

Rule 1.9 [3-310(E)] Duties To Former Clients
(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – 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 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 had acquired information protected by Business and Professions Code § 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 has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:
- (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the 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;*
 - (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client; or
 - (3) without the informed written consent* of the former client, accept representation adverse to the former client where, by virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation.

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchurna Water Co. v. Bailey* (1932) 216 Cal. 564 [15

P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) 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. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] 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 involved has actual knowledge of information protected by Rules 1.6, 1.9(c), and Business and Professions 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.*

[3] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[4] With regard to the effectiveness of an advance consent, see Comment [8] to Rule 1.7. With regard to disqualification of a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

PROPOSED RULE OF PROFESSIONAL CONDUCT 1.9
(Current Rule 3-310(E))
Duties to Former Clients

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the national standard of the American Bar Association (“ABA”) counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations: Model Rules 1.7 (Current Client Conflicts); 1.8(f) (third party payments); 1.8(g) (aggregate settlements); and 1.9 (Duties To Former Clients).

The result of the Commission’s evaluation is a two-fold recommendation for implementing:

- (1) the Model Rules’ framework of having separate rules that regulate different conflicts interest situations: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and
- (2) proposed Rule 1.9 (duties to former clients), which regulates conflicts situations that are currently regulated under rule 3-310(E). Proposed rule 1.9 largely adheres to the internal framework of Model Rule 1.9, which addresses duties to former client in three separate provisions, MR 1.9(a) through (c), rather than the current rule’s approach to address those duties in a single provision, 3-310(E).

Proposed rule 1.9 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Conflicts Framework.** of having (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).¹

¹ Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., MR 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse To A Client] and MR 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By Or For A Client]).

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees).

2. Recommendation of addressing duties to former clients in three separate provisions that track the organization of Model Rule 1.9. There are three separate provisions, each of which addresses a different aspect of duties owed a former client or recognizes the different ways in which a lawyer can incur duties to a client that survive the lawyer-client relationship. The Commission determined that implementing Rule 1.9 will help make a lawyer's duties to a former client more apparent, thus promoting compliance with the rule. This is particularly important in the context of former clients. Although the principal value at issue in conflicts of interest involving former clients is confidentiality, there is a residual duty of loyalty that the Supreme Court has recognized. (See, e.g., *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811.) The proposed rule affirms that duty. (See paragraph (c)(3) and Comment [1].)

There are a number of reasons for the Commission's recommendation. *First*, adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law and statutes, should protect client interests by better demarcating the ways in which the lawyer might acquire confidential client information "material to the matter," (paragraphs (a) and (b)), and delimit the lawyer's precise duties in protecting that information once acquired, (paragraph (c)). *Second*, incorporating the concept of matters that are "substantially related" into the blackletter of the rule reflects how current rule 3-310(E) has been interpreted and applied in both civil (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445) and disciplinary contexts (*In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735).

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed Rule 1.9 recognizes that a lawyer who has participated in the same or a substantially related matter in which the lawyer's new client has interests adverse to the former client, the lawyer will have acquired confidential information material to the new matter and will be prohibited from representing the new client unless the former client gives informed written consent.

Paragraph (b) incorporates Model Rule 1.9(b), which was adopted as the law of California by the court in *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324. In effect, Rule 1.9(b) will codify the *Adams v. Aerojet* case. The concept recognized by *Adams* and MR 1.9(b) is that a lawyer in a law firm may become privy to the confidential information of a firm client even if the lawyer did not personally represent the client in the same or a substantially related matter. This is sometimes referred to as the "water cooler" phenomenon, the lawyer having acquired the information by consulting with another firm lawyer who actually worked on the case. Incorporating this concept into a rule of professional conduct would afford greater client protection regarding adverse use of confidential information by alerting lawyers to how confidential information might be acquired even without having actually represented a client.

The Commission is also recommending rule counterparts to those rules, each of which is the subject of a separate memorandum.

