

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, August 12, 2009 11:02 AM
To: McCurdy, Lauren; Difuntorum, Randall
Cc: Robert L. Kehr; Stan Lamport; Kurt Melchior; Kevin Mohr G; Paul Vapnek; Harry Sondheim; Lee, Mimi
Subject: RRC - 3-310 [1.9] - III.B. - Materials for 8/28-29/09 Meeting
Attachments: RRC - 3-310 [1-9] - Rule - DFT4 (08-06-09) - Cf to DFT3.3.pdf; RRC - 3-310 [1-9] - Rule - DFT4 (08-06-09) - Cf to DFT3.3.doc

Greetings Lauren & Randy:

On Bob's behalf, I've attached Rule 1.9 [3-310], Draft 4 (8/6/09), redline, compared to Draft 3.3 (7/8/09), the draft considered at the 7/24-25/09 meeting. In Word and PDF.

Here is Bob's 8/7/09 e-mail to the Drafters:

My redraft is attached. I don't believe that I have any comments from Kurt or Stan to the paragraph (b) or (c) Comments, and as a result I've made no changes in them, except that I've changed the paragraph numbers to follow in sequence what at the moment are the paragraph (a) Comment paragraphs.

Accordingly, the recommendations in the draft are his alone. However, I anticipate the other drafters will comment during the e-mail comment period that ends 8/24/09.

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

Kevin

P.S. to Bob: I filled in the cross-references to my meeting notes that you had left blank in the attached. Otherwise, it is identical to what you circulated on 8/7.

--
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2 **Rule 1.9 Duties To Former Clients¹**
3

4 (a) A lawyer who has formerly represented a client in a matter shall not thereafter
5 represent² another person in the same or a substantially related matter in which
6 that person's interests are materially adverse³ to the interests of the former client
7 unless the former client gives informed written consent.⁴
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9 (b)⁵ A lawyer shall not knowingly represent a person in the same or a substantially
10 related matter in which a firm with which the lawyer formerly was associated had
11 previously represented a client

12 (1)⁶ whose interests are materially adverse to that person; and
13

¹ The Rule was deemed approved at its July 24-25, 2009 meeting. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶. 6B.

² The Commission at its February 29-March 1, 2008 meeting voted 9-2-1 to adhere to the MR language and to move to a Comment discussion of the “accept or continue the representation of” language that had appeared in DFT 1.2 and that currently is found (inconsistently) in Rule 3-310. See 2/29-3/1/08 KEM Meeting Notes, III.G., at ¶. 7. The concept of “accept or continue” now is found in a somewhat different form in the last sentence of proposed Comment [1]. The retention of “substantially related matter” recognizes that the prohibition on a lawyer attacking his or her work for a former client should not be limited by an artificial definition of “matter”. For example, a lawyer who participated in preparing a contract for a client’s use with its customer X would be prohibited by paragraph (a) from later attacking the enforceability of that contract when the former client has used it with customer Y or Z.

³ The Commission at its May 8-9, 2009 meeting voted 7-4-1 to adopt paragraph (a) of the MR. See 5/8-9/09 KEM Meeting Notes, III.B., at ¶. 2A.

⁴ The Commission at its February 29-March 1, 2008 meeting voted 10-1-1 to remove from this Rule the requirement of obtaining the current client’s consent. See 2/29-3/1/08 KEM Meeting Notes, III.G. at ¶. 9. Although a lawyer’s duties to former clients can be significant to a new client b/c of possible limits on the lawyer’s freedom of action in representing the new client or b/c of possible confusion over the lawyer’s role (as discussed in Comments *a* and *b* to Restatement §132), this concern is covered by Rule 1.7(d). See Comment [9] to this Rule. The question was raised as to whether Rule 1.7(d) is adequate in this setting because it requires only “disclosure” and not “informed written consent”. It was requested that this issue be revisited following public comment on Rule 1.7. See 2/29-3/1/08 KEM Meeting Notes, III.G., at ¶. 9.b.

⁵ The Commission at its February 29-March 1, 2008 meeting rejected a motion to delete paragraph (b) by a vote of 5-6-1. See 2/29-3/1/08 KEM Meeting Notes, III.G., at ¶. 11.

See also 8/10/08 KEM E-mail to Drafters, ¶. 4. The Commission at its May 8-9, 2009 meeting voted 8-3-0 to adopt the introductory paragraph of paragraph (b). See 5/8-9, 2009 KEM Meeting Notes, III.B., at ¶. 3A.

⁶ The Commission at its May 8-9, 200 meeting voted 8-3-0 to adopt paragraph (b)(1) of the MR. See 5/8-9/09 KEM Meeting Notes, III.B., at ¶.3B.

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(2) about whom the lawyer, while at the former law firm, had acquired information protected by Rules 1.6 and 1.9(c)⁷ that is material to the matter;⁸

unless the former client gives⁹ informed written consent.

(c) A lawyer who formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:¹⁰

(1) use information relating to the representation to the disadvantage of the former client except as these Rules or the State Bar Act would permit¹¹ with respect to a current¹² client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules or the State Bar Act would permit with respect to a current client.¹³

⁷ The Commission at its 7/24-25, 2009 meeting defeated by a vote of 4-7-1 a motion to add a reference to section 6068(e). See 7/24-25/09 KEM Meeting Notes, III.B., at ¶5A.

⁸ The Commission at its May 8-9, 2009 meeting voted 6-4-0 to adopt the N.J. version of paragraph (b)(2). See 5/8-9/09 KEM Meeting Notes, III.B., at ¶. 3C. This change corrects a drafting error in the MR, which by its terms is not limited to information the lawyer learned at the former firm. Note that the vote was to insert only the clause, “while at the former firm,” from the New Jersey rule, not the entire subparagraph from that rule.

⁹ See footnote 4, above.

¹⁰ The Commission at its May 8-9, 2009 meeting voted 3-5-3 against including an exception allowing use or disclosure with the former client’s informed written consent. See 5/8-9/09 KEM Meeting Notes, III.B., at ¶.4B. After discussion about the need to express the ability to obtain consent, the drafters were directed to propose a Comment that explains the “or as these Rules ... permit”. See 5/8-9/09 KEM Meeting Notes, III.B., at ¶.4B.a –i. This vote was inconsistent with the Commission’s subsequent decision to require “informed written consent” before a lawyer uses confidential information. See 5/8-9/09 KEM Meeting Notes, III.B., at ¶¶.5 and 6. Although it was decided that this requirement of written consent will be decided on a Rule by Rule basis (See 5/8-9/09 KEM Meeting Notes, III.B., at ¶7), we did not return to this issue at the meeting. Also note that our Rule 1.8.2 uses “information relating to the representation” although the defined term in our Rule 1.6(a) is “confidential information relating to the representation”.

