

From: [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#)
Cc: [Robert L. Kehr](#); [Stan Lampport](#); [Kurt Melchior](#); [Kevin Mohr G](#); [Paul Vapnek](#); [Harry Sondheim](#)
Subject: RRC - 1.9 [3-310] - III.E. - Agenda Materials (1/22-23/10 Meeting)
Date: Monday, January 11, 2010 8:34:09 PM
Attachments: [RRC - 3-310 \[1-9\] - Public Comment Chart - By Commenter - DFT2.2 \(01-06-10\)RLK-KEM.doc](#)
[RRC - 3-310 \[1-9\] - E-mails, etc. - REV \(01-19-10\) 117-123.pdf](#)
[RRC - 3-310 \[1-9\] - Compare - Rule & Comment Explanation - DFT4.1 \(01-11-10\)RLK-KEM.doc](#)
[RRC - 3-310 \[1-9\] - Compare - Introduction - DFT3.1 \(01-11-10\)RLK-KEM - Cf.to DFT2.doc](#)
[RRC - 3-310 \[1-9\] - Dashboard - For Adoption - DFT3 \(01-10-10\)KEM.doc](#)
[RRC - 3-310 \[1-9\] - Rule - DFT6.3 \(01-07-10\)RLK - Cf. to DFT5.3 - LAND.doc](#)

Greetings Lauren & Randy:

I've attached the following, so you have all the 1.9 documents in one place. Please include them in the agenda materials in the following order:

1. Public Comment Chart, Draft 2.2 (1/6/10)RLK-KEM. In Word.
2. Rule, Draft 6.3 (1/7/10). This is the draft Bob circulated on 1/7/10. I've changed the draft number according to our (my?) draft numbering convention but it is identical to Bob's draft. In Word.
3. E-mail compilation excerpt, including communications among the drafters over the last week or so. In PDF.
4. Dashboard, Draft 3 (1/10/10)KEM. I've made the changes Bob requested. Marked in yellow. In Word.
5. Introduction, Draft 3.1 (1/11/10)RLK-KEM - Cf. to DFT2. I made a change to the legend under the date and highlighted where we'll have to make changes after the next meeting for submission to RAC/BOG.
6. Rule & Comment Comparison Chart, Draft 4.1 (1/11/10)RLK-KEM. This is identical to draft 4, which Bob circulated on 1/7, except that I've highlighted in yellow parts of the document that may require further change.

I have a few comments on the proposed changes that I will circulate during the next week. Otherwise, I think these are good to go.

Bob, if you would prefer a different order, please advise. I think items 1, 2 and 3 are the most important for consideration.

Stan, Draft 6.3 is the most recent draft of the Rule.

Thanks,

Kevin

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

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	California Public Defenders Association ("CPDA")	M			<p>CPDA is generally in agreement with Proposed Rules 1.9 and 1.10 except for their failure to follow existing law in recognizing that imputed conflicts of interest must be analyzed differently between criminal cases and civil cases, especially in criminal cases where the clients are represented by a public defender's office or other indigent defense office. The problems with Proposed Rules 1.9 and 1.10 are not so much in the language of the proposed rules but instead arise from certain comments published in conjunction with these rules. Comments [5] and [6] to Proposed Rule 1.9 are problematic, contrary to existing law, fail to take into consideration various factors concerning public defender and other indigent offices, and would result in wasteful expenditures of limited public funds without resulting in any additional protection of the confidences and secrets of former clients. The application of the <i>Ahmanson</i> presumption to criminal cases was expressly rejected in <i>Rhaburn v. Superior Court</i>. The CPDA respectfully suggests that Comments [5] and [6] must be modified to limit their application to civil cases, or at least recognize that the vicarious disqualification rule must be</p>	<p>The CPDA letter describes proposed Comments [5] and [6] as expanding the scope of Rule 1.9 by creating imputation among lawyers associated in a law firm so that a lawyer can be subject to vicarious disqualification because another lawyer in the law firm possesses disqualifying information. This is not correct, and the Commission has not made the requested change. Each of the three paragraphs in Rule 1.9 is premised on a lawyer's actual possession of confidential information. Comments [5] and [6] discuss whether two matters are substantially related, that is, whether confidential information acquired in a lawyer's employment in one matter will be deemed to be pertinent to the lawyer's employment in a different matter. The imputation with which CPDA is concerned appears in Rule 1.10.</p> <p>Also regarding Comment [5], see the reply to OCTC, below.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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					applied more flexibly in criminal cases. In addition, since Comment [5] to Proposed Rule 1.10 incorporates Rule 1.9, and applies the same disqualification rules where the former client was represented by a lawyer who is no longer employed by the firm, Rule 1.10, subdivision (b)(1), and Comment [5] must likewise be modified.	
2	COPRAC	M		Comment [3]	<p>We agree with the minority as to the issue involving Business and Professions Code section 6068(e) and proposed Rule 1.6, in that it appears to COPRAC that the definition of confidential information set forth in proposed rule 1.6 is narrower than the scope of Section 6068(e). The proposed rule references the State Bar Act; Comment [3] references Rule 1.6; Comment [7] then refers to both section 6068(e) and Rule 1.6; and finally Comment [10] then references yet a further iteration, a duty to preserve confidential information “about a client.” COPRAC suggests that uniformity of reference would assist practitioners in applying the rule. Reference to section 6068(e) and Rule 1.6 (assuming that rule is re-crafted to address the concerns of the minority) would be appropriate.</p> <p>Comment [3] appears to have an incorrect reference to the type of work being performed by the lawyer who is the subject of the second</p>	<p>The Commission does not agree because Rule 1.6 defines “confidential information related to the representation” to include all information protected by Section 6068(e). Nevertheless, there is no important reason for not including dual references to Rule 1.6 and Section 6068(e), and the Commission has edited Rule 1.9 accordingly.</p> <p>The Commission agrees and has made the</p>

