

Lee, Mimi

From: Marlaud, Angela
Sent: Tuesday, November 24, 2009 8:27 AM
To: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwvapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: FW: Final RRC Agenda Submission - 1.11 [3-310] - IV.E. - December 11-12, 2009 Agenda Materials
Attachments: RRC - 3-310 [1-11] - Dash, Rule, Comment - COMBO - DFT3 (11-23-09).pdf

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Tuesday, November 24, 2009 8:06 AM
To: Marlaud, Angela
Cc: Jerome Sapiro; Robert L. Kehr; Kurt Melchior; Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G; pkramer@energy.state.ca.us
Subject: Final RRC Agenda Submission - 1.11 [3-310] - IV.E. - December 11-12, 2009 Agenda Materials

Greetings Angela:

I've attached a single, scaled PDF file that includes the following documents for this Rule (please use this e-mail as the cover memo for the Agenda item):

1. Dashboard, Draft 2 (11/23/09);
2. Rule & Comment Chart, Draft 3 (11/23/09)JS-KEM;
3. E-mail Compilation Excerpt, pages 63-72.

NOTES TO COMMISSION:

1. Nearly all of the Rule and comment has been approved, so we should be able to complete the rule during the December meeting for inclusion in the Batch 6 public comment submission that is due at the BOG's January 7, 2010 meeting. I've highlighted in yellow in the attached comparison chart the major issues that remain.

2. The major issues that remain are:

- a. The two issues George raised concerning paragraph (e): (i) subparagraph (e)(1), which as drafted requires the U.S. Attorney office to recuse itself if the incoming U.S. Attorney brings with him or her a conflict with, for example, an ongoing investigation, or have the involved lawyers be subject to discipline; and (ii) subparagraph (e)(3), particularly the second sentence, requiring notice to the former client. See also Comment [9C].

- (1) Both issues are discussed extensively in footnote 20 of the Comparison Chart.
 - (2) There is disagreement among the drafters on these issues; the different positions of the drafters are explained in the footnote.
- b. The addition of a Comment to explain that a government lawyer's personal participation in a matter in which he or she was personally and substantially involved while at a private firm requires not only the informed written consent of the affected government agency (per (d)(2)(i)), but also that of the former client per (d)(1) [Rule 1.9 applies]. See Comment [9A] and the heading accompanying it.
- (1) See footnote 42 (which appears on the page preceding [9A]; thank you, Bill Gates).
 - (2) Again, there is disagreement among the drafters, whose positions are explained in the footnote.
3. Comments [2A] and [Alt-2A]. Consideration of these comments was deferred pending a final decision on the content of paragraph (e). See footnotes 28-30.
4. Please note that we have also renumbered what were Comments [9A] through [9D] in the previous draft as Comments [9B] through [9E]. With the exception of [9D], they are all still at issue. For the most part, their resolution depends on the resolution of the issues in footnote 20 (Item #2, above). However, the Commission will also have to vote between the alternatives: [9B] vs. [Alt-9B], [9C] vs. [Alt-9C], and [9E] vs. [Alt-9E].

I'll send on the underlying Word documents to the drafters and staff at a later date.

Please let me know if you have any questions. Thanks,

Kevin

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Proposed Rule 1.11 [N/A]

“Special Conflicts Of Interest For Former And Current Government Officers And Employees”

(Draft #6.1, 11/23/09)

Summary: Proposed Rule 1.11 is based on Model Rule 1.11 and addresses conflicts arising from a lawyer moving to or from government service. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule’s topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864].

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input checked="" type="checkbox"/> Some material additions to ABA Model Rule	<input checked="" type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input checked="" type="checkbox"/> Some material deletions from ABA Model Rule
<input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law

Rule	RPC 3-310.
Statute	
Case law	<i>City & County of San Francisco v. Cobra Solutions, Inc.</i> (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]; <i>City of Santa Barbara v. Superior Court</i> (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403].

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

D.C. Rule 1.11; N.Y. Rule 1.11.

- Other Primary Factor(s)

Stakeholders and Level of Controversy

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

The proposed Rule departs from the Model Rule by requiring that a government lawyer's disqualification be imputed to other lawyers in the governmental organization that employs the lawyer unless the former client consents or the disqualified lawyer is screened.

Not Controversial – Explanation:

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:</p> <p>(1) is subject to Rule 1.9(c); and</p>	<p>(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:¹</p> <p>(1) is subject to Rule 1.9(c); and²</p>	<p>Paragraphs (a) and subparagraph (1) are identical with the Model Rule.</p>
<p>(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 consent, confirmed in writing, to the representation.</p>	<p>(2) shall not otherwise³ 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 <u>written</u> consent, confirmed in writing, to the representation. <u>This paragraph shall not apply to matters governed by Rule 1.12(a).</u>⁴</p>	<p>Paragraph (a)(2) tracks the approach of Model Rule paragraph (a)(2). However, the Commission has changed “consent, confirmed in writing” to “informed written consent” because the latter provides more client protection.</p> <p>The last sentence of this paragraph has been added to make clear that matters that come within the scope of proposed Rule 1.12(a) are governed by that rule and not by Rule 1.11. Lawyers should not be in a quandary about which rule applies in a given circumstance.</p>

* Proposed Rule 1.11, Draft 6.1 (11/23/09); Redline/strikeout showing changes to the ABA Model Rule

¹ Paragraph (a) is identical to Model Rule 1.11. It was deemed approved on May 9, 2009. See 5/8-9/09 KEM Meeting Notes, III.D., at ¶. 1.

² On May 9, 2009, a proposed change from “is subject to” to “shall comply with” was defeated by a 8-2-1 vote. See 5/8-9/09 KEM Meeting Notes, III.D., at ¶. 2A.

³ On May 9, 2009, a motion to delete “otherwise” was defeated by a 2-8-1 vote. See 5/8-9/09 KEM Meeting Notes, III.D., at ¶. 4A.

⁴ This sentence was approved on May 9, 2009. It is adapted from New York Rule 1.11, effective in April 1, 2009. A motion to place this sentence in a comment was defeated by a 3-7-2 vote. See 5/8-9/09 KEM Meeting Notes, III.D., at ¶. 5A.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(b) When a lawyer is disqualified 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:</p>	<p>(b) When a lawyer is disqualifiedprohibited from representation under paragraph (a),⁵ no lawyer in a firm with which that lawyer is associated may knowingly⁶ undertake or continue representation in such a matter unless:⁷</p>	<p>Proposed paragraph (b) is substantially the same as Model Rule 1.11(b). However, the word “disqualified” has been changed to “prohibited” because whether a lawyer is potentially subject to discipline will be determined by this rule, but whether a lawyer will be disqualified by representation will be a matter for decision by the tribunal before whom the lawyer appears.</p> <p>Under paragraph (b), a law firm could use screening in order to avoid imputation of a conflict from one lawyer to the rest of the law firm.</p> <p>A minority of the Commission dissents from this paragraph because the use of the word “knowingly” will require actual</p>

⁵ **RRC Action:** At the 7/24-25/09 meeting, beginning paragraph (b) to track the Model Rule, with the substitution of “prohibited” for “disqualified” was deemed approved. See 7/24-25/09 KEM Meeting Notes, III.C., at ¶. 4.d.

⁶ **RRC Action:** On July 24, 2009, the use of the word “knowingly” was approved by 9-3-2 vote. See 7/24-25/09 KEM Meeting Notes, III.C., at ¶. 5A. Bob Kehr and Jerry Sapiro dissent from that decision. They think this is a substantive error. Using “knowingly” immunizes from discipline a lawyer who does not even run a conflicts check. Bob and Jerry would substitute for “knowingly” the phrase “and who knows or reasonably should know of the lawyer’s prior participation” or words to that effect.

⁷ **RRC Action:** Paragraph (b) is substantially the same as the Model Rule. It and its subparagraphs were approved on July 24 and 25, 2009. The changes are to avoid using the word “disqualified,” which is used in the Model Rule. The proposed paragraph would permit a firm to use screening to avoid imputed disqualification. It does not include any standards for screening and does not require that the screening and written notice to the government agency be done either promptly or reasonably. Those are to be considered, if at all, in the Terminology rule. The specific votes:

The introductory clause, except with “prohibited” substituted for “disqualified” was approved by a 11-2-0 vote. See 7/24-25/09 KEM Meeting Notes, III.C., at ¶. 4B.

The RRC voted 9-3-2 to retain the word “knowingly.” See Id. at ¶. 5A.

As to having a separate, global terminology section similar to MR 1.0, it was deemed approved See Id. at ¶. 9A.

As to the suggestion to treat screening globally in a terminology section, but without prejudice to inserting additional comments specific to screening in a government lawyer context, it was deemed approved. See id., at ¶. 10.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>knowledge before a lawyer who has a conflict of interest under this rule may be disciplined. That will immunize from discipline a lawyer who does not bother to check for conflicts of interest. The lawyer who knows or reasonably should know that he or she is prohibited from representation under this rule ought to be subject to discipline, and not merely the lawyer that OCTC can prove had actual knowledge.</p>
<p>(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and</p> <p>(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.</p>	<p>(1) the disqualified personally prohibited⁸ lawyer is timely and effectively⁹ screened from any participation in the matter and is apportioned no part of the fee therefrom;¹⁰ and</p> <p>(2)¹¹ written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this ruleRule.</p>	<p>Subparagraphs (1) and (2) substantially track the language of the Model Rule. However, "prohibited" is substituted for "disqualified" for the same reasons stated in respect to paragraph (b), <i>supra</i>.</p> <p>The phrase "and effectively" has been added in order to require a law firm to create an effective screen before it may avoid imputation of a lawyer's conflict to other members of the firm. This is similar to a change adopted by New York in its version of Rule 1.11(b)(1)(ii).</p> <p>In subparagraph (2), "rule" has been capitalized in accordance with the convention followed by the Commission in referring to</p>

⁸ **RRC Action:** At the 11/6-7/09 meeting, substitution of "personally prohibited" for "prohibited lawyer" throughout the Rule was deemed approved. See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 4.