¹¹ Harry Sondheim at the Commission’s 7/24-25/09 meeting requested the revisiting following public comment of the decision to omit “or require”. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶6A.

¹² The Drafters recommend inserting “current” as a modifier of client for clarity.

¹³ The Commission at its May 8-9, 200 meeting voted 8-2-1 to adopt paragraph (c) of the MR with the addition of references to the State Bar Act and the removal of “or require”. See 5/8-9/09 KEM Meeting Notes, III.B., at ¶.4A. and ¶4A.d.

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32 **Comment**¹⁴
33

34 [1]¹⁵. After termination of a lawyer-client relationship, ~~a the~~ lawyer owes two duties to
35 the former client. ~~A The~~ lawyer may not (i) do anything ~~which will that carries a~~
36 ~~substantial risk that it will~~¹⁶ injuriously affect his or her former client in any manner in
37 which the lawyer represented the former client, ~~and or~~ (ii) at any time use against his or
38 her former client knowledge or information acquired by virtue of the previous
39 relationship. (*People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 159.) These duties
40 exist to preserve a client's trust and candor in the lawyer-client relationship, by assuring
41 that ~~a the~~ client can entrust the client's matter to the lawyer and ~~can~~ confide information
42 to the lawyer that ~~will be is~~ protected ~~under as required by Rule 1.6~~¹⁷ ~~Business and~~
43 ~~Professions Code section 6068(e)~~ without fear that ~~it any such information later~~ will be
44 used against the client ~~later~~.

45 [2]¹⁸ Paragraph (a) addresses both of these ~~two~~ duties. ~~First, it is intended to~~ ~~It first~~
46 ~~addresses the~~ situations in which ~~there is a substantial risk that~~¹⁹ a lawyer's
47 representation of another client would result in the lawyer doing work that ~~will would~~
48 injuriously affect the former client with respect to a matter in which the lawyer
49 represented the former client. For example, a lawyer could not properly seek to rescind
50 on behalf of a new client a contract the lawyer drafted on behalf of the former client. A
51 lawyer who has prosecuted an accused person could not represent the accused in a

¹⁴ Because the Commission at its May 24-25, 2009 meeting used Stan Lampport's draft of the paragraph (a) Comments in lieu of those originally proposed by Kevin Mohr and those proposed by Bob Kehr, all paragraph (a) Comments compare to the Lampport draft. Comparison to the MR will appear in a future three-column chart. The balance of the Comment compares to the MR Comment. Also for ease of use, this draft removes all of Kevin's footnotes to the paragraph (a) Comments that appeared in Draft 3.3.

¹⁵ Comment [1] was approved 7-0-5 at the Commission's July 24-25, 2009, with "and" changed to "or" in the fourth line of the Comment, and subject to any editorial suggestions from the drafters. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶9A.

¹⁶ See fn. 19, below.

¹⁷ The Commission at its July 24-25, 2009 meeting voted 4-7-1 against adding to paragraph (b)(2) a reference to section 6068(e). See 7/24-25/09 KEM Meeting Notes, III.B., at ¶10A. Because the Rule refers only to Rule 1.6, we have conformed the Comment, here and in later paragraphs.

¹⁸ Comment [2] was approved by a vote of 6-1-5 at the Commission's July 24-25, 2009, with the substitution of the "substantial risk" language in the second sentence and the use of "matter" as the last word in the paragraph, and subject to any wording suggestions from the drafters. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶10A. and see fn. 19 and 20, below.

¹⁹ The Commission at its July 24-25, 2009 meeting approved by a vote of 9-0-3 the inclusion of the substantial risk language. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶10C.

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52 subsequent civil action against the government concerning the same
53 [transaction](#)²⁰.

54 [3]²¹ Paragraph (a) also addresses the second of the two duties owed to a former client.
55 It applies when there is a substantial risk that information protected by [Business and](#)
56 [Professions Code section 6068\(e\) Rule 1.6](#) that was obtained in the prior representation
57 would be used or disclosed in a subsequent representation in a manner that is contrary
58 to the former client’s interests and without the former client’s informed written consent.
59 For example, a lawyer who has represented a businessperson and learned extensive
60 private financial information about that person [ordinarily](#) may not ~~then later~~ [ordinarily](#)
61 represent that person’s spouse in seeking a divorce. Similarly, a lawyer who has
62 previously represented a client in securing environmental permits to build a shopping
63 center [ordinarily](#) would be precluded from [later](#) representing neighbors seeking to
64 oppose rezoning of the property on the basis of environmental considerations; however,
65 paragraph (a) would not apply if the lawyer later defends a tenant of the completed
66 shopping center in resisting eviction for nonpayment of rent [if there is no substantial](#)
67 [relationship between the zoning and eviction matters.](#)

68 [4]²² Paragraph (a) applies when the lawyer’s representation is in the same or [a](#)
69 substantially related matter to the lawyer’s representation of the former client. The term
70 “matter” for purposes of this Rule [applies to all types of legal representations](#)²³.
71 [includes](#) civil and criminal litigation, transactions of every kind, and all other types of

²⁰ The change from “transaction” to “matter” was deemed approved at the Commission’s July 24-25, 2009. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶10D.

²¹ Comment [3] was approved 8-3-3 at the Commission’s July 24-25, 2009 with the addition of “ordinarily”, with the addition of the concluding phrase, and subject to any wording suggestions from the drafters. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶11A.

²² The Commission at its July 24-25, 2009 meeting approved the adoption of Comment [4] by a vote of 10-2-1 subject to any wording suggestions by the drafters. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶12A.

²³ It was suggested at the Commission’s July 24-25, 2009 meeting that the drafting of Rule 4.2 might provide helpful language for the discussion of “matter”. On review of those materials, the drafters found nothing there that is helpful here. Raul Martinez suggested using the “all types of representations” language, and the drafters have adopted that recommendation. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶12.b. The addition of “legal” was suggested by Nace Ruvelo and has been adopted by the drafters. There are two aspects to the meaning of “matter”. One is the type of legal representations, which is the subject of this Comment. That part of the Comment should be reconsidered once the Commission decides on whether to have a universal Rule 1.0.1 definition of “matter”. The other aspect is the scope of a “matter”. One of the public comments to Rule 1.7 was a request for an explanation of the scope of a “matter”, and the Commission declined to attempt that. The Rule 1.7 Comment should be reconsidered after the Completion of this Comment to see if the former client situation provides any basis for a discussion of the scope of a “matter” in the current client situation.