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					<p>“(b) A lawyer shall not represent a person in a matter which the lawyer knows to be the same or substantially related to a matter in which a law firm with which the lawyer formerly was associated had represented a client:</p> <p>(1) whose interests are materially adverse to that person; and</p> <p>(2) about whom the lawyer, while at the former law firm, had acquired information that is protected by Business and Professions Code section 6068(e) and Rule 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent.”</p>	<p>which it has been adopted.</p>
6	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M			<p>PREC is generally supportive of the proposed Rule and its Comments. However, there is some concern that the Comments are too long, give practice pointers, and are suggestive of means to avoid disqualification in a way that may be viewed as attempting to create substantive law for civil proceedings. Comments [8] and [9] in particular seem directed to provide guidance not just to lawyers but also to Courts on the subject of</p>	<p>The Commission's response regarding Comment [8] is given immediately below.</p> <p>On Comment [9], the Commission agrees that its discussion of burdens is not appropriate. The application will be worked out by case law. California already has some applicable case law, for example, <i>Adams v. Aerojet-General</i>, 86 Cal. App. 4th 1324 (2001). The allocation of the burden might depend on the situation in which the issue arises.</p>

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					<p>disqualification. Comments that refer to disqualification are not just for disciplinary purposes – they seem calculated to specifically address how Courts will handle disqualification.</p> <p>Comment [8] With respect to Comment [8], the disqualification reference could be avoided by saying that such representation is not a violation of this rule.</p> <p>Comment [9] If Comment [9] is to be retained, the last sentence should be modified to make it clear that the burden of proof should rest upon the firm <i>and the lawyer</i> whose disqualification is being sought. Paragraph (b) of the Proposed Rule is about a lawyer, not just a firm. We note, however, that the disciplinary rules are no place to set civil burdens of proof or regulate disqualification.</p> <p>1.9(c)(1) and (2) PREC also has some concern about the repeated references to the State Bar Act, in subsections (c)(1) and (2). We note that the reference to the State Bar Act in a disciplinary rule is too broad, and carries with it the same lack of clarity that would come with language such as “except otherwise as provided by law.” If the primary concern by reference to the State Bar Act is Section 6068(e), and if that is the intent, the rule should simply refer</p>	<p>such as in a damage claim by a former client, a disciplinary proceeding or a disqualification motion, so no single statement should be attempted.</p> <p>The Commission agrees and has removed the reference to disqualification and most of the discussion of the application of the Rule.</p> <p>The Commissions removal of most of Comment [9] obviates these additional comments.</p> <p>The Commission agrees that the broad reference to the State Bar Act could lead to confusion. However, the legislature presumably has the authority to create exceptions to the general rule of client confidentiality, and narrowing the Rule as suggested might interfere with any such action by the legislature.</p>