⁹ **RRC Action:** See footnote 14, below.

¹⁰ **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 13-1-0 to adopt MR 1.11(b)(1), except with "prohibited" substituted for "disqualified." See 7/24-25/09 KEM Meeting Notes, III.C., at ¶. 6. This had been paragraph (b)(3) in proposed Draft 2 (7/7/09).

¹¹ **RRC Action:** At the 7/24-25/09 meeting, the RRC voted 12-1-1 to adopt MR 1.11(b)(2). See 7/24-25/09 KEM Meeting Notes, III.C., at ¶. 7. This had been paragraph (b)(4) in proposed Draft 2 (7/7/09).

In addition, at the same meeting, the RRC voted 12-0-1 to delete paragraphs (b)(1) and (b)(2) in proposed Draft 2 (7/7/09). See *id.* at ¶. 8A.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, 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 and which, 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 which 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 disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.</p>	<p>(c)¹² Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, 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 and which, 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 which 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 disqualified <u>personally prohibited</u>¹³ lawyer is timely <u>and effectively</u>¹⁴ screened from any</p>	<p>these rules.</p> <p>Proposed paragraph (c) substantially tracks the wording of Model Rule 1.11(c). However, in the second sentence, the subordinate clauses have been broken up by commas, and the word "that" is used for clarity and for correct parallel construction.</p> <p>In the third sentence, "prohibited" has been substituted for the word "disqualified" because this rule will be applied in disciplinary matters, while whether a law firm will or will not be disqualified is a matter for decision by the tribunal before which the law firm is appearing.</p> <p>The phrase "and effectively" has been added in order to require that, before a law firm may avoid imputation of a lawyer's conflict to the rest of the firm, the firm's screen must be effective.</p>

¹² **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to delete paragraph (c) by a 2-9-1 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at p. 2A.

¹³ See footnote 8.

¹⁴ **RRC Action:** At the 8/28-29/09 meeting, the RRC voted 6-4-1 to retain the phrase "and effectively" in paragraph (c). See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 3A. The Chair deemed approved the addition of "and effectively" to paragraph (b)(1). Id. at ¶. 3B.

Finally, the Consultant noted the necessity to change the phrase "promptly and reasonably" in proposed Rule 1.12(d)(1) to "timely and effectively." Id. at ¶. 3C.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>participation in the matter and is apportioned no part of the fee therefrom.</p>	
<p>(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:</p>	<p>(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:</p>	<p>Paragraph (d) and its subparagraphs are substantially the same as Model Rule 1.11(d).</p>
<p>(1) is subject to Rules 1.7 and 1.9; and</p>	<p>(1) is subject to Rules 1.7 and 1.9; and</p>	
<p>(2) shall not:</p> <p>(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 consent, confirmed in writing; or</p>	<p>(2) shall not:</p> <p>(i) participate in a matter in which the lawyer participated personally and substantially¹⁵ while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed <u>written</u> consent⁷.</p>	<p>In subparagraph (d)(2)(i), “informed written consent” has been substituted for “consent confirmed in writing” because the phrase “informed written consent” provides greater client protection than the Model Rule formulation.</p>

¹⁵ **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to delete the term “personally and substantially” from paragraph (d)(2) and both its subparagraphs by a 0-9-3 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 7A.

¹⁶ **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to insert in the black letter of paragraph (d)(2)(i) the express requirement that the lawyer must obtain the consent of the former client by a 0-9-3 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 8A.

Prior to the 11/6-7/09 meeting, the Consultant requested that the Commission revisit that issue. See Draft 5.2 (10/28/09), at n. 16. During the meeting, the lead drafter and Consultant agreed the issue could be addressed in a comment, and that suggestion was deemed approved. See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 1.b. See Comment [9A], below.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(ii) negotiate for private employment with any person who is involved as a party or as lawyer 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).</p>	<p align="center">confirmed in writing; or¹⁶</p> <p>(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, except¹⁷ that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator¹⁸ may negotiate for private employment as permitted by Rule 1.12(b)¹⁹ and subject to the conditions stated in Rule 1.12(b).</p>	

¹⁷ **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to delete the language in paragraph (d)(2)(ii) from “except” to then end by a 2-9-0 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 9A.

¹⁸ **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated by a 4-7-0 vote a motion to revise paragraph (d)(2)(ii) as follows:

“ . . . judge, to another adjudicative officer or to an arbitrator . . . “

See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 9B.

¹⁹ **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to delete the first reference to “1.12(b)” paragraph (d)(2)(ii) by a 3-6-0 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 9C.

<u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Commission's Proposed Rule*</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	<u>Explanation of Changes to the ABA Model Rule</u>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(e)²⁰ If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule²¹, no other lawyer serving in the same government office, agency or department as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:</p>	

²⁰ **RRC Action:** During the 11/6-7/09 meeting, Jerry Sapiro joined in KEM's proposed paragraph (Alt-e), with several stylistic changes. Those changes have been implemented below. See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 2 & footnote.

The paragraph has been re-lettered "(e)".

At the same meeting, a motion to delete paragraph (e) in its entirety was defeated by a 3-5-1 vote. See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 2A.

Further Drafting & Drafters' Disagreement: At the same meeting, the Chair directed the drafters to attempt to draft a "good cause" exception that would enable the government, e.g., the U.S. Attorney, to continue an ongoing Grand Jury investigation, etc., in the event the appointed U.S. Attorney is disqualified because of previous representation while in the private sector. See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 2D.

Consultant's Note: There are two issues that George Cardona raised during our meeting: (1) the problem with applying *Cobra Solutions* to an appointed U.S. Attorney who joins the office in the midst of an investigation of the lawyer's former client (i.e., stating expressly, as we have, that screening will not avoid DQ of the entire U.S. Attorney Office in that situation); and (2) requiring notice to the former client to enable it to monitor the screen's effectiveness.

Issue (1): Cobra Solutions. *Cobra* is the law. The only solution I see is one that was suggested during the meeting: delete proposed subparagraph (e)(1) from the black letter and place it in a comment, e.g., simply apprise lawyers that *Cobra* is out there and the risks w/ implementing a screen for the head of an office. Although removing *Cobra* from the black letter will not avoid the office's DQ should the federal court decide to apply *Cobra*, it will at least protect the lawyers in the office from discipline. The Comment could provide something along these lines:

[X] Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely and effectively screened and notice is given promptly to the former client to enable it to ensure the government's compliance with the screen. However, if the personally prohibited lawyer is (i) the head of the office, agency or department, or a lawyer with comparable managerial authority, or (ii) a lawyer with direct supervisory authority over any of the lawyers participating in the matter, then both the personally prohibited lawyer and the office may be disqualified from the representation. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 852-54 (2006).

Note, however, that proposed Comment [9E] (or its alternative, [Alt-9E]), may work just as well if we deleted subparagraph (e)(1). See footnotes 48 & 49, below.

In any event, the Commission cannot ignore *Cobra*. Putting it in the comment will remove the specter of discipline from the equation but put the interested parties on notice that they run the risk of disqualification should they proceed as they have in the past: screening the new U.S. Attorney in the event he or she brings or has brought a conflict to the job. However, I don't see how we can carve out a "good faith" exception as to this issue. The situation George Cardona presented closely tracks the facts of *Cobra Solutions*: The head of the office (U.S. Attorney/City Attorney) brings with him or her a conflict of interest from the office head's former private firm in the midst of an investigation/action against a former client of the firm in the same or substantially related matter. The Supreme Court was well-aware of the policy issues militating against disqualification of the office and permitting screening – the cost to the public fisc, loss of specialized expertise of the lawyers handling the case and the concomitant loss of time by requiring new counsel to familiarize themselves with the case, and the deleterious effect on government recruitment efforts (see 38 Cal.4th 839, 851-52) – but chose to adopt a bright-line rule prohibiting the office from screening the head of the office. If anything, *Cobra Solutions* presented a stronger case for a "good faith" exception: *Cobra Solutions* involved an elected official, Daniel Herrera. The U.S. Attorney is typically a political appointee. In the latter situation, the opportunity to avoid the kinds of conflicts that might arise would appear to be greater than in an elected official scenario (i.e., by simply not appointing the person).

Drafters' Disagreement re Issue (1): Jerry Sapiro would not remove paragraph (e)(1) from the Rule. See 11/21/09 Sapiro E-mail to Drafters, cc Lamport & Kramer, in E-mail Compilation. In particular, Jerry argues in ¶¶. 23-25 of his e-mail that U.S. Attorney offices have already fashioned a work-around to this problem.

Bob Kehr would delete paragraph (e)(1), include the foregoing "Comment [X]," but change "may" to "might" in the next to last sentence of the Comment. See 11/22/09 Kehr E-mail to Drafters, cc Lamport & Kramer, ¶.2.

KEM leans toward deleting paragraph (e)(1), including the foregoing "Comment [X]," but not changing the "may" to "might". Either "may" or "might" is acceptable grammatically, both being concerned with "possibility". Generally, "might" suggests a smaller possibility. In light of *Cobra*, I believe that "may" is the correct word.