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72 | representations.- The scope of a “matter” for purposes of this Rule depends on the facts
73 | of a particular situation or transaction. The lawyer’s involvement in a matter can also be
74 | a question of degree. ~~The An~~ underlying question is whether the lawyer was so involved
75 | in the earlier matter that the subsequent representation justly can be ~~justly~~ regarded as a
76 | changing of sides in the matter in question. A lawyer might avoid a conflict under this
77 | Rule by limiting the scope of a representation. [See Rule 1.2(c) (limiting the scope of
78 | representation)]

79 |
80 | [5]²⁴ Matters are the same or substantially related for purposes of this Rule: ~~if~~ (i) if they
81 | involve the same transaction or legal dispute or other work performed by the lawyer for
82 | the former client, or (ii) if the lawyer normally would have obtained received information
83 | in the prior representation that is protected by ~~Business and Professions Code section~~
84 | ~~6068(e) Rule 1.6, and that~~ the lawyer would be expected to use or disclose that
85 | information in the subsequent representation because it is material, ~~such as when the~~
86 | ~~lawyer’s duty to represent the new client competently in~~ the subsequent representation
87 | ~~would require the lawyer to use or reveal the former client’s confidential information.~~

88 |
89 | [6]²⁵ The term “substantially related matter” as used in this Rule is not applied identically
90 | in all types of proceedings. ~~the same as the substantial relationship test that is used by~~
91 | ~~the courts in lawyer disqualification proceedings.~~ Under the substantial relationship test
92 | ~~in~~ a disqualification proceeding, a court will presume conclusively that a lawyer has
93 | obtained confidential information material to the adverse engagement ~~if the~~
94 | ~~circumstances of the prior representation indicate that such information would have been~~
95 | ~~imparted.~~ when it appears by virtue of the nature of the former representation or the
96 | relationship of the attorney to his former client that confidential information material to
97 | the current dispute normally would have been imparted to the attorney. (*H.F. Ahmanson*
98 | *& Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454) This disqualification
99 | application ~~e substantial relationship test~~, exists, at least in part, to protect the former
100 | client by avoiding an inquiry into the substance of the ~~very~~ information ~~which that the a~~
101 | former client is entitled to keep from being imparted to the lawyer’s current client. (See *In*
102 | *re Complex Asbestos Litigation*, (1991) 232 Cal.App.3d at p. 592; *Woods v. Superior*
103 | *Court* (1983) 149 Cal.App.3d 931, 934.) In disciplinary proceedings, and in civil
104 | litigation between lawyer and client, where the lawyer’s new client is not present, the
105 | evidentiary presumption created ~~by the substantial relationship test for disqualification~~
106 | purposes may might not be necessary because the lawyer. ~~In such cases, any~~
107 | ~~conclusion or presumption concerning the type of confidential factual information that~~
108 | ~~would normally have been obtained in the prior representation may can be overcome or~~

²⁴ No vote was taken on Comment [5] so that the drafters would have the opportunity to work on it. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶13B. What follows is the drafters’ effort to resolve the points made at that meeting.

²⁵ The Commission at its July 24-25, 2009 meeting decided to reverse Comments [6] and [7]. That change has not been made in this draft so as to avoid confusion in comparing versions, but it will be made after the Comment is approved. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶14A.i. No vote was taken on either Comment. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶14A. The current Comment [6] attempts to resolve all open issues. The drafters have removed all of Comment [7], having concluded that it adds nothing materials to what already is contained in the Comment.

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109 | ~~rebutted by the lawyer by proof provide evidence~~ concerning the information actually
110 | received in the prior representation.

111 |
112 | ~~[7] By contrast, the term “substantially related matter” as used in this Rule is intended to~~
113 | ~~focus the Rule on situations that involve a substantial risk of a violation of one of the two~~
114 | ~~duties to a former client described above. The Rule recognizes that the two duties may~~
115 | ~~violated when the two matters are the same and when the two matters were not the~~
116 | ~~same, but when the new representation involves the lawyer’s prior work for the former~~
117 | ~~client or the use or disclosure of confidential information the lawyer obtained in the~~
118 | ~~course of representing the former client.~~

119 | [8]²⁶ Paragraph (a) applies when the new client’s interests are materially adverse to the
120 | former client’s interests. In light of the overall purpose of the Rule to protect candor and
121 | trust during the lawyer-client relationship, the term “materially adverse” should be
122 | applied with that purpose in mind. Accordingly, a client’s interests are materially adverse
123 | to the former client if the lawyer’s representation of the new client creates a substantial
124 | risk that the lawyer either (i) would perform work for the new client that would injuriously
125 | affect the former client in any manner in which the lawyer represented the former client,
126 | or (ii) would use or reveal information protected by Business and Professions Code
127 | section 6068(e) that the former client would not want disclosed or in a manner that would
128 | be to the disadvantage to the former client.

129 |
130 | **Lawyers Moving Between Firms**

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132 | ~~[59]~~ Paragraph (b) ~~describes the potential for a conflict of interest when a client is a~~
133 | ~~former client because the lawyer no longer is associated with the law firm that~~
134 | ~~represents or represented the client. In that situation, operates to disqualify~~ the lawyer
135 | ~~has a conflict of interest~~ only when the lawyer ~~involved~~ has actual knowledge of
136 | information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm
137 | acquired no knowledge or information relating to a particular client of the firm, and that
138 | lawyer later joined another firm, neither the lawyer individually nor the second firm is
139 | disqualified from representing another client in the same or a related matter even though
140 | the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm
141 | once a lawyer has terminated association with the firm.²⁷

142 |
143 | ~~[106]~~ Application of paragraph (b) depends on a situation’s particular facts, aided by
144 | inferences, deductions or working presumptions that reasonably may be made about the

²⁶ I (rlk) have not removed Comment [8] out of deference to Stan, but please look at Comment [2] and tell me what it adds. It appears redundant to me.

²⁷ There are two substantive differences between this proposal and MR Comment [5]. First, MR paragraph (b) – we presume unintentionally - speaks of the lawyer’s former firm formerly having represented the client while our paragraph (b) includes the situation in which the former firm continues to represent the client. The first sentence of our Comment [5] tracks that difference. Second, we have removed the MR’s reference to disqualification to clarify that this is a conflicts Rule and that disqualification remains within the province of the courts.