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				Comment [11]	to that section. Regarding Comment [11], we are concerned about the last sentence that seems to convey that a lawyer is free to disclose any information about a former client that is “generally known information.” This is not well defined and leaves open the possibility of being construed by lawyers as <i>carte blanche</i> to reveal information from the public record. If the sentence is retained, we believe the meaning of “generally known information” should be clarified, and distinguished from public record information.	The Commission disagrees and has not made the requested change. The concept of what information is generally known is well understood, and it correctly describes that category of information, learned by a client as a result of representing a client, that the lawyer is not obligated to not repeat.
7	Office of Chief Trial Counsel (“OCTC”), State Bar of California			1.9(a) & 1.9(b) 1.9(b)	1. OCTC is concerned that paragraphs (a) and (b) have added an undefined term, “materially adverse,” rather than “adverse” in the current rule. This is a significant change in the law. This will create uncertainty for lawyers and make prosecution more difficult. In addition, paragraph (b) should reference § 6068(e), as well as Rules 1.6 and 1.9(c).	The Commission disagrees as this language is found in other jurisdictions without causing confusion so far as the Commission is aware. The Commission agrees and has made the requested change. See the RRC response to the COPRAC letter. The Commission disagrees and has not made the

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				1.9(c)(1)	2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit ... or when the information has become generally known" in paragraph (c)(1). First, OCTC repeats the concern it raised in relation to proposed Rule 1.6 that lawyers are required to disclose confidential information under some circumstances. Second, OCTC notes that currently, a lawyer may not reveal information in the public record if the lawyer learned of that information during or because of the representation. See <i>In the Matter of Johnson</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190. ²	requested change. OCTC misunderstands the <i>Johnson</i> decision. It does not say that a lawyer never can disclose public information but rather that a lawyer is not free to disclose information simply because it can be found among public records; information might be in a public record but not generally known.
				1.9(c)(2)	3. Paragraph (c)(2) references the exception to current clients. First, like paragraph (c)(1), (c)(2) raises issue of whether the confidentiality rules should require some disclosures. Second, unlike (c)(1), paragraph (c)(2) does not include the language "or when the information is generally known." This requires clarification.	The Commission disagrees and has not made the requested change. OCTC is correct that paragraph (c)(2) does not express an exception for information that is generally known. However, that paragraph prohibits the disclosure of confidential information, and the Commission does not see how a lawyer could be considered to have disclosed information that already is generally known. Comment [5] as previously drafted described a

² KEM Note: This same concern was raised in relation to Rule 1.6 by OCTC and Rob Sall. I've revised Comment [6] to that rule as follows:

[6] Confidential information relating to the representation and contained in lawyer work product is protected under this Rule. However, "confidential information relating to the representation" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known and outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

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				Cmt. [5]	<p>4. The statement in Comment 5 that the substantial relationship test presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In <i>In the Matter of Lane</i> (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: "Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)" (Id at 747.) If there is to be a change in the law, it should be in the rule, not a comment.</p> <p>Further, OCTC disagrees with Comment [5]'s analysis, which states the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; the new client can learn of them even if not present by reading the pleadings or a transcript. The new client may also be a witness.</p>	<p>distinction between the application of the substantial relationship test in disqualification and in other contexts. The Commission agrees with OCTC's citation of the <i>Lane</i> case, an opinion that demonstrates that Comment [5] was based on a faulty premise. The Commission accordingly has removed Comment [5].</p>

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					<p>The Commission's Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney's mind. It would create numerous disputes as to what the client really told the lawyer. Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.</p> <p>Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (<i>City National Bank v. Adams</i> (2002) 96 Cal.App.4th 315, 328.)</p> <p>In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See <i>City National Bank v. Adam, supra</i>, Cal.App.4th at 328; <i>In re I Successor Corp</i></p>	

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					<p>(Bkrtcy S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (<i>City National Bank v. Adams, supra</i>, 96 Cal.App.4th at 327-328.)</p> <p>Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931, 934.) While <i>Woods</i> addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.</p>	The Commission believes Comment [6] is correct and cannot tell from the OCTC letter how it might be