Issue (2): Notice to Former Client. This is the issue that might warrant a good faith exception. Unlike other rules in which we've provided exceptions, I don't think the exception has to be in the Rule itself, at least not if we relegate subparagraph (e)(1) and the second sentence of subparagraph (e)(3) to a comment. However, I do not think we should give the U.S. Attorney's Office a free pass on this. For example, if the investigation is ongoing during the U.S. Attorney's confirmation process, then there should be no good faith exception. There is no reason why the government should not have to engage in a conflicts check before the U.S. Attorney is appointed. It should not only involve current investigations but also investigations reasonably certain to arise in the future (offshoots of current investigations). The more difficult issue is the Herrera case, where the conflict did not arise until over a year after Mr. Herrera had taken office. I don't think we can provide a blanket pass in this instance, but perhaps we can draft a nuanced comment along the lines of the advance waiver comment (i.e., Comment [31]) to Rule 1.7. I haven't attempted such a comment. I'd like to hear from the drafters whether they believe it is feasible. In essence, the comment would state that in some instances, notice may not be required, for example, where a conflict has arisen involving a lawyer during a Grand Jury investigation. This good faith exception should apply not only to the head of the office but to any lawyer in the office. We could also add that the government office must give the required notice as soon as reasonably practicable after the confidentiality of the investigation has been compromised, either by the investigation becoming public knowledge (e.g., targets or persons of interest being interviewed), an indictment, or a decision not to indict. At a minimum, however, we should delete the second sentence of subparagraph (e)(3), above, and rewrite or delete the last two sentences of Comment [9C] (or [Alt-9C]).

Drafters' Disagreement re Issue (2): Jerry Sapiro strongly objects to any good faith exception to the notice requirement. See 11/21/09 Sapiro E-mail to Drafters, cc Lamport & Kramer, at ¶¶. 26-28.

Bob Kehr disagrees and does not favor notice to the former client. See 11/22/09 Kehr E-mail, at ¶. 3 (p. 71 of Compilation).

KEM agrees with Jerry Sapiro that notice to the former client should be required.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(1)²² the personally prohibited lawyer is neither (i) the head of the office, agency or department, or a lawyer with comparable managerial authority, nor (ii) a lawyer with direct supervisory</p>	

²¹ **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to retain the first sentence of proposed paragraph (e) by a 4-7-1 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 10A. That sentence provided:

If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule and is the head of the government office, agency, or department or is supervisory lawyer therein, no lawyer serving in the same government office, agency, or department may knowingly undertake or continue representation in the matter.

At the same meeting, the RRC defeated a motion to retain the second sentence of proposed paragraph (e) by a 3-7-1 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 10B. That sentence provided:

If the prohibited lawyer is not head of the office, agency or department and is not a supervisory lawyer therein, no other lawyer therein may knowingly undertake or continue representation in the matter unless:

With the deletion of introductory clause of paragraph (e), the remainder of the paragraph was deemed deleted. Id.

²² **Drafters' Disagreement:** The drafters disagree on whether the substance of paragraph (e)(1) should remain in the Rule or be moved to a comment. See footnote 20, Issue (1).

²³ **Drafters' Explanation of the Substance of Paragraph (e)(1) [regardless of whether it is placed in the Rule itself or in a comment]:** Rather than place the condition of not being the head of the office or supervisor in the introductory clause, we believe it would be cleaner to track the language of paragraph (b) in the introductory clause, and insert the requirement that the migrating lawyer not be the head of, or a supervisory lawyer in, the office as a subparagraph along with the other conditions to permitting screening.

We've added the phrase "or a lawyer with comparable managerial authority," which is taken from Model Rule 5.1(a) (and our proposed Rule 5.1) in an attempt to encompass other lawyers in senior management in the government office who might be able to influence lawyers handling the matter in a manner similar to that of the office head. The Court in *Cobra Solutions* did not reach that issue but suggested it might be a problem.

In addition, we tweaked the "supervisory" lawyer prohibition to require only those lawyers with "direct supervisory authority" over the other lawyers working on the matter. This language is taken from MR 5.1(b). We should not extend the holding of *Cobra Solutions* to mid-level supervisors who have no authority over the lawyers actually working on the matter.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>authority over any of the lawyers participating in the representation;²³</p>	
	<p>(2) the personally prohibited lawyer is timely and effectively screened from any participation in the matter; and</p>	
	<p>(3)²⁴ the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements. However, if notice to the former client is prohibited by law or by Rule 1.6, the exception to the imputation of the prohibited lawyer's conflict of interest to other lawyers in the office, agency, or department under this paragraph (e) shall not be available.</p>	

But see footnote 20, which describes the disagreement among the drafters on the placement of paragraph (e)(1)'s concept.

²⁴ **Drafters' Disagreement:** Bob prefers that we treat the notice requirements for a screen globally but regardless, does not believe we should require notice in this situation. See 11/22/09 Kehr E-mail, ¶. 3.

Jerry and KEM want to address notice specifically in this Rule.

However, **KEM** believes that the second sentence of paragraph (e)(3) should be deleted. See footnote 20, above.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(e) As used in this Rule, the term "matter" includes:</p> <p>(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</p> <p>(2) any other matter covered by the conflict of interest rules of the appropriate government agency.</p>	<p>(ef)²⁵ As used in this Rule, the term "matter" includes:²⁶</p> <p>(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</p> <p>(2) any other matter covered by the conflict of interest rules of the appropriate government agency.</p>	<p>Proposed paragraph (f) and its subparagraphs are identical with Model Rule 1.1(e) and its subparagraphs. That paragraph has been re-lettered because of the addition of new paragraph (e), which does not have a counterpart in the Model Rule.</p>

²⁵ **RRC Action:** In light of the fact that the RRC did not adopt a universal definition for "matter," see 11/6-7/09 KEM Meeting Notes, IV.A., at ¶. 17A, the definition of "matter" in paragraph (f) remains. See id., IV.D., at ¶. 5.b.

²⁶ **RRC Action:** At the 8/28-29 meeting, the RRC defeated by a 2-7-2 vote a motion to add a provision that would prohibit a lawyer who holds public office from using the public position to obtain special advantage in legislative matters for the lawyer or for a client when the lawyer knows or it is obvious that such action is not in the public interest, etc. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 12A.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.</p>	<p>[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the<u>these</u> Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 <u>and conflicts resulting from duties to former clients as stated in Rule 1.9</u>. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 4-0<u>1.0.1</u>(e) for the definition of "informed <u>written</u> consent."²⁷</p>	<p>Proposed Comment [1] is substantially the same as Model Rule Comment [1]. However, the reference to the Rules of Professional Conduct has been changed to "these Rules" to conform with the drafting convention the Commission is following. The reference to Rule 1.9 has been added because a lawyer who served or who is currently serving as a public officer or employee is subject to both Rule 1.7 and Rule 1.9. "Informed consent" has been changed to "informed written consent" in the last sentence because it affords greater protection to the government agency.</p>
<p>[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. 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. Because of the special problems raised by imputation within a government agency, paragraph</p>	<p>[2]²⁸ [JS] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraphs (b) <u>and (e) sets forth a special imputation rules</u> for former <u>and current</u> government lawyers. <u>They also that provides for screening and notice.</u> Because of the special</p>	<p>The first sentence of proposed Comment [2] is identical with its counterpart in the Model Rule.</p> <p>The Commission modified the second sentence to refer to both paragraphs (b) and (e), and to refer to both former and current government lawyers, because the rule applies to both former and current government lawyers and because those paragraphs establish imputation and screening rules for the two sets of lawyers.</p>

²⁷ **RRC Action:** At the 11/6-7/09 meeting, the RRC voted 9-1-1 to adopt MR 1.11, cmt. [1], as revised by the drafters in Draft 5.2 (10/28/09). See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 6. With the acceptance of the revised Model Rule comment, the three replacement paragraphs prepared by Stan Lampert were deemed rejected. See id., at ¶. 6.a.

²⁸ **Consultant's Note:** Because the subject of Comment [2] and [Alt-2] includes paragraph (e), at the 11/6-7/09 meeting, consideration of these two comments was postponed until a revised paragraph (e) was presented to the RRC. See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 9.

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<p>(d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.</p>	<p>problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers. Paragraphs (b) and (e) permit the conflicts of a lawyer formerly or currently serving as an officer or employee of the government to be imputed to other lawyers in the law firm or to other associated government officers or employees.²⁹</p>	<p>The third sentence has also been modified to reflect that change.</p> <p>The Commission deleted the fourth sentence because it is not consistent with California law. See <i>City & County of San Francisco v. Cobra Solutions, Inc.</i> and <i>Younger v. Superior Court</i>, both <i>supra</i>.</p> <p>The new fourth sentence has been added in order to accurately reflect what this rule will provide.</p> <p>NOTE: SEE [Alt-2], BELOW, FOR AN ALTERNATIVE PROPOSAL FOR THIS COMMENT.</p>

²⁹ Original sentence deleted and new sentence added in order to make explicit the difference between this proposed rule and Model Rule 1.11(d).

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	<p>[Alt-2] <u>[KEM]</u> Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. 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. Because of the special problems raised by imputation within a government agency, paragraph Paragraph (d) does not impute provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, but also provides for screening and notice in certain situations although ordinarily it will be prudent to screen such lawyers.³⁰</p>	<p>NOTE: The redline strikeouts and underlines are to Jerry's proposed revision of Comment [2], above.</p>
<p>[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</p>	<p>[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</p>	<p>This proposed Comment is substantially the same as Model Rule Comment [3]. The references to "this Rule" and to specific paragraphs of Rule 1.11 have been added for clarity.</p>

³⁰ **Consultant's Note/Recommendation:** I've suggested a slightly different version of Jerry's proposed Comment [2]. Rather than address paragraphs (b) (former government lawyer) and (e) (current government lawyer) together, I have addressed them in separate sentences.