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145 | way in which lawyers work together.²⁸ ~~A lawyer may have general access to files of all~~
146 | ~~clients of a law firm and may regularly participate in discussions of their affairs; it should~~
147 | ~~be inferred that such a lawyer in fact is privy to all information about all the firm's clients.~~
148 | ~~In contrast, another lawyer may have access to the files of only a limited number of~~
149 | ~~clients and participate in discussions of the affairs of no other clients; in the absence of~~
150 | ~~information to the contrary, it should be inferred that such a lawyer in fact is privy to~~
151 | ~~information about the clients actually served but not those of other clients. In such an~~
152 | ~~inquiry, the burden of proof should rest upon the firm whose disqualification is sought.~~

153 |
154 | ~~[7]— Independent of the question of disqualification of a firm, a lawyer changing~~
155 | ~~professional association has a continuing duty to preserve confidentiality of information~~
156 | ~~about a client formerly represented. See Rules 1.6 and 1.9(c).⁻²⁹~~

157 |
158 | **Confidential Information**³⁰

159 |
160 | [8]³¹ Paragraph (c) provides that confidential information acquired by ~~the a~~ lawyer in
161 | the course of representing a client may not subsequently be used or revealed by the
162 | lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the
163 | confidential information of a client the lawyer is obligated to protect and Rule 1.6(b) for
164 | situations where the lawyer is permitted to reveal such information. However, Tthe fact
165 | that a lawyer has once served a client does not preclude the lawyer from using generally
166 | known information about that client when later representing another client.

167 |

²⁸ We recommend removing the following language because it is not consistent with the better, nuanced approach California case law, which does not go nearly so far as to require disqualification merely because a lawyer might have had access to all of the firm's files. See, e.g., *Adams v. Aerojet-General Corporation*, 86 Cal. App.4th 1324, 1334 (2001) and *Dieter v. Board of Regents of the University of California*, 963 F. Supp. 908, 911 (E.D.Cal. 1997). Also, we do not wish to discuss disqualification issues.

²⁹ We recommend removing Comment [7] because it effectively describes paragraph (b) as a rule of disqualification rather than discipline and because, to the extent it describes a lawyer's disciplinary duties, it merely repeats our proposed Comment [1].

The Consultant would keep this Comment notwithstanding its reference to disqualification.

³⁰ The organization of the MR Comment placed this discussion of confidential information under the heading "Lawyers Moving Between Firms." We have added this additional heading and the new heading before Comment [9] for ease of access.

The Consultant disagrees with the addition of this heading because paragraph (c) is not the sole provision of this Rule concerned with confidential information. See 7/3/09 Mohr Memo to Commission, section A.

³¹ Paragraph (c) was adopted with the phrase "information relating to the representation" although our Rule 1.6 uses "confidential information relating to the representation". We ask that the drafting of paragraph (c) be reconsidered in light of its inconsistency with our Rule 1.6(a).

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168 | [Client Consent](#)³²

169

170 | [9] The provisions of this Rule are for the protection of former clients and can be
171 | waived if the client gives informed [written](#) consent, ~~which consent must be confirmed in~~
172 | ~~writing under paragraphs (a) and (b)~~. See Rule 1.0(e). With regard to the effectiveness
173 | of an advance [waiver consent](#), see Comment [22] to Rule 1.7. [With regard to
174 | disqualification of a firm with which a lawyer is or was formerly associated, see Rule
175 | 1.10.]³³

176

177 | ~~[X]~~³⁴ [The term person “person” as used in paragraphs \(a\) and \(b\) of this Rule refers to](#)
178 | [a lawyer’s potential new client, the representation of whom would trigger application of](#)
179 | [this Rule.](#)

³² See footnote 30, above.

³³ This sentence has been bracketed pending completion of Rule 1.10.

³⁴ The drafters were requested to add a comment explaining the meaning of “person” in this Rule, subject to being deleted if the Commission adopts a global explanation of the term. See 7/24-25/09 KEM Meeting Notes, III.B., at ¶3A. The drafters have done so but point out that Model Rule 1.9 has no such explanation, and they believe none is needed. The use of the term “person” merely avoids the confusion that would result from using “client” twice in Rule sentences, and we don’t think that the Rule usage of “person” will cause confusion.

McCurdy, Lauren

Subject: FW: RRC - 3-310 [1.9] - III.B. - Materials for 8/28-29/09 Meeting

From: Lamport, Stanley W. [mailto:SLamport@coxcastle.com]

Sent: Friday, August 14, 2009 8:32 AM

To: Lamport, Stanley W.; Kevin Mohr; McCurdy, Lauren; Difuntorum, Randall

Cc: Robert L. Kehr; Kurt Melchior; Kevin Mohr G; Paul Vapnek; Harry Sondheim; Lee, Mimi

Subject: RE: RRC - 3-310 [1.9] - III.B. - Materials for 8/28-29/09 Meeting

I would like to amend my proposed language in my item 4 below to state: "Under Rule 1.10, when one lawyer in a law firm is required to comply with Paragraph (a), all of the other lawyers in the firm also must comply with Paragraph (a). Paragraph (b) addresses how this Rule applies when a lawyer has left the law firm and represents a client whose interests are materially adverse to a former client of the law firm. In that situation, the lawyer is subject to Paragraph (a) only when..."

From: Lamport, Stanley W.

Sent: Thursday, August 13, 2009 5:22 PM

To: 'Kevin Mohr'; Lauren McCurdy; Randall Difuntorum

Cc: Robert L. Kehr; Kurt Melchior; Kevin Mohr G; Paul Vapnek; Harry Sondheim; Lee, Mimi

Subject: RE: RRC - 3-310 [1.9] - III.B. - Materials for 8/28-29/09 Meeting

The following are my comments to the revised draft:

1. Comment [1]. Two issues. First, I do not agree with insertion of the phrase "that carries a substantial risk that it will" in lines 38 and 39. It is proper in Comment [2], but not in Comment [1]. The duty is to not do anything injurious in a manner in which the lawyer represented the former client. The rule creates a zone of protection with the substantial risk language. The "substantial risk" concept is also in Comment [3] that deals with confidential information, but we did not add substantial risk to that duty in Comment [1]. The language in Comment [1] is misplaced and should be deleted. Second, I do not agree with replacing the word "it" on line 45 with "any such information later." The sentence is talking about two things, (i) being able to entrust a matter to the lawyer and (ii) confiding confidential information, but then ends by referring only to confidential information. "It" was in there to refer to both concepts. If we want to spell it out we need to say "that the lawyer's knowledge of the client's matter and any confidential information confided to the lawyer later..." Personally, I prefer "it." But the sentence does not work as presently reworded.