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				Cmt. [6]	5. Comment [6] presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related."	edited. The Commission agrees and has added the 6068(e) reference to Comment [6]. The Commission disagrees, as explained above in reply to the OCTC comment on paragraph (c)(2), has not made the requested change.
				Cmt. [7]	Comment [6] also does not reference Business & Professions Code section 6068(e). Yet, Comment [7] does reference section 6068(e). The difference in these Comments could create some confusion and uncertainty.	
				Cmt. [11]	As to Comment [11], OCTC is concerned that, like paragraph (c) itself, what is meant by "generally known information" and this Comment appears not consistent with the established law that section 6068(e) is broader than the attorney-client privilege. Section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that is in the public record. (See <i>In the Matter of Johnson</i> (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the current law. ³	
1	Orange County Bar Association	M		1.9(c)(1) & (2)	The OCBA is concerned that the change from the Model Rule in paragraphs (c)(1) and (2), to substitute "current client" for "client,"	The Model Rules sometimes refer to current clients without the modifier "current", which sometimes causes a lack of clarity as to whether the reference

³ See footnote 2.

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					<p>potentially introduces ambiguity. As former clients continue to enjoy various protections against use and disclosure of their confidential information, it is not clear whether the modified reference to “current client” is intended to narrow the exception to apply only to rules applicable to current clients, to the exclusion of rules permitting disclosures as to former clients. The OCBA accordingly asks the Commission to clarify the meaning and intent behind the reference to “a current client” in the exception.</p> <p>Comment [1] Comment [1] should be amended to substitute “with respect to” for “in” on line five (with the phrase to read “. . . will injuriously affect his or her former client with respect to any matter. . .”) so that the Comment is not read as restricted only to the very matter in which the attorney represented the former client.</p> <p>Comment [4] Comment [4] should be amended to add “in” after “is” in the second line (simply to correct what appears to be a typographical error).</p> <p>Comment [7] Comment [7] should be amended to substitute “. . . with respect to any matter in which the lawyer represented the former client” for “in any manner in which the lawyer represented the former client” (in the third sentence, subpart (i)), to clarify the meaning of the</p>	<p>includes former clients. The Commission has adopted the style of including “current” whenever a misreading otherwise might be possible. In paragraph (c) the reference to “current” client is correct and emphasizes that the duty of confidentiality to former clients is no less than is owed to current clients. The Commission has not made the requested change. Subparagraph (c)(1) provides a good example because, without “current” it confusingly would read: “. . . use information relating to the representation to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a client,”.</p> <p>The Commission has not made the requested change. The questioned phrase is taken directly from the Supreme Court’s opinion in <i>Wutchumna Water Co. v. Bailey</i>, 216 Cal. 564 (1932), where it appears multiple times.</p> <p>The Commission agrees and has made the suggested addition.</p> <p>This repeats the suggestion made with respect to Comment [1], and for the same reason the Commission has not made this change.</p>

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				Comment [11]	<p>Comment, consistent with our suggestions for Comment [1].</p> <p>Comment [7] also should be amended by substituting "of" for "to" in the last line (simply to correct what appears to be a typographical error).</p> <p>The OCBA believes that Comment [11] should be deleted entirely, as not useful and as inherently contradictory, or it should be amended to eliminate any ambiguity.</p>	<p>The Commission agrees and has made the suggested change.</p> <p>The Commission disagrees and has not made the requested change. The first and third sentences of Comment [11] are taken directly from the Model Rule and are correct. The second sentence merely provides cross references to other Rules.</p>
4	San Diego County Bar Association, Legal Ethics Committee	A			We approve of the new rule in its entirety.	No response required.
5	Santa Clara County Bar Association	A			No comment.	No response required.

Rule 1.9 Duties To Former Clients

(Commission's Proposed Rule – Clean Version)

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

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564) These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide information to the lawyer that will be protected as required by Business and Professions Code section 6068(e) and Rule 1.6 without fear that any such information later will be used against the client. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client with respect to a matter in which the lawyer represented the former client. For example, a lawyer could not properly seek to rescind on behalf of a new client a contract the lawyer drafted on behalf of the former client. A lawyer who has prosecuted an accused person could not

represent the accused in a subsequent civil action against the government concerning the same matter.

[3] Paragraph (a) also addresses the second of the two duties owed to a former client. It applies when there is a substantial risk that information protected by Rule 1.6 that was obtained in the prior representation would be used or disclosed in a subsequent representation in a manner that is contrary to the former client's interests and without the former client's informed written consent. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person ordinarily may not later represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in connection with the environmental review associated with the land use approvals to build a shopping center ordinarily would be precluded from later representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations that existed when the lawyer represented the client; however, paragraph (a) would not apply if the lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent if there is no substantial relationship between the land use zoning and eviction matters.