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<p>example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later 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 these paragraphs.</p>	<p>example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later 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 these paragraphs (a)(2) and (d)(2).³²</p>	
<p>[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,</p>	<p>[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,</p>	<p>Proposed Comment [4] is substantially the same as Model Rule Comment [4]. The reference to paragraph (e) has been added because that paragraph has been added to the black letter rule.</p> <p>The reference to "this Rule" has been changed because this rule does not dictate how a tribunal may rule on the subject of disqualification and because the rewording makes the next to last sentence active voice instead of passive.</p> <p>The last sentence has been revised because this rule does not dictate whether a lawyer or law firm will be disqualified. Instead, this rule is a disciplinary rule, and the subject of disqualification will be decided by tribunals on a case by case basis.</p>

³² **RRC Action:** At the 9/11/09 meeting, adoption of what was denominated Comment [Alt-3] in the meeting draft, which included the foregoing changes to MR 1.11, cmt. [3], was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 7.b. At the 11/6-7/09 meeting, the RRC confirmed that decision by a 10-0-1 vote. See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 8.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.</p>	<p>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) are necessary to prevent the disqualification rule <u>this Rule</u> from imposing too severe a deterrent against entering public service. The limitation <u>limitations of disqualification representation</u> in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification <u>imputing conflicts</u> to all substantive issues on which the lawyer worked, serves a similar function.³³</p>	
	<p><u>[4A]³⁴ 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.</u></p>	<p>The Model Rule does not have a counterpart of proposed Comment [4A]. The Commission added it to make clear the purposes of Rule 1.11(a)(1) and (c). This comment has been copied from proposed New York Rule 1.11 Comment [4A].</p>

³³ **RRC Action:** At the 9/11/09 meeting, a motion to strike the Comment except for the last two sentences was defeated by a 4-4-2 vote. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 8A. At the 11/6-7/09 meeting, Comment [4] was deemed approved. See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 9.

³⁴ **RRC Action:** At the 9/11/09 meeting, proposed Comment [4A], derived from NY Rule 1.11, was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 9.b. The words “or require” that appear in the New York comment were deleted as has been done throughout the Rules.

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	<p><u>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 and effectively screened. Thus, the 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.</u></p>	

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. 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 [9].</p>	<p>[5]³⁵ 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. However, because <u>Because</u> the conflict of interest is governed by paragraph<u>paragraphs (d) and (e)</u>, the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do.³⁶ 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 [9]¹⁴.</p>	<p>The first sentence of proposed Comment [5] is identical with that in Comment [5] of the Model Rule. The second sentence has been deleted because conflicts of interest may be imputed to an entire government agency under California law. See <i>City and County of San Francisco v. Cobra Solutions, Inc.</i> and <i>Younger v. Superior Court</i>, both <i>supra</i>.</p> <p>In the last sentence, the citation has been changed to Comment [14] of proposed Rule 1.13 because that is the California counterpart of Comment [9] of Model Rule 1.13.</p>
<p>[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or</p>	<p align="center"><u>Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)</u></p> <p>[6]³⁷ Paragraphs (b) and (c) contemplate a screening arrangement <u>for former government lawyers</u>. See Rule 4-0<u>1.0.1</u>(k) (requirements for screening procedures). These paragraphs do not</p>	<p>This Comment is identical to Model Rule Comment [6].</p> <p>The second sentence is in brackets because the Commission will need to revisit it, depending on what the definition of "screening" will be in proposed Rule 1.0.1.</p>

³⁵ **RRC Action:** At the 9/11/09 meeting, adoption of MR 1.11, cmt. [5] was deemed approved, but with the deletion of the Model Rule comment's second sentence and substitution of the correct number of the comment to proposed Rule 1.13. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 10.b.

³⁶ **Consultant's Note:** I've suggested a substitute sentence in the event the Commission adopts paragraph (e). My proposed replacement of the second sentence of the Comment depends upon whether the Commission retains paragraph (e) in the Rule.

³⁷ **RRC Action:** At the 9/11/09 meeting, the RRC voted 6-2-0 to retain MR 1.11, cmt. [6]. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 11A.

<p align="center"><u>ABA Model Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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.</p>	<p>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.</p>	
<p>[7] Notice, 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.</p>	<p>[7]³⁸ 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.</p>	<p>This Comment is substantially the same as Model Rule Comment [7]. The phrase "to the appropriate government agency" is added in order to make clear to whom the notice must be given.</p>
<p>[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.</p>	<p>[8]³⁹ Paragraph (c) operates only when the lawyer in question has actual knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.</p>	<p>This Comment is substantially the same as Model Rule Comment [8]. It has been reworded for brevity. In its proposed comments, New York made the same change.</p> <p>A minority of the Commission disagrees with the substance of this comment because both this comment and the Model Rule permit easy evasion of the client protections of Rule 1.11 by a lawyer who does not, for example, run a conflicts of interest check and thereby evades actual knowledge of the conflict.</p>

³⁸ **RRC Action:** At the 9/11/09 meeting, adoption of MR 1.11, cmt. [7], as revised to add "to the appropriate government agency," was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 14.a.

³⁹ **RRC Action:** At the 9/11/09 meeting, adoption of MR 1.11, cmt. [8], as revised to substitute "actual" for the clause, "which means actual knowledge," was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 15.b.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[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.</p>	<p>[9]⁴⁰ 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.</p>	<p>This proposed Comment is identical to Model Rule Comment [9].</p>
	<p><u>Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and</u></p>	

⁴⁰ **RRC Action:** At the 9/11/09 meeting, adoption of MR 1.11, cmt. [9] was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 16.a.

⁴¹ **Drafters' Note/Recommendation:** Include this heading to separate the concept of consented-to participation of the personally prohibited lawyer under (d)(2)(ii) from the screening of that lawyer under paragraph (e).

⁴² **Drafters' Disagreement:** At the 11/6-7/09, inclusion of a comment that addressed the required consents to permit a government office or employee to participate personally in a matter in which the lawyer had participated personally and substantially while in private practice was deemed approved. See 11/6-7/09 KEM Meeting Notes, IV.D., at ¶. 1.b. See also footnote 16. KEM recommends adoption of Comment [9A]. RLK agrees.

Jerry Sapiro recommends the following comment:

[Alt-9A] As stated in subparagraph (d)(1), a lawyer who is a government officer or employee must also comply with Rules 1.7 and 1.9. Thus, if he or she has more than one client whose interests may conflict, he or she will have to obtain the informed written consent of all the clients as required by Rule 1.7. A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice, non-governmental employment, or employment by another government agency 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

Consultant's Note: Jerry's proposal incorrectly expands the scope of the Rule. First, by its terms, paragraph (d)(2)(i) applies only when a lawyer "participated" in the matter. Rule 1.7 has no applicability in that instance and should not be included in the Comment. Second, the black letter does not address the situation where a lawyer was employed by another government agency; it applies only when the lawyer "participated ... while in private practice or nongovernmental employment." The Comment should not be expanded beyond language of the Rule. Nor should the Rule be changed. The reference to 1.7 is to alert lawyers who are part-time government lawyers that they must comply with Rule 1.7 in the event of a concurrent conflict of interest. The situation being addressed in paragraph (d)(2)(i) and Comment [9A] is a conflict that results from successive representation.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>substantially.</u>⁴¹</p> <p>[9A]⁴² 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).</p>	
	<p><u>Screening of Current Government Lawyers Pursuant to Paragraph (e)</u></p> <p>[9B]⁴³ [JS] Paragraph (e) of this Rule permits a current government lawyer to undertake or continue a representation notwithstanding the conflicts of interest of another lawyer in the same office, agency or department if (i) the lawyer reasonably believes that the lawyer can provide competent and diligent representation in the matter and (ii) the office acts promptly and reasonably to comply with the notice and screening requirements of subparagraph (2).</p>	<p>Subheadings have been added to ease of reference when reading the Comment.</p> <p>Proposed Comment [9A] has no counterpart in the Model Rule. Because proposed Rule 1.11(d) would permit imputation of conflicts of interest to an entire government law office, the Commission has added paragraph (e) which, under certain circumstances, would allow the government law office to use an ethical screen to prevent imputation of the conflicts of interest. Proposed Comments [9A] and [9B] explain how this rule operates and make clear that the government law office is still subject to rules of confidentiality.</p>

⁴³ Proposed Comments [9B] and [9C] are adapted from the comments proposed by New York.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[Alt-9B]⁴⁴ [KEM] Paragraph (e) of this Rule permits a current government lawyer to undertake or continue a representation notwithstanding the<u>that a</u> conflicts of interest of<u>prohibits</u> another lawyer in the same office, agency or department <u>from participating in the matter</u> if: (i) <u>the prohibited lawyer is neither the head of the office, agency or department, or a lawyer with comparable managerial authority, nor a lawyer with direct supervisory authority over any of the lawyers involved in the representation;</u> (ii) the lawyer reasonably believes that the lawyer can provide competent and diligent representation in the matter and (iii) the office acts promptly and reasonably to comply with<u>there is timely compliance with</u> the notice and screening requirements of subparagraph (2) <u>and (3).</u></p>	<p>NOTE: The redline strikeouts and underlines are to Jerry's proposed Comment [9A], above.</p>
	<p>[9C] [JS] <u>If the conflict arises from the government lawyer's prior representation of a client, the office, agency or department is required to notify the former client of the circumstances warranting the use of screens and the actions that have been taken to comply with the requirements of this Rule, unless providing notice would be in violation of law, such as Business & Professions Code section 6068(e), or</u></p>	<p>See Explanation of Changes for Comment [9A]</p>