2. Comment [3]. As a land use lawyer, I have to say that the land use example, which is derived from the Model Rule Comment, reads like a foreign permitting process. We don't have environmental permits in California per se. It would be consistent with how California land use permitting works to say, "a lawyer who has previously represented a client in connection with the environmental review associated with the land use approvals to build a shopping center ordinarily would be precluded from later representing neighbors seeking to oppose a rezoning of the property based on environmental considerations that existed when the lawyer represented the client..." This is a slight revision over the language in the Comment to account for the fact that if the environmental issue is something that did not exist at the time of the representation, it would not be conflict. For example, if the issue relates to the release of hazardous material that occurred after the representation, I don't see how that would raise a conflict.

3. Comment [5] and deleted Comment [7]. Comment [5] does not deal with substantial relationship with respect to the first of the two duties related to the rule. It deals only with the confidential information portion. Comment [7] dealt with both concepts. I do not agree with deleting it. I would move Comment [7] to the beginning of Comment [5] and have the rest of Comment [5] follow it.

4. Comment [9] I do not understand the first sentence in this Comment. It is unclear and I don't get why we are talking about potential conflicts in this sentence. This is an issue of imputation and whether imputation follows a lawyer to a new firm. Why can't we say, "Under Rule 1.10, when one lawyer in a law firm is required to comply with Paragraph (a), all of the other lawyers in the firm also must comply with Paragraph (a). Paragraph (b) addresses how this Rule applies when a lawyer has left the law firm and represents a former client of the firm. In that situation, the lawyer is subject to Paragraph

(a) only when..." In addition, on line 123 I would replace the word "disqualified" with "prevented." On line 124 I would change "a related matter" to "a substantially related matter."

.5. Comment [8] and Rule (c)(1). I think that the "generally known" language in the rule and in the Comment would be a limitation of the protections of confidential information under 6068(e)(1). My understanding is that 6068(e)(1) extends to information that is a matter of public record, such as a client's criminal conviction or that a client is a corporation not entitled to do business in the state. That information could be said to be generally known, because it is a matter of public record. As long as someone the lawyer is dealing with does not know it and the client would not want it revealed to that person or used against the client with respect to that person, I think it would be protected under 6068(e)(1). In order to not unduly limit the protection under 6068(e)(1) I would revise (c)(1) to say on line 29 "is known to the current client." I would revise the last sentence of the Comment to say, "The fact that a lawyer has once served a client does not preclude the lawyer from using information when representing another client that is known to that client."

6. Comment [9]. With respect to the last bracketed sentence, lines 148-149, when we get around to removing the brackets, we need to revise the sentence to change the "disqualification" language and to more properly refer to the scope of Rule 1.10.

From: Kevin Mohr [mailto:kemohr@charter.net]

Sent: Wednesday, August 12, 2009 11:02 AM

To: Lauren McCurdy; Randall Difuntorum

Cc: Robert L. Kehr; Lamport, Stanley W.; Kurt Melchior; Kevin Mohr G; Paul Vapnek; Harry Sondheim; Lee, Mimi

Subject: RRC - 3-310 [1.9] - III.B. - Materials for 8/28-29/09 Meeting

Greetings Lauren & Randy:

On Bob's behalf, I've attached Rule 1.9 [3-310], Draft 4 (8/6/09), redline, compared to Draft 3.3 (7/8/09), the draft considered at the 7/24-25/09 meeting. In Word and PDF.

Here is Bob's 8/7/09 e-mail to the Drafters:

My redraft is attached. I don't believe that I have any comments from Kurt or Stan to the paragraph (b) or (c) Comments, and as a result I've made no changes in them, except that I've changed the paragraph numbers to follow in sequence what at the moment are the paragraph (a) Comment paragraphs.

Accordingly, the recommendations in the draft are his alone. However, I anticipate the other drafters will comment during the e-mail comment period that ends 8/24/09.

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

Kevin

P.S. to Bob: I filled in the cross-references to my meeting notes that you had left blank in the attached. Otherwise, it is identical to what you circulated on 8/7.

--

Kevin E. Mohr

Professor

Western State University College of Law

1111 N. State College Blvd.

Fullerton, CA 92831

**RRC – Rule 1.9 [3-310(E)]
E-mails, etc. – Revised (8/24/2009)**

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July 27, 2009 Kehr E-mail #1 to Drafters (Lampert, Melchior & KEM), cc Chair & Difuntorum:

Now that we know that this Rule will be on the August agenda, and given that the agenda deadline is, in round numbers, yesterday ---

Stan: You were going to look at your Comment [8] to see if you think it is needed. Any thoughts on this?

Kurt: At the July meeting you expressed concern about the Comment [3] language: "... in a manner that is contrary to the former client's interests" (if I correctly understood you). Having reread Stan's language in context, I'm not certain what your concern is. Can you explain?

July 27, 2009 Kehr E-mail #2 to Drafters, cc Chair & Difuntorum:

I overlooked one point. Kevin: you were going to look at Rule 4.2 to see if there is a definition of "matter" that we either should use in Rule 1.9, Comment [4] or in a universal definition section.

July 28, 2009 Difuntorum E-mail to Kehr, cc Drafters, Chair & KEM:

Here's the info on the RRC's proposed Rule 4.2. Attached is the current version of the proposed rule and pasted below is an excerpt from the comments that addresses the term "matter." -Randy D.

**RRC – Rule 4.2 [2-100]
Rule – Post-PCD [#17.4] (1/5/09) – ANNOTATED
10-Day Ballot**

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] As used in paragraph (a), "the subject of the representation," "matter," and "person" are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

July 28, 2009 KEM E-mail to Drafters, cc Chair & Staff:

Thanks, Randy. I'm back after my cataract surgery yesterday, which appears to have been successful (though I'll know more when I return to the doc next week; doc was very pleased w/ what he could see today).

Further to Randy's insert below, I've attached a copy of an e-mail I sent Randy in 2006 concerning Rule 4.2 [2-100], w/ a copy of the drafters, and Bob's response thereto. Although the Commission did not define matter in Rule 4.2, the ABA's definition of "matter" in its Formal Op. 342 (concerning screening of government lawyers under the ABA Code) might provide some helpful hints/ideas.

