | | appear more appropriate for treatises, law review articles, and ethics opinions. | useful guidance to lawyers and courts on the application of the Rule. |
| 1 | San Diego County Bar Association Legal Ethics Committee ("SDCBA") | M | Yes | (e) | 1. The commenter notes the minority objection to screening in the private to government context. | 1. This comment is moot because the Board of Governors deleted original paragraph (e) which had been recommended by the Commission. That paragraph dealt with conflicts and screening if a lawyer moves from other employment into government service. |
| | | | | (e)(2) | 2. Commenter agrees with the proposed wording of paragraph (e)(2) but expresses concern about how the client could monitor the screen and ensure it retains its effectiveness. | 2. This comment is moot because the Board of Governors deleted original paragraph (e), which dealt with conflicts and screening if a lawyer moves from other employment into government service. |
| | | | | (e) | 3. Commenter points out that paragraph (e) does not address the head of office and supervisory lawyer situation and thereby is <i>de facto</i> overruling <i>Cobra Solutions</i> . | 3. This comment is moot because Board of Governors deleted original paragraph (e), which dealt with conflicts and screening if a lawyer moves from other employment into government service. In addition, <i>Cobra Solutions</i> and other cases are cited in Comment [9B]. Those cases are not impliedly overruled by doing so. Instead, that Comment calls them to the readers' attention so that they are aware of the potential applicability of such cases in the disqualification context. |
| | | | | (b) & (c) | 4. San Diego County Bar Association agrees with the Commission minority that paragraphs (b) and (c) of Rule 1.11 should be modified to | 4. The Commission disagrees with the commenter and has retained the "knowingly" standard in the rule and comment. As in the other jurisdictions that |

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[Sorted by Commenter]**

TOTAL = 4 Agree = 0
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|-----|---|-----------------------|-----------------------------|--------------------|---|---|
| | | | | | prohibit lawyers in a firm who “know or reasonably should know” that a lawyer in his or her firm is prohibited from representation, from undertaking or continuing representation in such a matter unless the screening is conducted and notice given as set forth in 1.11(b)(1) and (2). | have adopted imputation as a disciplinary standard, the Commission concluded that the Model Rule’s standard should be adopted. Although a lawyer without actual knowledge could properly be disqualified in a civil action, the lawyer would not be subject to discipline. The Commission concluded that California should not depart from this approach. |
| 4 | U.S. Attorney’s Offices for the Central, Eastern, Northern and Southern Districts of California | M | Yes | | We are concerned that the last sentence of Proposed Comment [2] and new Proposed Comments [9B] and [9C], intermingle two distinct concepts, imputation and disqualification, and as a result create the impression that disqualification as the result of imputed conflicts is not unusual, when in fact it is only in extraordinary cases that imputation is appropriate, and only in even more unusual circumstances that disqualification as the result of such imputation is found appropriate. Accordingly, we suggest that the Proposed Comments be modified as follows | The Commission disagrees. The comments do not confuse imputation and disqualification. They have been drafted to keep the two concepts distinct. Comments [9B] and [9C] are physically located separately from Comment [2] in order to avoid confusion. Disqualification of prosecutors’ offices because of imputed conflicts may be unusual in criminal cases, but that is not the limit of Rule 1.11, which also applies to civil and to non-litigation matters. Whether disqualification of prosecutors’ offices is or is not unusual should not be the subject of the Comments. Although the Legislature has made disqualification unusual in situations in which <i>Younger</i> and other precedents apply, and although court decisions express reluctance to disqualify entire offices of prosecutors, the former client of a side-shifting prosecutor is still aggrieved, and the Comments should not sanctify the conflicts of interest in such cases. |
| | | | | Comment [2] & [9C] | First, we suggest that the text of Proposed Comment [9C], which addresses only imputation and screening for purposes of this | The Commission disagrees. The effect of these changes would be to change the neutral wording of Comment [9C] (“This Rule leaves open the issues of |

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 Agree = 0
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|-----|-----------|-----------------------|-----------------------------|----------------|--|--|
| | | | | | <p>Rule, and not disqualification, be modified to make more clear that the Rule does not itself impute conflicts within government agencies, and moved to replace the last sentence in Proposed Comment [2]. This would avoid an unnecessary cross-reference, and bring the Proposed Comment closer to the ABA Model Rule Comments, which include in their Comment [2] the discussion of imputation and screening for current government lawyers. The resulting Comment [2] would read:</p> <p>“Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or non-governmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. The Rule does not impute a current government lawyer’s conflict under paragraph (d) to other</p> | <p>...”) to wording that would be used by the commenters to argue that Rule 1.11 prohibits imputation of conflicts within government offices. The Rules of Professional Conduct should not be reworded to change the analyses and results of disqualification motions. This rule should not define when conflicts will be imputed within government offices for disqualification purposes and should not be written to change the decisional law regarding disqualification motions. California decisions have not accepted Model Rule Comment [2]. In addition, moving Comment [9C] to Comment [2] and merging them would change the significance of both comments. Now, they clearly distinguish conflicts for discipline purposes from conflicts for disqualification purposes. The Commission recommends that the rule not become a revision of decisional law regarding disqualification and that the distinctions between discipline and disqualification be kept clear.</p> |