⁴⁴ **Consultant's Note:** This is my proposed alternative to Comment [9B]. There is a problem with proposed Comments [9B] and [9C] that has arisen before in the context of other rules: NY is one of two states that has law firm discipline, so the NY comment can be written in the active voice. However, we have avoided doing that with Rule 1.12 and in the black letter of this rule (" . . . unless: . . . the prohibited lawyer is timely screened," etc.) I have revised the Comments accordingly and also suggest other revisions.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>Rule 1.6. <u>The requirement that the government lawyer's former client be notified cannot be fulfilled if notice would make public information that the government office, agency, or department is required to keep secret. For example, a prosecutor's office could not notify a personally disqualified lawyer's former client who is the subject of a pending grand jury investigation. In such circumstances, screening is not available.</u></p>	
	<p>[Alt-9C]⁴⁵ [KEM] If the conflict arises from the a government lawyer's prior representation of a client, the office, agency or department is paragraph (e) required requires to notify that the former client <u>be notified</u>⁴⁶ of the circumstances warranting the use of screens and the actions that have been taken to comply with the requirements of this Rule, unless providing notice would be in violation of law, such as Business & Professions Code section 6068(e)(1), or Rule 1.6. The requirement that the government lawyer's former client be notified cannot be fulfilled if notice would make public information that the government office, agency, or department is required to keep secret. For example, a prosecutor's office could not notify a personally disqualified prohibited lawyer's former client who is the subject of a pending grand jury investigation. In such circumstances,</p>	<p>NOTE: The redline strikeouts and underlines are to Jerry's proposed Comment [9B], above.</p>

⁴⁵ **Consultant's Note:** This is my proposed revision of Comment [9C].

⁴⁶ See footnote 44, Consultant's Note.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	screening is not available.	
	<p><u>This Rule Not Determinative of Disqualification</u></p> <p>[9D] This Rule does not address whether a law firm will be disqualified from <u>a representation in certain circumstances</u>. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal <u>in light of the relevant facts</u>.⁴⁷</p>	<p>NOTE: The redline strikeouts and underlines are to previous draft of the Rule considered at the 9/11/09 meeting.</p> <p>Proposed Comment [9C] is added in order to make clear that, although this rule affects discipline, whether a lawyer or law firm will or will not be disqualified as a matter to be determined by the appropriate tribunal and is not necessarily dictated by this rule. There is no model rule counterpart.</p>
	<p>[9E]⁴⁸ <u>If the personally conflicted lawyer is the head of an office, or a supervisory lawyer who has responsibility for overseeing the matter that gives rise to the conflict, screening may not avoid disqualification. See, e.g., City & County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 389, 852-54 (2006); and Younger v. Superior Court, 77 Cal. App. 3d 892 (1978).</u></p>	<p>Proposed Comment [9D] has been added to make clear why paragraph (e) of the black letter rule does not apply if the personally conflicted lawyer is the head of a government office or a supervisory lawyer who has responsibility for overseeing the matter that gives rise to the conflict. There is no model rule counterpart. This Comment accurately reflects California decisional law.</p>

⁴⁷ **RRC Action:** At the 9/11/09 meeting, the RRC voted 8-2-0 to adopt Comment [9D] (then numbered [9A]), as revised during the meeting. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 17A.

⁴⁸ See footnote 49, below.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[9D]Alt-9E⁴⁹ This Rule does not address whether screening may be utilized by a government office to avoid disqualification. If the personally conflicted prohibited lawyer is the head of an government office, agency or department, or a supervisory lawyer who has responsibility for overseeing the matter that gives rise to the conflict direct supervisory authority over any of the lawyers participating in the representation,⁵⁰ screening may not avoid disqualification. See, e.g., <i>City & County of San Francisco v. Cobra Solutions, Inc.</i>, 38 Cal. 4th 389, 852-54 (2006); and <i>Younger v. Superior Court</i>, 77 Cal. App. 3d 892 (1978).</p>	<p>NOTE: The redline strikeouts and underlines are to Jerry's proposed Comment [9D], above.</p>
<p>[10] For purposes of paragraph (e) 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.</p>	<p><u>Matter</u></p> <p>[10]⁵¹ For purposes of paragraph (ef) 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.</p>	

⁴⁹ **Consultant's Note:** At the 9/11/09 meeting, consideration of Comment [9E] (then numbered [9B]) was deferred pending the Commission's decision re proposed paragraph (e). See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 18.a. This comment, [Alt-9E] represents my proposed revision of the Comment that was under consideration at that meeting.

⁵⁰ See footnote 23, above. Language taken from Rule 5.1.

⁵¹ **RRC Action:** At the 9/11/09 meeting, adoption of MR 1.11, cmt. [10] was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 19.a.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>

**RRC – Rule 1.11 [3-310]
E-mails, etc. – Revised (12/08/2009)**

September 26, 2009 KEM E-mail to Sapiro, cc Drafters, Kramer, Lamport, Difuntorum & McCurdy:.....	54
September 26, 2009 Sapiro E-mail to KEM, cc Drafters, Kramer, Lamport, Difuntorum & McCurdy:.....	55
October 7, 2009 KEM E-mail to Drafters, cc Lamport, Chair, Paul Kramer (BOG) and Staff:.....	56
October 27, 2009 Kehr E-mail to KEM, cc Drafters:	57
October 27, 2009 KEM E-mail to Kehr, cc Drafters:	57
October 27, 2009 KEM E-mail to Drafters, cc Chair, Staff & Paul Kramer (BOG):.....	57
October 27, 2009 Sapiro E-mail to Drafters, cc Kramer:	58
October 27, 2009 Lamport E-mail to KEM, cc Drafters, Chair, Staff & Kramer:	58
October 27, 2009 KEM E-mail to Sapiro, cc Drafters, Chair, Staff & Kramer:.....	58
October 27, 2009 KEM E-mail to Lamport, cc Drafters, Chair, Staff & Kramer:	59
October 27, 2009 Sapiro E-mail to KEM, cc Drafters, Chair, Staff & Kramer:.....	59
October 27, 2009 Kehr E-mail to Sapiro, cc Drafters, Chair, Staff & Kramer:	59
October 28, 2009 Lamport E-mail to Drafters, cc Chair, Staff & Kramer:.....	60
October 28, 2009 KEM E-mail to Drafters, cc Chair, Staff & Kramer:	61
November 3, 2009 Sondheim E-mail to RRC:	62
November 14, 2009 KEM E-mail to Drafters (Sapiro, Kehr, Melchior), cc Chair, Lamport & Staff:	63
November 16, 2009 Lamport E-mail to KEM, cc Kehr, Melchior, Chair & Staff:.....	63
November 21, 2009 Sapiro E-mail to Drafters, cc Lamport & Paul Kramer:	64
November 21, 2009 Sapiro E-mail to Drafters, cc Lamport & Paul Kramer re Comment [9A]:	70
November 22, 2009 Kehr E-mail to Drafters, cc Lamport & Kramer:.....	70
November 23, 2009 Sapiro E-mail to Drafters, cc Lamport & Kramer:.....	71
November 23, 2009 KEM E-mail to Sapiro, cc Drafters, Lamport & Kramer:.....	72

November 14, 2009 KEM E-mail to Drafters (Sapiro, Kehr, Melchior), cc Chair, Lamport & Staff:

I've attached the following:

1. Draft 6 (11/12/09) of Rule 1.11, redline, compared to Draft 5.2 (10/28/09), the draft considered at the November 2009 meeting. The draft incorporates the changes approved at that meeting. In Word.
2. My meeting notes for 1.11 from that meeting. In PDF.

KEM Notes:

1. The major issues that remain are:

a. The two issues George raised concerning paragraph (e): (i) subparagraph (e)(1), which as drafted requires the U.S. Attorney office to recuse itself if the incoming U.S. Attorney brings with him or her a conflict with, for example, an ongoing investigation, or have the involved lawyers be subject to discipline; and (ii) subparagraph (e)(2), particularly the second sentence, requiring notice to the former client. See also Comment [9C]. I've given you my take on those issues in footnote 20 of the attached draft 6.

b. The addition of a Comment to explain that a government lawyer's personal participation in a matter in which he or she was personally and substantially involved while at a private firm requires not only the informed written consent of the affected government agency (per (d)(2)(i)), but also that of the former client per (d)(1) [Rule 1.9 applies]. See Comment [9A] and the heading accompanying it. I've also renumbered what were Comments [9A] through [9D] in the previous draft as Comments [9B] through [9E].

2. I have not attempted to update the comparison chart until we've resolved the foregoing issues. I (or Jerry) will need a little time to do that so I ask that the drafters resolve these issues by Saturday, 11/21, at 5:00 p.m. so that we can timely prepare the comparison chart and/or Introduction for submission to the Commission by the 11/22 deadline.

Please let me know if you have any questions.

November 16, 2009 Lamport E-mail to KEM, cc Kehr, Melchior, Chair & Staff:

Attached are the screening dissents to the two rules. Kurt had a general dissent to Rule 1.18 that he shared with me. I am not sure whether Kurt expected me to finish that dissent. Let me know if you have received anything from Kurt. If not I will get that dissent finalized and over to you later today.