I've also attached a copy of ABA Formal Op. 96-396, which addresses the issue of scope of "matter" w/in the meaning of Rule 4.2. See part V. of Op. 396, at pages 6-7 of the attached. Again, probably not on point, but it might provide us with some ideas.

Please let me know if you have any questions.

June 9, 2006 KEM E-mail to Randy Difuntorum re language for a paragraph (c)(4) in proposed Rule 4.2 [2-100] re government investigations, forwarded to RRC:

Here is a very rough draft of a comment. All I was trying to do was get the concept down on paper, not try to finesse the precise language. As written, I think it is much broader than the Commission members would like -- I can envision any number of abuses that would be possible -- unless we were also to define "matter." See below.

Anyway, here is my effort, which is simply a refashioning of your description of the comment:

"This Rule is only intended to prevent a lawyer from communicating with a represented person in the specific matter in which that person is represented. Therefore, the Rule would not prevent a prosecutor from questioning a represented defendant, who has been charged with crime A but not crime B, about crime B, even where crime B is similar to crime A but the defendant is not represented with respect to crime B."

As to "matter", the ABA issued Formal Ethics Op. 342 in 1975 concerning disqualification and screening of government lawyers and made an attempt at defining "matter." If we were to follow that definition, it might very well gut the exception we are trying to fashion with this comment. This is what the ABA committee wrote:

"Although a precise definition of 'matter' as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. [FN19] Perhaps the scope of the term 'matter' may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. [FN20] By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same 'matter' is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties. [FN21]"

FN19. See MANNING, FEDERAL CONFLICT OF INTEREST LAW 204 (1964).

FN20. See *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2nd Cir. 1973), where an issue of fact regarding Burlington's control of Patentex was an issue of fact in the earlier litigation as well as in the instant litigation. Similarly, in *General Motors Corp. v. City of New York*, 501 F.2d 639 (2nd Cir. 1974), it appeared that many, if not all, of the issues of fact in the two cases involved the same conduct of General Motors that allegedly resulted in monopolizing trade in the manufacture and sale of city buses, and it was held that the same 'matter' was involved within the meaning of DR 9-101(B). In that opinion it was said, at 651: 'the district court set forth the proper tests (60 F.R.D. at 402): In determining whether this case involves the same matter as the 1956 Bus case, the most important consideration is not whether the two actions rely for their foundation upon the same section of the law, but whether the facts necessary to support the two claims are sufficiently similar.'

FN21. 'Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrent to lawyers ever to accept employment with the government. This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter,' the latter being thought to be within the prescription of former Canon 36; *Allied Realty of St. Paul v. Exchange National Bank of Chicago*, 283 F. Supp. 464 (D. Minn. 1968), *aff'd*, 408 F.2d 1099 (8th Cir. 1969). See also B. MANNING, *FEDERAL CONFLICT OF INTEREST LAW* 204 (1964). A contrary interpretation would unduly interfere with the opportunity of a former lawyer to use his expert technical legal skills, and the prospect of such unnecessary limitations on future practice probably would unreasonably hinder the recruiting efforts of various local, state and federal governmental agencies and bodies.

Our interpretation leaves protection of governmental confidences or information largely to the Disciplinary Rules of Canon 4, which apply to governmental lawyers as well as privately employed lawyers; see note 4, *supra*. This result is consistent with the trend toward 'government in the sunshine' and with such statutes as the Freedom of Information Act; cf. *National Labor Relations Board v. Sears, Roebuck & Co.*, 95 S. Ct. 1504 (1975), which discusses the application of that act and its exceptions to the work of government lawyers and generally protects information held by government lawyers when the information falls within the classifications of attorney work product or executive privilege."

I hope this helps somewhat. Please feel free to revise my efforts.

Thanks,

Kevin

* * *

July 10, 2006 Kehr E-mail to Drafters re proposed Rule 4.2 [2-100] and definition of “matter”:

Harry: I have looked at the June 9, 2006 e-mail from Kevin. Perhaps I haven't fully appreciated Kevin's suggestion, but it seems that using a definition of "matter" would not directly address the issues presented, and would not do so accurately. The inaccuracy I fear would be caused in part by the inherent fuzziness of any definition of "matter", as I think Kevin's ABA opinion quote suggests. In part the problem I see is that the prosecutors' issue can arise in a single matter and is not caused only by the possibility that they will want to interview a person who is represented only in a different matter. As I understand current law, a prosecutor is entitled to interview a represented person so long as the interview is pre-indictment and is non-custodial. Returning to the difficulty of defining "matter", it also occurs to me that two matters might be separate and distinct, but that information obtained in one interview nevertheless might be material to the other matter, such as the answer to the question: "Where were you on the night of ...?"

I inserted the missing word, as you pointed out in your Jun 29 e-mail to me, and have attached the revised draft. As far as I am concerned, there is no reason not to include this in the agenda materials and in any mailing to other interested persons. See you all in two weeks.

August 2, 2009 Kehr E-mail to KEM, cc Sondheim, Difuntorum & McCurdy:

Kevin: I have been working on revising this draft and have noticed (so far) two places in which my notes differ from your minutes. They are ---

- I have in my notes that the Rule was deemed approved; and
- When I moved the adoption of Stan's Comment [1], the motion was subject to any editorial suggestions by the drafters (you might remember that I said I had several minor suggestions about the wording, and the other co-drafters had not yet been heard from on Stan's draft). I did the same with the subsequent paragraphs of Stan's that I asked to be adopted.

I'll let you know if I have any other comments on your minutes

August 3, 2009 KEM E-mail to Kehr, cc Sondheim, Difuntorum & McCurdy:

I agree that the black letter was deemed approved (actually, I thought it had been deemed approved following the revisions the Commission approved at the May 2009 meeting).

As for Stan's proposed Comment re paragraph (a), I agree with your understanding. I thought I had written down that you agreed w/ his approach but had a number of drafting issues. I thought that would apply throughout his proposed comment and anticipated you would make the necessary changes in the next draft. It just is not reflected in my notes. I'll make the necessary changes to them.

Please let me know if there are any other problems.

August 4, 2009 Kehr E-mail to KEM, cc Sondheim, Difuntorum & McCurdy:

It's possible that my notes are off, and that the reference was to approval of the Rule at the prior meeting. In any event, I've spotted one more nit in the minutes. Nace suggested the addition of "legal" in the second sentence of Comment [4], so that the insertion would be: "... applies to all types of legal representations" I have made that change in the draft that I have been working on and hope to get back to as early as Thursday evening.