[4] Paragraph (a) applies when the lawyer's representation is in the same matter as, or in a matter substantially related to, the lawyer's representation of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a

conflict of interest. See Rule 1.2(c) (limiting the scope of representation) and Rule 1.7, Comment [15].

~~[5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney. (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454) This disqualification application exists, at least in part, to protect the former client by avoiding an inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. (See *In re Complex Asbestos Litigation*, (1991) 232 Cal.App.3d at p. 592; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes might not be necessary because the lawyer can provide evidence concerning the information actually received in the prior representation.~~

[6] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code section 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

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

Lawyers Moving Between Firms

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

[9] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. ~~A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast,~~

~~another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.~~

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

[11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Client Consent

[12] The provisions of this Rule are for the protection of former clients and can be waived if the former client gives informed written consent. See Rule 1.0(e). With regard to the effectiveness of an advance consent, see Comment [22] to Rule 1.7. With regard to the application of a lawyer's conflict to a firm with which a lawyer is or was formerly associated, see Rule 1.10.

December 29, 2009 Kehr E-mail to Drafters (Lamport, Melchior, KEM, Vapnek), cc Chair & Staff:

I have attached the commenter chart and a revised draft of the Rule and Comment. This requires careful review. The commenters made some interesting points.

I will hold off on the remaining documents until I've heard from you on this.

Attached:

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT2 (12-29-09)RLK.doc
RRC - 3-310 [1-9] - Rule - DFT6 (12-29-09) - Cf. to DFT5.3.doc

December 31, 2009 Melchior E-mail to Drafters, cc Chair & Staff:

I will make comments as I go along.

1. (b)(1) seems confusing due to the use of the word "are." Do we mean a person whose interests in the current matter are adverse, or whose interests in the prior matter were? I think that we mean the former and should say so. I have had my say about the vagueness of "materially adverse" and will not repeat that here.
 2. I thought that we had decided that a lawyer's disclosure of information received from a client, even if it has since become public through other means, could reveal that the client had previously had occasion to seek legal advice about that subject or otherwise compromise the client's privacy, and that this should NOT be allowed. But (b)(1) allows it.
 3. Captions for the subdivisions would really help one find their way through this maze. And the language is quite forbidding.
 4. The third sentence of Comment [1] is a lengthy, sententious and pompous statement which adds nothing to one's comprehension. I would delete it.
 5. And it follows that much of Comments [2] and [3] is infected by this virus, carried over from [1].
 6. I will stop reading the Comments, but note that we have managed to have 3 MORE comments than the ABA has -- if that can be believed! -- but are retaining or expanding on the ABA bloviations, to no discernible benefit. Going to the public comments, I am fine with the responses until we get to the CPDA, where I think we could be more responsive. I have just read (scanned) the Rhaburn case which CPDA cites; and while the case states that in civil matters, disqualification standards have become more flexible recently (a debatable proposition to me), it plainly states that the rule should be less rigidly applied in criminal cases. HOW MUCH less rigidly, remains to be seen. So it is my opinion that we must recognize their point.
- We might best be able to do that by ADDING (really!) an additional Comment to the effect that the standards for disqualification in criminal cases are evolving (indeed, so are they in civil cases), cf. Rhaburn, and that for DQ purposes in criminal cases, practitioners are advised to consult current case law -- or some variant of this.

Trying to shoehorn that into the current comment would make the illegible, impenetrable, IMO.

7. I agree with PREC's comment 11. See my comment 2 above.

January 5, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

I haven't had a chance to review your proposals but I did notice that the chart you circulated did not include the OCTC comments, which are quite pointed about the rule's treatment of the substantial relationship test.

I've attached a revised draft 2.1 (1/4/10)RLK-KEM of the chart. I've added OCTC's comments but they await your response. Please also note that I've resorted the Commenters in alphabetical order but otherwise have not made any changes to the chart.

I will review its substance of the chart as well as the draft rule you circulated last week later tonight.

I've also attached the OCTC letter, converted to Word. I haven't proofed it for accuracy but the OCR program I used for the conversion is usually very accurate.

Please let me know if you have any questions.

Attached:

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT2.1 (01-04-09)RLK-KEM.doc

RRC - PubCom - 11-04-09 OCTC Letter to RRC re Batch 5-F(2).doc

January 5, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

Now that I'm done with the CEB program materials, I will get back to the RRC agenda items. Except for your message about the number of Rule 1.8 and your and Kurt's messages on Rule 1.9, I haven't heard back from anyone on those items on which I'm taking the lead. Because time is beginning to grow short, I will plow ahead beginning tonight and try to get completed drafts out as quickly as I can.