Attachments:

- RRC - 1-18 - Dissent re Paragraph 1.18(d)(2) - DFT1 (11-16-09).doc
- RRC - 1-11 - Dissent re Paragraph 1.11(e) - DFT1 (11-16-09).doc

November 21, 2009 Sapiro E-mail to Drafters, cc Lamport & Paul Kramer:

1. At our last meeting, Mr. Cardona objected to proposed paragraph (e) because a United States Attorney Office may receive appointment of a new United States Attorney who has previously represented the subject of an investigation or an indictment. In the case of an investigation, he said the office would not be able to give notice of the existence of a screen to the former client of the new United States Attorney. He said he feared that another United States Attorney Office might have to take the case. Mr. Sondheim deferred a vote on proposed paragraph (e) to see whether there is some way of developing a concept of “good cause” so that the United States Attorney can continue the investigation without notice to the former client.
2. Mr. Cardona said that he would attempt to get permission to submit a proposal concerning this issue. I also asked him to let me know whether the United States Attorney Offices in California have been able to deal with *Younger* and *Cobra* problems and, if so, how. I have not heard from Mr. Cardona. While awaiting further communications from Mr. Cardona, I have done some research on the subject. This email reflects the result of that research. First, a disclaimer: because of the press of client business, I have not been able to do a thorough job of research and have not even been able to shephardize some of the cases that are discussed *infra*.
3. However, because I think the recusal of the entire United States Attorney Office is not likely to be required in this situation in most instances, I think we do not need a “good cause” exception. As you will see, the Department of Justice seems to have developed a cure for the infection caused by a conflicted head of office. They change the head of the office for the purpose of the tainted case.
4. First, let’s set the scene. A lawyer in private practice represents a client who is the subject of a criminal investigation, grand jury proceedings, or prosecution. The client tells all to the lawyer. Subsequently, the lawyer is appointed United States Attorney, becomes head of the office that is investigating or prosecuting the client. He or she withdraws from representing the client and moves into the prosecution role. >From the former client’s perspective, all his or her secrets are in the prosecution’s hands, and his or her former lawyer is now the prosecutor. Or from the public’s point of view, the prosecutor now has divided loyalty and may be biased in favor of his or her former client, so justice is not done. I assume we all agree that the new head of the office is prevented by Rule 1.9 from participating in the prosecution of the former client.
5. In proposed paragraph (e), we would permit screening to avoid imputation of the conflict of interest of a subordinate government attorney to the entire office. However, notice to the affected former client of that subordinate attorney would have to be given in order for the screen to avoid imputation. In addition, under the proposed paragraph, screening would not avoid imputation if the attorney who moves from private practice to government employment is supervising the matter that causes the conflict of interest or is head of the government office. In this respect, the proposed paragraph would follow California decisions such as *San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 (2006); and *Younger v. Superior Court*, 77 Cal. App. 3d 892 (1978). As stated by the Supreme Court in *Cobra*, 38 Cal. 4th at 846 (citations omitted):

Two ethical duties are entwined in any attorney-client relationship. First is the attorney’s duty of confidentiality, which fosters full and open communication between client and counsel, based on the client’s understanding that the attorney is statutorily obligated . . . to maintain the client’s confidences. . . . The second is the attorney’s duty of undivided loyalty to the client. . . . These ethical duties are

mandated by the California Rules of Professional Conduct. (Rules Prof. Conduct Rule 3-310(C) & (E).)

The interplay of the duties of confidentiality and loyalty affects the conflict of interest rules that govern attorneys. An attorney who seeks to simultaneously represent clients with directly adverse interests in the same litigation will be automatically disqualified. . . . Moreover, an attorney may not switch sides during pending litigation representing first one side and then the other. . . . That is true because the duty to preserve client confidences survives determination of the attorney's representation. . . .

4. In *Younger, supra*, Johnnie Cochran moved from private practice to the district attorney's office as a supervisory attorney. Although the office had erected an ethical screen to isolate Mr. Cochran, because he was near the top of the supervisory chain, the entire office was recused because his personal conflicts of interest were imputed to the entire office. *Younger*, 77 Cal. App. 3d at 895-97. In *Cobra* a member of the law firm that represented the client was elected city attorney and became the lead attorney in a civil case against his former client. His entire office was disqualified.

5. *Younger* and *Cobra* are not the only California cases on this subject. For example, *People v. Superior Court (Greer)*, 19 Cal. 3d 255, 266-67 (1977), affirmed an order requiring the Attorney General to replace the office of a district attorney. The district attorney's office had a conflict of interest because the mother of the homicide victim was a "discovery clerk" in the district attorney's office.^[1]

6. In *People v. Lepe*, 164 Cal. App. 3d 685 (1985), the trial court recused the district attorney and his entire office from a prosecution. Before he became district attorney, the district attorney defended Mr. Lepe against charges of assault on a third person and for intimidation of two witnesses. The current prosecution was for assault on those same two witnesses. The court of appeal affirmed the disqualification. It held that the district attorney's prior representation of the defendant necessarily included obtaining confidential information from the defendant. Therefore, the defendant was at risk of disclosure of that confidential information. That caused a conflict of interest and made it unlikely that the defendant would receive a fair trial, particularly because the defendant was contending that his plea bargain in the witness intimidation case was not valid and that the district attorney had not adequately represented him in the prior case. The court of appeal also affirmed the recusal of the entire office supervised by the district attorney.

As the deputies are hired by Storey [the district attorney], evaluated by Storey, promoted by Storey and fired by Storey, we cannot say the office can be sanitized such to assume the deputy who prosecutes the case will not be influenced by the considerations that bar Storey himself from participation in the case.

People v. Lepe, supra, 164 Cal. App. 3d at 689.

7. In our meetings, some have said that the law reflected in *Younger* and *Cobra* is "unsettled." I disagree. In *Cobra*, 38 Cal. 4th at 850, the Supreme Court said that the principles discussed in *Younger* "have not lost their relevance." Following *Younger*, the Court held that the entire office of the San Francisco City Attorney was recused because the City Attorney had formerly worked

in the firm that represented the defendant. Because he was the head of the office, the entire office was disqualified. The Court stated at 853-54:

Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants. The power to review, hire, and fire is a potent one. Thus, a former client may legitimately question whether a government law office, now headed by the client's former counsel has the unfair advantage of knowing the former client's confidential information when it litigates against the client in a matter substantially related to the attorney's prior representation of that client.

There is another reason to require the disqualification of the conflicted head a government law office. That reason arises from a compelling societal interest in preserving the integrity of the office of a City Attorney. It is beyond dispute that the citizens of a city are entitled to a City Attorney's office that unreservedly represents the City's best interests when it undertakes litigation. Public perception that a City Attorney and his deputies might be influenced by the City Attorney's previous representation of a client, at the expense of the best interests of the city, would insidiously undermine public confidence in the integrity of municipal government and its city attorney's office.

8. California is not alone in recusing an entire prosecutorial office if the head of the office is conflicted. Where the elected chief prosecutor who directed and supervised the entire office had represented the defendant in two prior convictions, the entire office was disqualified. “[I]n this case, the prosecutor who had the administrative control over the entire staff was the one who had formerly represented the particular defendant involved and, therefore, the trial court properly disqualified the entire staff of deputies.” *State v. Tippecanoe County Court*, 432 N.E. 2d 1377, 1379 (Ind. 1982).

9. In *State v. Stenger*, 760 P.2d 357, 361 (Wash. 1988), the Washington Supreme Court disqualified the entire office of a prosecutor where the death penalty was sought, and the district attorney had been the defendant's former counsel. The disqualification was ordered because the district attorney “. . . did not effectively screen and separate himself from the case but instead maintained quite close contact with it.” At 760 P.2d 2d 360-61, the Washington Supreme Court stated the principles well [footnotes omitted]:

4. Where the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has previously personally represented the accused in the same case or in a matter so closely interwoven therewith as to be in effect a part thereof, the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed. This is not to say, however, that anytime a prosecuting attorney is disqualified in a case for any reason that the entire prosecuting attorney's office is also disqualified. Where the previous case is not the same case (or one closely interwoven therewith) that is being prosecuted, and where, for some other ethical reason the prosecuting attorney may be totally disqualified from the case, if that prosecuting attorney separates himself or herself from all connection with the case and delegates full authority and control

over the case to a deputy prosecuting attorney, we perceive no persuasive reason why such a complete delegation of authority and control and screening should not be honored if scrupulously maintained.

5. There is a difference between the relationship of a lawyer in a private law firm and a lawyer in a public law office such as prosecuting attorney, public defender, or attorney general; accordingly, where a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.

6. Under the facts of the case before us, although the prosecuting attorney did eventually delegate handling of the case to a deputy prosecuting attorney in his office, he did not effectively screen and separate himself from the case but instead maintained quite close contact with it. We need go no further in this capital case in order to conclude that it is appropriate that a special prosecuting attorney be appointed to handle and control the case.

10. In *People v. Shinkle*, 415 N.E. 2d 909, 910 (N.Y. 1980), the former defense attorney became the chief assistant in the office of the prosecutor before and during defendant's trial. Relying on an "unmistakable appearance of impropriety" standard and because of "the continuing opportunity for breach of confidences", the court disqualified the entire office.

11. In *People v. Stevens*, 642 P.2d 39, 41 (Colo. Ct. App. 1981), defendant's former lawyer was hired by the district attorney. The conviction was reversed in part because the trial court denied a motion for appointment of a special prosecutor. The court said that any inconvenience to the prosecution resulting from the appointment of a special prosecutor, "usually a deputy district attorney from another judicial district," is ". . . but a small price to pay to avoid this appearance of impropriety."

12. In *State v. Chambers*, 86 N.M. 383, 524 P.2d 999, *cert. denied*, 86 N.M. 372 (1974), the defense attorney was appointed an assistant district attorney. The entire district attorney's office was disqualified.

13. In *State v. Cooper*, 63 Ohio Misc. 1, 409 N.E. 2d 1070 (Common Pleas 1980), the defense attorney was appointed an assistant county prosecuting attorney while the case was pending before a court. The court held that no showing of prejudice was required. The prosecuting attorney, his assistants, and the attorney aids on the staff of the prosecuting attorney were all recused.