August 6, 2009 KEM E-mail to Kehr, cc Drafters (Lampert, Melchior, KEM), Sondheim, Difuntorum & McCurdy:

I hope that your surgery went well yesterday. I also hope that you are not reading this until Thursday evening at the earliest.

I've just copied you with a chart on state variations of MR 1.0 ("Terminology"). In that chart are several definitions of "Matter" that you might want to consider as you address the issue for Rule 1.9. Here are the definitions:

1. Alaska Rule 9.1(i):

(i) "Matter" includes any judicial or other proceeding, any application, or request for a ruling or other determination, and any contract, claim, controversy, investigation, charge, accusation, arrest, negotiation, or other particular transaction or dealings involving a specific party or parties.

2. D.C. Rule 1.0(h):

(h) "Matter" means any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule.

3. NY Rule 1.0(l):

(l) "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

4. ND Rule 1.0(i):

(i) "Matter", for purposes of Rules 1.7 through 1.12, includes any judicial or other proceeding, application, request for a ruling or other determination, contract claim, controversy, investigation, charge, accusation, arrest, or other transaction.

5. Oregon Rule 1.0(i):

(i) "Matter" includes 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 any other matter covered by the conflict of interest rules of a government agency.

Please let me know if you have any questions.

August 7, 2009 Kehr E-mail to Drafters, cc Chair, Vapnek, Difuntorum & McCurdy:

My redraft is attached. I don't believe that I have any comments from Kurt or Stan to the paragraph (b) or (c) Comments, and as a result I've made no changes in them, except that I've changed the paragraph numbers to follow in sequence what at the moment are the paragraph (a) Comment paragraphs.

August 12, 2009 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Lee:

On Bob's behalf, I've attached Rule 1.9 [3-310], Draft 4 (8/6/09), redline, compared to Draft 3.3 (7/8/09), the draft considered at the 7/24-25/09 meeting. In Word and PDF.

Here is Bob's 8/7/09 e-mail to the Drafters:

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Accordingly, the recommendations in the draft are his alone. However, I anticipate the other drafters will comment during the e-mail comment period that ends 8/24/09.

Please let me know if you have any questions.

August 13, 2009 Lamport E-mail to McCurdy, Difuntorum & KEM, cc Drafters, Chair & Lee:

The following are my comments to the revised draft:

1. Comment [1]. Two issues. First, I do not agree with insertion of the phrase "that carries a substantial risk that it will" in lines 38 and 39. It is proper in Comment [2], but not in Comment [1]. The duty is to not do anything injurious in a manner in which the lawyer represented the former client. The rule creates a zone of protection with the substantial risk language. The "substantial risk" concept is also in Comment [3] that deals with confidential information, but we did not add substantial risk to that duty in Comment [1]. The language in Comment [1] is misplaced and should be deleted. Second, I do not agree with replacing the word "it" on line 45 with "any such information later." The sentence is talking about two things, (i) being able to entrust a matter to the lawyer and (ii) confiding confidential information, but then ends by referring only to confidential information. "It" was in there to refer to both concepts. If we want

to spell it out we need to say "that the lawyer's knowledge of the client's matter and any confidential information confided to the lawyer later..." Personally, I prefer "it." But the sentence does not work as presently reworded.

2. Comment [3]. As a land use lawyer, I have to say that the land use example, which is derived from the Model Rule Comment, reads like a foreign permitting process. We don't have environmental permits in California per se. It would be consistent with how California land use permitting works to say, "a lawyer who has previously represented a client in connection with the environmental review associated with the land use approvals to build a shopping center ordinarily would be precluded from later representing neighbors seeking to oppose a rezoning of the property based on environmental considerations that existed when the lawyer represented the client..." This is a slight revision over the language in the Comment to account for the fact that if the environmental issue is something that did not exist at the time of the representation, it would not be conflict. For example, if the issue relates to the release of hazardous material that occurred after the representation, I don't see how that would raise a conflict.

3. Comment [5] and deleted Comment [7]. Comment [5] does not deal with substantial relationship with respect to the first of the two duties related to the rule. It deals only with the confidential information portion. Comment [7] dealt with both concepts. I do not agree with deleting it. I would move Comment [7] to the beginning of Comment [5] and have the rest of Comment [5] follow it.

4. Comment [9] I do not understand the first sentence in this Comment. It is unclear and I don't get why we are talking about potential conflicts in this sentence. This is an issue of imputation and whether imputation follows a lawyer to a new firm. Why can't we say, "Under Rule 1.10, when one lawyer in a law firm is required to comply with Paragraph (a), all of the other lawyers in the firm also must comply with Paragraph (a). Paragraph (b) addresses how this Rule applies when a lawyer has left the law firm and represents a former client of the firm. In that situation, the lawyer is subject to Paragraph (a) only when..." In addition, on line 123 I would replace the word "disqualified" with "prevented." On line 124 I would change "a related matter" to "a substantially related matter."⁶

5. Comment [8] and Rule (c)(1). I think that the "generally known" language in the rule and in the Comment would be a limitation of the protections of confidential information under 6068(e)(1). My understanding is that 6068(e)(1) extends to information that is a matter of public record, such as a client's criminal conviction or that a client is a corporation not entitled to do business in the state. That information could be said to be generally known, because it is a matter of public record. As long as someone the lawyer is dealing with does not know it and the client would not want it revealed to that person or used against the client with respect to that person, I think it would be protected under 6068(e)(1). In order to not unduly limit the protection under 6068(e)(1) I would revise (c)(1) to say on line 29 "is known to the current client." I would revise the last sentence of the Comment to say, "The fact that a lawyer has once served a client does not preclude the lawyer from using information when representing another client that is known to that client."

6. Comment [9]. With respect to the last bracketed sentence, lines 148-149, when we get around to removing the brackets, we need to revise the sentence to change the "disqualification" language and to more properly refer to the scope of Rule 1.10.

⁶ See August 14, 2009 Lampion E-mail to McCurdy, Difuntorum & KEM, cc Drafters, Chair & Lee:, below.

August 14, 2009 KEM E-mail to Staff:

If it's not too late, would you please include in the agenda materials Stan's e-mail, below, immediately after the latest draft of the Rule I sent you earlier?