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 Agree = 0
 Disagree = 0
 Modify = 4
 NI = 0

| No. | Commenter | Position ¹ | Comment on Behalf of Group? | Rule Paragraph | Comment | RRC Response |
|-----|-----------|-----------------------|-----------------------------|----------------|---|--|
| | | | | Comment [9B] | <p>lawyers serving in the same governmental agency; whether such imputation will occur and whether the use of a timely screen will avoid that imputation are matters of case law.”</p> <p>Second, we would suggest that Proposed Comment [9B], which makes clear that this Rule does not govern disqualification, be modified to make more clear the distinction between criminal and civil cases, remove the citation to <u>Younger</u> (which applied to a criminal case a disqualification standard that has since been displaced by statute), and cite additional case law that has limited the circumstances in which disqualification on the basis of imputed conflicts may be appropriate. The resulting Proposed Comment [9B] would read:</p> <p><u>“This Rule Not Determinative of Disqualification</u></p> <p>[9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. The policies underlying discipline and disqualification are different. See, e.g., <i>Hollywood v. Superior Court</i> (2008) 43 Cal.4th 721. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See,</p> | <p>The Commission disagrees with the deletion of <i>Younger</i>. <i>Younger</i> still states valid analyses of disqualification standards. In <i>Cobra Solutions</i>, 38 Cal. 4th 839, 850 (2006), the Court stated that the principles discussed in <i>Younger</i> “have not lost their relevance.” Not calling <i>Younger</i> to the attention of a reader would be misleading. The Commission does not recommend that additional cases be cited in Comment [9B]. The list of cases that would have to be added to the comment would make the comment far too long.</p> <p>The Commission also disagrees with the proposal to reword the last sentence of Comment [9B]. It now states, “Regarding prosecutors in criminal matters, see Penal Code section 1424.” That is the code section the Legislature added to offset <i>Younger</i> and its sequellae. Instead of the neutral wording of the last sentence of Comment [9B], the commenters would change the sentence from alerting a reader to the need to consult the code section to a sentence that would make the code section the limit of disqualification motions. The Comment should not become a basis for changing the premises of disqualification decisions. Other standards may</p> |

**Rule 1.11 Special Conflicts for Government Employees
[Sorted by Commenter]**

TOTAL = 4 Agree = 0
 Disagree = 0
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|-----|-----------|-----------------------|-----------------------------|----------------|--|---|
| | | | | | e.g., <i>In re Charlisse C.</i> , 45 Cal.4 th 145 (2008); <i>City & County of San Francisco v. Cobra Solutions, Inc.</i> , 38 Cal.4 th 839 (2006). Standards for disqualification of criminal prosecutors are set forth in Penal Code section 1424.” | also apply, such as due process and confidentiality. Moreover, federal courts are not bound by the California Penal Code in deciding disqualification motions. The change the commenters recommend is an attempt to bring the California statute into federal practice by changing the Rules of Professional conduct. |

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(Commission's Proposed Rule – Clean Version)

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
- (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).
- (b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
- (1) the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.
- (c) Except as law may otherwise expressly permit, a lawyer who was a public officer or employee and, during that employment, acquired information that the lawyer knows is confidential government information about a person, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
- (1) is subject to Rules 1.7 and 1.9; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent; or
 - (ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is

participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

- (e) As used in this Rule, the term “matter” includes:
- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

- [1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to these Rules, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See, e.g., Business and Professions Code section 6131. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0.1(e) for the definition of “informed written consent.”
- [2] Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer

currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Concerning imputation and screening within a government agency, see Comments [9B] and [9C], below.

- [3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later government or private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). [As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by paragraphs (a)(2) and (d)(2).]
- [4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer’s professional

functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) is necessary to prevent this Rule from imposing too severe an obstacle against entering public service. The limitations of representation in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than imputing conflicts to all substantive issues on which the lawyer worked, serves a similar function.

- [4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person

acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely screened. Thus, a purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.

- [5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because the conflict of interest is governed by paragraphs (a) and (b), the latter agency is required to screen the lawyer. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [14]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].

Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)

- [6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule 1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer

from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

- [7] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.
- [8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.
- [9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially.

- [9A] A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).

This Rule Not Determinative of Disqualification

- [9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34]. Regarding prosecutors in criminal matters, see Penal Code section 1424.
- [9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.

Matter

- [10] For purposes of paragraph (f) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.