14. Although it did not involve a prosecutor's office and was a civil case, the 8th Circuit reversed the decision of a district court refusing to disqualify the state's counsel in a civil anti-trust price fixing suit. *Arkansas v. Dean Food Pods Co.*, 605 F.2d 380, 387 (8th Cir. 1979), disqualified the state's counsel and his staff attorneys, but not his co-counsel.

15. The Model Rules do not impute disqualification within a government office. Model Rule 1.10 contains the general imputation rule. In 2002, it was revised to make explicit that Rule 1.11, and not 1.10, applies to the government lawyer context. Rule 1.10(d) states that the "disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." Contrary to California decisions such as *Cobra*, *supra*, Rule 1.10, Comment [7] says that

“ . . . where a lawyer represents the government after having served clients in private practice, non-governmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.”

16. Model Rule 1.11 also conflicts with California decisional law. Model Rule 1.11, Comment [2] says “Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.”

17. The Restatement differs from the Model Rules and is closer to California decisions. Restatement Section 123 prohibits representation by lawyers who are affiliated with a conflicted lawyer. Illustration 4 of the Comment to Section 123 states:

4. Assistant Prosecutor A, who has recently joined a county prosecutor’s office, represented Defendant at a preliminary hearing in a pending criminal case while in private practice. Because A would be prohibited from prosecuting Defendant at trial in the same matter (see § 132), under the rule of imputation described in this Section, ordinarily no other member of the same county prosecutor’s office could conduct the prosecution. A special prosecutor or a prosecutor from an adjoining but jurisdictionally distinct county ordinarily could act. If state law does not permit appointment of such other prosecutors, however, screening measures such as those described in § 124(2) can suffice to permit the prosecution to proceed.

18. Not all courts disqualify an entire office when a personally conflicted lawyer moves from private practice. The Reporter’s Note to Restatement, Section 123, Comment d(iii) cites *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981); *State v. Jones*, 180 Ct. 443, 429 A.2d 936 (1980); and *State v. Fitzpatrick*, 464 So. 2d 1185 (Fl. 1985).

19. In the *United States v. Vlahos*, 33 F.3d 758, 762-63 (7th Cir. 1994), the court of appeals reversed a district court order disqualifying an entire United States Attorney Office. An individual Assistant United States Attorney had a conflict of interest. The Seventh Circuit held that the district court should have ordered a different Assistant United States Attorney to handle the case and not disqualify the entire executive branch.

20. Similarly, *United States v. Catalanotto*, 468 F. Supp. 503 (D. Ariz. 1978), held that the entire government agency should not have been disqualified vicariously because one Assistant United States Attorney had a conflict of interest. That was not a “head of office” problem.

21. In *Matter of Grand Jury Investigation of Targets*, 918 F. Supp. 1374 (S.D. Cal. 1996), the court denied a motion to disqualify the entire United States Attorney Office because of imputed ethical conflicts of interest. However, that did not involve the head of the office. One Assistant United States Attorney recused himself from investigating the Targets because of his prior representation of one of the Targets. There was no evidence that confidential information had been shared, and an ethical screen had been imposed. *Id.*, 918 F. Supp. at 1378.

22. *United States v. Bolden*, 353 F.3d 870, 875-86 (10th Cir. 2003), said that “where it is shown that an Assistant United States Attorney is subject to a conflict of interest, the proper remedy [generally] is to remove that individual, not all of the attorneys in the district, from the case.” The

court went on to say that disqualification of the entire office is almost always reversible error because of separation powers issues.

23. *United States v. Goot*, 894 F.2d 231, 232 (7th Cir. 1990), shows that the Department of Justice recognizes the “head of office” problem and has a way to cure it. The defendant hired an attorney in 1984 to represent him in a criminal investigation. In 1985, that attorney was appointed United States Attorney of the district that conducted the investigation. In 1987, the United States obtained an indictment against the defendant. Before the indictment was obtained, the defendant’s former attorney recused himself from the investigation and appointed an Acting United States Attorney for the investigation. *Id.*, 894 F.2d at 233. The defendant moved to disqualify the entire United States Attorney Office on Fifth and Sixth Amendment grounds. Because a new Acting United States Attorney had been appointed and a sufficient screen had been erected, the disqualification of the entire office was not ordered. *Id.*, 894 F.2d at 236-37.

24. Similarly, in a recent unpublished decision, the United States District Court for the Northern District of California denied a motion to recuse government attorneys and to dismiss an indictment. The facts indicate one method by which the United States Attorney can avoid recusal of an entire office. *United States v. Nosal*, 2009 WL 482236. During the investigative stage, Joseph Russoniello represented the defendant while Mr. Russoniello was at Cooley, Godward, Kronisch, LLP. In 2007, Mr. Russoniello was appointed the United States Attorney for the Northern District of California. >From the beginning of his tenure in office, Mr. Russoniello recused himself from any involvement in the matter involving his former client and assigned an Assistant United States Attorney as the Acting United States Attorney for the case. Another Assistant United States Attorney was named as lead prosecutor, acting under the supervision of the Acting United States Attorney. The recusal issue was thereafter transferred to the General Counsel’s Office of the Executive Office for United States Attorneys. That office approved the recusal and assigned an Assistant Deputy Attorney General, who had formerly been the United States Attorney for the Northern District of California, as the Acting United States Attorney for the matter. In effect, the head of the office was removed and replaced for the case. Mr. Russoniello’s former client moved to dismiss the indictment and to recuse all government counsel from the case. The motion was denied. The court held that the steps taken by the executive branch to recuse Mr. Russoniello did not mandate recusing the Assistant United States Attorney who was handling the case because he was not supervised by Mr. Russoniello when acting on the case. However, the court ordered Mr. Russoniello to file a declaration under seal, setting forth the efforts he had taken to ensure that he “has not had and does not have any communication with or influence upon . . .” the Assistant United States Attorney working on the case, disclosing the steps he had taken to wall himself off from any and all matters related to the case, and disclosing any other procedures he had put in place to prevent conflicts between the United States Attorney Office of the Northern District of California and his former client.

25. *Groot* and *Nosal* illustrate that the United States Attorney Office can avoid imputed disqualification, even if the head of the office is the conflicted attorney, by transferring supervisory responsibility over the case away from the head of the office, removing the head of the office from all involvement in the case, and creating an ethical wall. Otherwise, the United States Attorney Office can avoid imputed disqualification by recusing the entire office and transferring responsibility for the case to a different office.

26. As a result of the foregoing, it is my conclusion that proposed paragraph (e) accurately states the standards that should apply in California. It includes use of screening to eliminate

potential recusal of an entire office, except if an attorney who is supervising the engagement or the head of the office is the conflicted lawyer. If the conflicted head of the office recuses himself or herself from participation in the case and appoints an acting head of the office and removes himself or herself from direct supervisory authority over the lawyers participating in the representation, the exception in paragraph (e)(1) does not apply. If, in addition, the conflicted lawyer is timely and effectively screened from any participation in the matter, paragraph (e)(2) is satisfied. All the office has to do is give the notice required by paragraph (e)(3).

27. If the head of the office was personally involved in representation of a former client that is substantially related to the case at hand, it appears to me that in most cases the former client is going to know that the government office is acting on the matter. For example, in *United States v. Nosal, supra*, Mr. Russoniello represented the defendant in the investigatory stages of the case. Both he and his former client knew about the investigation before Mr. Russoniello was appointed United States Attorney.

28. My own conclusion is that, if the United States Attorney Office cannot tell the former client of the conflicted head of the office about the matter and the conflict, then the former client of the head of the office has no knowledge of or ability to protect himself or herself under Rule 1.9, under Rule 1.11, or under the Fifth and Sixth Amendments. Recusal is a minor price to pay for protecting the rights of the subject of the investigation. Such situations are likely to be infrequent.

November 21, 2009 Sapiro E-mail to Drafters, cc Lamport & Paul Kramer re Comment [9A]:

I am grateful for the draft Comment 9A Kevin prepared. A redlined revision is attached. I took the liberty of building on it for two reasons.

First, I think it should make explicit the duties under 1.7 and not just 1.9. I am home ill, so I do not have my meeting notes with me, but I think our charge was broader than just a 1.9 comment.

Because I added the 1.7 concept, I moved the reference to paragraph (d)(1) to the beginning of the paragraph.

Second, I added reference to former employment by another government agency to the 1.9 statement. This rule applies if a lawyer moves from one government agency to another. For example, if the State is suing San Francisco, and an assistant city attorney goes to work for the attorney general, 1.11 and 1.9 might apply.

Attachment:

RRC - 3-310 [1-11] - Comment [9A] - JS (11-16-09) - Cf. to KEM (11-14-09).doc

November 22, 2009 Kehr E-mail to Drafters, cc Lamport & Kramer:

Despite the *Deukmejian* case, the many similarities between private and public law offices and our having defined “law firm” to include governmental law offices, and despite the special responsibilities of prosecutors, I view the public arena as being different in respect to the imputation issue that we are puzzling through. As a result, I continue to think that we would

be wrong to turn the *Cobra Solutions* line of disqualification decisions into a rigid rule of professional discipline. Subject to three drafting issues, the first two of them nits, I fully support Kevin's suggestion in Draft 6, fn. 20, that we remove paragraph (e)(1) and substitute the Comment paragraph he placed in that footnote (to be used on place of current [9E] and [Alt-9E]). Kevin's footnote draft seems to me to be clear, concise, and correct.