Paragraph (c) has three subparagraphs. Subparagraph (c)(1) prohibits a lawyer from “using” a former client’s information to the client’s disadvantage except as permitted under the Rules or the State Bar Act, or if the information has become generally known. This is the former client counterpart to proposed Rule 1.8.2, which prohibits a lawyer from “using” a current client’s confidential information to the client’s disadvantage. Subparagraph (c)(2) prohibits a lawyer from “revealing” a former client’s confidential information except to the extent such disclosure is permitted by the Rules or the State Bar Act. Subparagraph (c)(3) has no counterpart in Model Rule 1.9. It carries forward current rule 3-310(E), modified to conform to the Commission’s format and style requirements. The intent of including this subparagraph is to ensure that the concept of residual loyalty recognized in the *Wutchumna* and *Oasis West* cases cited above is incorporated into the Rule. This provision is somewhat controversial as a minority of the Commission takes the position that the concept addressed in subparagraph (c)(3) is already adequately addressed in paragraph (a) and subparagraphs (c)(1) and (c)(2), and the inclusion of (c)(3) might cause confusion without adding any public protection.

There are four comments to proposed Rule 1.9, all of which provide interpretative guidance or clarify how the proposed rule, which is intended to govern a broad array of complex conflicts situations, should be applied. Comment [1] clarifies that there is a residual duty of loyalty owed former clients so that a lawyer is prohibited from attacking the very legal services that the lawyer has provided the former client, and provides two examples of prohibited representations. Comment [2] explains how paragraph (b), which codifies *Adams v. Aerojet-General*, should be applied, and provides additional clarification on how the rule should be applied when a lawyer moves laterally from one firm to another. Comment [3] draws an important distinction between information that is in the public record (e.g., a former client’s criminal record) and information that is “generally known,” and cites to *In the Matter of Johnson*, a Review Department case that imposed discipline on a lawyer for revealing public record information of a former client’s criminal history. Comment [4] provides cross-references to related rules that govern other situations involving former clients, for example, when the former client is a governmental agency.

**Rule 1.9 [3-310(E)] ~~Avoiding the Representation of Adverse Interests~~
Duties To Former Clients**

(Redline Comparison of the Proposed Rule to Current California Rule)

- (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 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 had acquired information protected by Business and Professions Code § 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 has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:
- (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the 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;*
- (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client; or
- (E3) ~~A member shall not,~~ without the informed written consent* of the ~~client or~~ former client, accept employmentrepresentation adverse to the ~~client or~~ former client where, by ~~reason~~virtue of the representation of the ~~client or~~ former client, the ~~member has obtained confidential~~lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the employmentrepresentation.

Discussion

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~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) 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. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] 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 involved has actual knowledge of information protected by Rules 1.6, 1.9(c), and Business and Professions 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.*

[3] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[4] With regard to the effectiveness of an advance consent, see Comment [8] to Rule 1.7. With regard to disqualification of a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

**Rule 1.9 [3-310(E)] Duties ~~to~~To Former Clients
(Redline Comparison of the Proposed Rule to ABA Model Rule)**

- (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~~person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent, ~~confirmed in writing.*~~
- (b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a 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 had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed written consent, ~~confirmed in writing.*~~
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:
- (1) use information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit ~~or require~~ with respect to a current client, or when the information has become generally known; ~~or*~~
 - (2) reveal information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules ~~would~~or the State Bar Act permit ~~or require~~ with respect to a current client; ~~or~~
 - (3) without the informed written consent* of the former client, accept representation adverse to the former client where, by virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation.

Comment

[1] After termination of a ~~client-lawyer~~lawyer-client relationship, ~~athe~~ lawyer ~~has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, fo~~owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the

former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. ~~So also and (ii) a lawyer who has prosecuted an accused person*~~ could not ~~properly~~ represent the accused in a subsequent civil action against the government concerning the same ~~transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.~~ matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

~~[2] 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. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.~~

~~[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts~~

~~gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.~~

Lawyers Moving Between Firms

~~[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.~~

~~[52] Paragraph (b) operates to disqualify the lawyer 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 involved has actual knowledge of information protected by Rules 1.6 ~~and~~ 1.9(c), and Business and Professions 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 ~~is disqualified from~~ 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.*~~

~~[3] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.~~

~~[4] With regard to the effectiveness of an advance consent, see Comment [8] to Rule 1.7. With regard to disqualification of a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.~~

~~[6] 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 whose disqualification is sought.~~

~~[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).~~

~~[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, 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.~~

~~[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.~~