January 5, 2009 Kehr E-mail to Melchior, cc Drafters, Chair & Staff:

I agree with the criticism of paragraph (b)(1) in your paragraph 1, and I've attempted a revision. See the attachment. Please tell me what you think of this.

I don't recall the decision you describe in your paragraph 2. Kevin: Can you assist on this?

As for captions, that is an interesting idea, but I don't see how to accomplish it.

Attached:

RRC - 3-310 [1-9] - Rule - DFT6.2 (01-05-10)RLK - Cf. to DFT5.3.doc

January 6, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

I'll get out a revised chart that covers the OCTC comment, perhaps this evening, but I have a preliminary question. You highlighted selected language, but I don't follow how you selected what to highlight. Can you clarify?

January 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

That was just to flag where you indicated agreement with a commenter and made a change to the rule. See also the footnote I included by which I addressed the "public record" vs. "generally known" issue. I also note that although you mention you changed comments [8] and [9] in response to LACBA, there are no markings in Comment [8].

By the way, I finally got to this a little while ago. I disagree with the changes you propose for 1.9(b), as well as the proposed change to 1.9(c). E-mail to follow shortly.

January 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

1. I see no reason to make the changes to paragraph (b). I realize COPRAC suggested it but there is no compelling reason to make any change except perhaps to add the reference to section 6068(e). In particular, with respect to subparagraph (1), all that's been done is to reverse the order of the language and in doing so diverged markedly from the Model Rule language. It will leave folks scratching their heads at what we meant and, when we explain that it is the exact same meaning as what is already in the Model Rule language, why we had to do it (other than to be different). The paragraph is quite simple to understand. None of my students have a problem with it; they understand immediately what is at issue. More important, the court in *Adams v. Aerojet-General* had no problem in understanding what was intended by Model Rule 1.9(b) when it adopted that provision for use in California in what is now known as the "modified substantial relationship test". We've already been over this paragraph and discussed it endlessly before. We've already spent numerous e-mail exchanges discussing this provision. There is nothing wrong with it. The Commission approved the MR language, modified to include the phrase, "while at the former law firm," which was taken from New Jersey and was the only change that was necessary to remove the ambiguities that had been raised. I object to the changes other than the addition of the 6068(e) reference. They do not improve the rule.

2. Also, as to the change to (c)(1), it should remain "the State Bar Act." If the Legislature is going to provide an exception, it will be in the State Bar Act, but not necessarily in 6068(e). In the recent past, the Legislature has proposed new sections 6068.1 and 6068.5, respectively, both of which were attempts to carve out exceptions to 60608(e). I think we should leave it as the State Bar Act in the Rule, but leave the specific reference to 6068(e) in the comment.

January 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

1. What I wrote in 1, below, about (b)(1) applies equally to the revision to (b)(2). Again, the only change that should be made is to add the reference to 6068(e).

2. In your previous e-mail to Kurt, you also stated the following, w/ a question for me, which I neglected to answer in my previous e-mail:

I don't recall the decision you describe in your paragraph 2. Kevin: Can you assist on this?

Here is what Kurt wrote in his #2:

I thought that we had decided that a lawyer's disclosure of information received from a client, even if it has since become public through other means, could reveal that the client had previously had occasion to seek legal advice about that subject or otherwise compromise the client's privacy, and that this should NOT be allowed. But (c)(1) allows it.

I did a search of my meeting notes and did not find anything along the lines that Kurt relates. There were a few discussions concerning "generally known" vs. "public record," but there weren't any votes on it. I've recommended that we address this in the comment to Rule 1.6 (two commenters requested that the distinction be drawn). Here is how I revised proposed Rule 1.6, cmt. [6]:

[6] Confidential information relating to the representation and contained in lawyer work product is protected under this Rule. However, "confidential information relating to the representation" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known and outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

The same or a similar statement could be placed at the end of Rule 1.9, cmt. [11].

January 7, 2010 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

My responses to your comments are interlineated below, and new drafts are attached. In addition, I have edited Comments [8] and [9] and altered the commenter chart accordingly. Thank you for picking up the OCTC comment. I don't know how I missed it before, but in any event I've covered it now. As you will see, my understanding of Matter of Johnson is the same as yours.