My drafting issues, beginning with the nits: First, the citation for *Cobra* is inverted. It is 38 Cal. 4th 839, not 389. Second, in the penultimate line of the Comment, I would change "may be disqualified from the representation" to: "might be subject to disqualification in the representation." As I've said a number of times before, "may" is a word whose meaning seems to be in transition, and as a result it often causes ambiguity. Are we hinting that we support disqualification of the lawyer and the office, or only that there is a risk this might occur. I think the latter is correct, and I think my suggested language says that more specifically.

My substantive comment on Kevin's footnote is that I do not support notice to the former client. I would remove that reference from the Comment paragraph and paragraph (e)(3) from the Rule. If the Commission takes this step, there will be some other needed conforming changes, such as removal of the reference to notice in both versions of Comment [2] and in the [9] series. I have not searched for other, which would be premature.

Although I am going beyond the scope of the message to which I am responding, I have other comments on Draft 6 of this Rule:

1. I support Kevin's recommendation for the captions before Comments [9A] and [9B].
2. I do not support the "reasonably believes" language of proposed Comment [9B]. It is based on the N.Y. Rule 1.7(b)(1), and it has no basis either in our Rule 1.7 or in any version of proposed 1.11(e). However, I do support Comment [Alt-9B] through and including the colon in its fourth line. Everything after that is up in the air for the moment.

I don't think there is any other open issue that I can comment on until the paragraph (e) issues are resolved.

November 23, 2009 Sapiro E-mail to Drafters, cc Lamport & Kramer:

1. I think Bob and I are deadlocked over the *Cobra* issue. I do not think we need to change proposed paragraph (e) because the cases involving the head of an office have been around so long, and are so clear, that prosecutorial offices should be required to comply with their duties under 1.9 and because, in criminal cases, the former client's liberty is at risk. Besides, the US Attorney issue is being handled by the US Attorney offices, as I discussed in my email Saturday. Bob disagrees.
2. Bob thinks we should move the *Cobra* issue to a comment, as you suggested. I respectfully disagree.
3. Bob would water down your language in the proposed comment. I again respectfully disagree. I think the disqualification cases are clear and that the use of "might" might be misleading because the cases I have read do not permit wiggle room in the "head of office" situation.

**RRC – Rule 1.11 [3-310]
E-mails, etc. – Revised (12/08/2009)**

4. I also think the inability of USAO offices to notify the former client does not justify a “good faith” exception both because it seems to be rare and because it is fraught with constitutional and other problems. Again, Bob disagrees.
5. Bob has not commented on my proposed change of Comment 9A from Saturday.
6. I agree with Bob that we should have captions before 9A and 9B, but the one before 9A would have to be revised if my revision of 9A is acceptable to both of you.
7. I agree with Bob about the “reasonably believes” language in 9B. I should have seen that and am glad Bob caught it. I would delete part (i). In addition, 9B will have to be revised depending on the resolution of the screening issues for paragraph (e) as a whole.
8. I suggest that we send the email exchange to Angela and draft in light of votes after the next meeting.

November 23, 2009 KEM E-mail to Sapiro, cc Drafters, Lamport & Kramer:

I disagree w/ your revisions to Comment [9A] because your proposed revisions incorrectly expand the scope of the Rule. First, by its terms, paragraph (d)(2)(i) applies only when a lawyer “participated” in the matter. Rule 1.7 has no applicability in that instance and should not be included in the Comment. Second, the black letter does not address the situation where a lawyer was “employed by another government agency;” it applies only when the lawyer “participated ... **while in private practice or nongovernmental employment.**” The Comment should not be expanded beyond language of the Rule. Nor should the Rule be changed. The reference to 1.7 in 1.11(d)(1) is there simply to alert lawyers who are part-time government lawyers that they must comply with Rule 1.7 in the event of a **concurrent** conflict of interest. The situation being addressed in paragraph (d)(2)(i) and Comment [9A] is a conflict that results from **successive** representation. We should not conflate the two issues.

Rule 1.11: Special Conflicts for Government Employees

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2009 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

Arizona, Connecticut, Florida, and Illinois omit the law clerk exception to ABA Model Rule 1.11(d)(2).

California has no provision comparable to ABA Model Rule 1.11.

Colorado: Rule 1.11(b)(2) requires the written notice to contain “a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed.” Colorado also adds a subparagraph (b)(3) prohibiting other lawyers in the firm from undertaking or continuing, representation unless the personally disqualified lawyer and the partners of the firm “reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.”

District of Columbia: Rule 1.11 tracks the basic provisions of ABA Model Rule 1.11, but D.C. requires a personally disqualified former government lawyer and another lawyer in the firm to file certain documents with the disqualified lawyer's former agency or department. As an alternative, the rule permits the former government lawyer to file those documents with bar counsel under seal if the firm's client requests it.

Georgia has adopted a Rule 9.5 that provides as follows:

Rule 9.5 Lawyer as a Public Official

(a) A lawyer who is a public official and represents the State, a municipal corporation in the State, the United States government, their agencies or officials, is bound by the provisions of these Rules.

(b) No provision of these Rules shall be construed to prohibit such a lawyer from taking a legal position adverse to the State, a municipal corporation in the State, the United States government, their agencies or officials, when such action is authorized or required by the U.S. Constitution, the Georgia Constitution or statutes of the United States or Georgia.

Illinois: Rule 1.11(a) covers any lawyer who knows “or reasonably should know” of the former government lawyer's prior participation. Rules 1.11(a)(1) and 1.11(b) condition the exceptions on apportioning the disqualified lawyer “no specific share” of the fee.

Iowa adds the following paragraph to Rule 1.11 relating to part-time prosecutors serving as criminal defense counsel:

(f) Prosecutors for the state or county shall not engage in the defense of an accused in any criminal matter during the time they are engaged in such public responsibilities. However, this paragraph does not apply to a lawyer not regularly employed as a prosecutor for the state or county who serves as a special prosecutor for a specific criminal case, provided that the employment does not create a conflict of interest or the lawyer complies with the requirements of rule 32:1.7(b).

Massachusetts: The law clerk exception in Model Rule 1.11(d)(2)(ii) is extended to law clerks working for mediators.

Missouri: Rule 1.11(e) provides as follows:

(1) A lawyer who also holds public office, whether full or part-time, shall not engage in activities in which his or her personal or professional interests are or foreseeably could be in conflict with his or her official duties or responsibilities...

(2) No lawyer in a firm in which a lawyer holding a public office is associated may undertake or continue representation in a matter in which the lawyer who holds public office would be disqualified, unless the lawyer holding public office is screened in the manner set forth in Rule 4-1.11(a).

New Hampshire adds a detailed provision regarding the responsibilities of “lawyer-officials,” who are defined as lawyers who are “actively engaged in the practice of law” and who are members of a “governmental body.”

New Jersey: Rules 1.11(a), (b), and (d) deviate from the Model Rules as follows:

(a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:

(1) in which the lawyer participated personally and substantially as a public officer or employee; or

(2) for which the lawyer had substantial responsibility as a public officer or employee; or

(3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.

(b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and

(2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party...

(d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment.

(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment, or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employments unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter or unless the private party gives its informed consent, confirmed in writing, and

(3) shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially or for which the lawyer has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12(c)...

New York: DR 9-101(B) partly tracks ABA Model Rule 1.11, but New York does not define the terms “confidential government information” and “matter.” If a lawyer is disqualified from a representation because the lawyer has

participated personally and substantially in the matter as a public officer or employee, DR 9-101(B)(1) permits other lawyers in the firm to undertake or continue representation in the matter if (a) the disqualified lawyer is “effectively screened from any participation, direct or indirect, including discussion, in the matter and is apportioned no part of the fee therefrom,” and (b) there are “no other circumstances in the particular representation that create an appearance of impropriety.” Under DR 9-101(B)(2), concerning disqualification based on “confidential government information,” the “appearance of impropriety” criterion is not expressly mentioned.

Oregon expands the “law clerk” exception to include a lawyer who is a “staff lawyer to or otherwise assisting in the official duties of” a judge, other adjudicative officer or arbitrator.

Oregon Rule 1.11(d) adds language drawn partly from DR 8-101 of the ABA Model Code of Professional Responsibility providing that, except as law otherwise expressly permits, a lawyer shall not:

(i) use the lawyer's public position to obtain, or attempt to obtain, special advantage in legislative matters for the lawyer or for a client.

(ii) use the lawyer's public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client.

(iii) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

(iv) either while in office or after leaving office use information the lawyer knows is confidential

government information obtained while a public official to represent a private client.

Oregon also deletes ABA Model Rule 1.11(e) and adds these paragraphs to Rule 1.11:

(e) Notwithstanding any Rule of Professional Conduct, and consistent with the “debate” clause, Article IV, section 9, of the Oregon Constitution, or the “speech or debate” clause, Article I, section 6, of the United States Constitution, a lawyer-legislator shall not be subject to discipline for words uttered in debate in either house of the Oregon Legislative Assembly or for any speech or debate in either house of the United States Congress.

(f) A member of a lawyer-legislator's firm shall not be subject to discipline for representing a client in any claim against the State of Oregon provided:

(1) the lawyer-legislator is screened from participation or representation in the matter in accordance with the procedure set forth in Rule 1.10(c) (the required affidavits shall be served on the Attorney General); and

(2) the lawyer-legislator shall not directly or indirectly receive a fee for such representation.

Pennsylvania: Rule 1.11(a)(2) does not require that client consent be “confirmed in writing.”

Texas: Rule 1.10(f) specifically excludes “regulation-making” and “rule-making” from the definition of “matter.”

Virginia adheres mostly to the original 1983 version of ABA Model Rule 1.11, except that Virginia adds the following

language drawn from DR 8-101 of the ABA Model Code of Professional Responsibility as Rule 1.11(a):

(a) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer’s action as a public official.