August 14, 2009 Lamport E-mail to McCurdy, Difuntorum & KEM, cc Drafters, Chair & Lee:

I would like to amend my proposed language in my item 4 below to state: "Under Rule 1.10, when one lawyer in a law firm is required to comply with Paragraph (a), all of the other lawyers in the firm also must comply with Paragraph (a). Paragraph (b) addresses how this Rule applies when a lawyer has left the law firm and represents a client whose interests are materially adverse to a former client of the law firm. In that situation, the lawyer is subject to Paragraph (a) only when..."

August 24, 2009 Tuft E-mail to RRC List:

1. I question the use of the term "current" in paragraph (c) on lines 26 and 30 of draft 4. Are we convinced there are no circumstances in which the rules or the State Bar Act would permit use or disclosure of information with respect to a former client?

2. Comment [1]:

a. The phrase anything that "carries" a substantial risk on line 35 is unclear and does not have a parallel in the other rules. . Shouldn't the word "carries" be changed to "creates" or "gives rise to"? (see note 4, below).

b. I would change "candor" on lines 42 to "confidence."

c. The last sentence in Model Rule [1] is useful and should be included.

3. Comment [6]. I do not favor citing court of appeals decisions, particularly where there is supreme court authority available (e.g., Cobra Solutions).

4. Comment [8].

a. This comment does appear to be redundant. However, I note that the wording on lines 123-124 ("representation of a new client creates a substantial risk" preferable to the wording in proposed comment [1] on line 35.

b. Comment [8] refers to information protected by §6068(e) rather than Rule 1.6. Are we making the right decision to limit the scope of this rule to information protected by 1.6 without a corresponding reference to section 6068(e) or are we creating a source of confusion in the minds of lawyers who are not steeped in the delicate intricacies of rule drafting and have to work with this rule in actual practice? Clarifying in a comment to this rule that the duty of confidentiality sources from section 6068(e) and that compliance with the statute is mandated in Rule 1.6(a) would be helpful.

5. Comment [9]. I do not understand the first sentence on lines 132-135 or the explanation in Note 27. Proposed ¶(b) tracks Model Rule 1.9(b).

August 24, 2009 Sapiro E-mail to RRC List:

1. Until we revise Rule 1.7(d), to require the informed written consent of the current client, please show me as dissenter to Rule 1.9.
2. For the same reason, unless we add to the Comment (probably at Comment [9]) a statement expressly cautioning the lawyer that the current client's informed written consent is also required under either Rule 1.7 or Rule 1.9, this rule is inadequate. It implies that the only consent that is required is the informed written consent of the former client, placing the former client in the anomalous position of being entitled to more protection than the current client.
3. I also request that I be shown as a dissenter to paragraph (b)(1) and to Comment [1]. We have uniquely defined the scope of confidential information in proposed Rule 1.6 to mean only information related to the representation. By limiting the cross-references to that rule and deleting references to Business and Professions Code section 6068(e), we limit the protections of the former client under this rule and mislead lawyers about their duties under Section 6068(e). For example, suppose I am hired for estate planning. During a meeting, the client says, "This is a confidential discussion, isn't it?" I respond, "Yes." The client then tells me that he is worried because his corporation is about to make a public offering, and there are misleading and false comments in the offering circular. Later, the client fires me. He is therefore a current client. By our unique limitation of the duty of confidentiality under Rules 1.6 and 1.9, I am later permitted by our rules to use the information my former client gave me against him and his company in suing on behalf of a current client who invested in the offering.
 - a. That would be inconsistent with Section 6068(e), but if I only read the Rules of Professional Conduct, I would be lead to believe that this disloyalty is permitted – indeed, under the majority votes on these two rules, encouraged. I say "encouraged" because paragraphs (c)(1) and (2) permit me to reveal information given to me in confidence by a former client if permitted by these rules.
4. My concern about the Rule 1.6 limitations is reinforced by proposed Comment [3]. If it only applies to information related to the representation, then I am free to disclose information communicated to me by my former client that was not related to the matter in which I was representing the former client. In addition, Comment [8] now expressly limits the scope of the information a lawyer is required to protect under this rule by referring only to Rule 1.6(a).
5. Responding to footnote 12, I agree that the word "current" should be inserted.
6. As a matter of drafting style, at line 64 of the agenda materials, at page 174, I would delete the semicolon and insert a period. Then, I would start the next sentence with the word "However."
7. In Comment [4], I think the phrase at lines 68 and 69 ["is in the same or a substantially related matter to the lawyer's representation"] would be clearer if it is revised to: ". . . in the same matter as, or a matter substantially related to, the lawyer's representation . . ."

8. In the next sentence, “all types of legal representation” appears both in line 70 and lines 71 and 72. This makes the sentence repetitiously redundant. I would revise the phrase at lines 71 and 72 from “. . . including civil and criminal litigation, transactions of every kind, and all other types of representations” to become “. . . such as civil and criminal litigation, administrative proceedings, and transactions of every kind.”
9. As a substantive matter, I question the validity of the last sentence of proposed Comment [4]. I do not see how a lawyer can avoid a conflict under Rule 1.9 by limiting the scope of a representation. By definition, this rule does not apply unless the current matter and the former matter are the same or substantially related. No matter how a lawyer limits the scope of the representation of the current client, if the matters are the same or are substantially related, any involvement in the representation of the current client to the detriment of the former client is impermissible. Does this sentence mean that, if I have a conflict of interest, I am absolved from it by limiting work for the current client to behind the scenes consultations and not appearing in court?
10. Regarding the deletion of Comment [7] and footnote 29, I disagree with the deletion of the entire paragraph. I would delete only the first phrase [“Independent of the question of disqualification of a firm”] I would leave the rest of the sentence in. I think the statement of this affirmative duty is important.
11. In Comment [6], at line 96, I would de-sex the word “his” and make it the word “the.”
12. In Comment [6], at line 104, I recommend that we clarify the reference to “client” by changing the phrase “between lawyer and client” to “between lawyer and former client.”
13. In proposed Comment [9], at line 171, I would insert the word “former” before the word “client” to clarify which client is the one who has to give the informed written consent.
14. I suspect that proposed Comment [X] was added primarily because of a concern I expressed at a previous meeting. I appreciate the attempt. However, the comment does not quite address the point that I raised. The word “person” implies that it refers to a client who is a living, breathing, human being. We use the word “client” to relate both to people and to artificial entities such as corporations. By using the word “person,” instead of the word “client” or phrases such as “current client” or “former client,” we imply that the sentences in which the word “person” appears only apply to human beings. That should be corrected.