I have taken the liberty of removing the Minority statement in the Introduction and the comparison chart b/c both of its elements no longer apply. The first element commented on a distinction between Rule 1.9 and 1.7(d) that no longer exists. The second commented on references only to Rule 1.6, but the current draft refers to Rule 1.6 and section 6068(e) in parallel. (Although I disagree with Rule 1.9 for a number of reasons, none of which were picked up with the prior Minority statement, I don't intend to file a minority report).

I have not edited the Dashboard b/c I lack the skill, but it is wrong in saying that we have made material additions to the Model Rule (and this statement also is inconsistent with the Introduction). The only real change is the "while at the former law firm" in paragraph (b)(2), but I view that as a clarification only.

As always, I hope that others will carefully review my drafting.

**RRC – Rule 1.9 [3-310(E)]
E-mails, etc. – Revised (1/19/2010)**

1. I see no reason to make the changes to paragraph (b). I realize COPRAC suggested it but there is no compelling reason to make any change except perhaps to add the reference to section 6068(e). In particular, with respect to subparagraph (1), all that's been done is to reverse the order of the language and in doing so diverged markedly from the Model Rule language. It will leave folks scratching their heads at what we meant and, when we explain that it is the exact same meaning as what is already in the Model Rule language, why we had to do it (other than to be different). The paragraph is quite simple to understand. None of my students have a problem with it; they understand immediately what is at issue. More important, the court in Adams v. Aerojet-General had no problem in understanding what was intended by Model Rule 1.9(b) when it adopted that provision for use in California in what is now known as the "modified substantial relationship test". We've already been over this paragraph and discussed it endlessly before. We've already spent numerous e-mail exchanges discussing this provision. There is nothing wrong with it. The Commission approved the MR language, modified to include the phrase, "while at the former law firm," which was taken from New Jersey and was the only change that was necessary to remove the ambiguities that had been raised. I object to the changes other than the addition of the 6068(e) reference. They do not improve the rule.

The last thing I would want to do is pointlessly extend the discussion on any Rule. Your comments convince me that any material change to paragraph (b) would cause that result, and I therefore have acceded to your recommendation. I want to say, however, that I think the ABA's drafting is wrong. Here one example. The MR language is: "A lawyer ... had previously represented a client ... about whom the lawyer had acquired [confidential] information" What makes information confidential is not that it is "about" a client. Information "about" a client is a subset of confidential information. The full category includes information about others. This means that MR 1.9 is limited in a way that does not appear in Rule 1.6.

2. Also, as to the change to (c)(1), it should remain "the State Bar Act." If the Legislature is going to provide an exception, it will be in the State Bar Act, but not necessarily in 6068(e). In the recent past, the Legislature has proposed new sections 6068.1 and 6068.5, respectively, both of which were attempts to carve out exceptions to 60608(e). I think we should leave it as the State Bar Act in the Rule, but leave the specific reference to 6068(e) in the comment.

I see your point on this.

Attached:

RRC - 3-310 [1-9] - Dashboard - ADOPT - DFT2 (09-03-09)RD.doc

RRC - 3-310 [1-9] - Compare - Introduction - DFT3 (01-07-10) - Cf. to DFT2.doc

RRC - 3-310 [1-9] - Compare - Rule & Comment Explanation - DFT4 (01-07-10)RLK.doc

RRC - 3-310 [1-9] - Rule - DFT6.3 (01-07-10)RLK - Cf. to DFT5.3 - LAND.doc

January 9, 2010 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

Please send the version of the Public Comment chart with the responses to OCTC comments. You sent the version that has neither the OCTC comments nor any responses. For your convenience, I'm re-sending the draft that has the OCTC comments but not your responses. The file name is:

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT2.1 (01-04-09)RLK-KEM.doc

January 11, 2010 Lamport E-mail to Kehr, cc Drafters, Chair & Staff:

The following are my comments:

1. The more I read Comments [5] and [6], the more I think [6] is inconsistent with [5] and needs to be fixed. Comment [5] correctly explains that the evidentiary presumption should not apply in disciplinary proceedings and may not apply in civil litigation when the lawyer actually can prove what information was received - a proposition with which I agree. But Comment [6] seems to suggest an evidentiary presumption in the second romanette, which states, "if the lawyer **normally would have obtained** information in the prior representation that is protected..." As phrased, the Comment states a presumption.

I think we need to revise [6] to state, "(ii) if the lawyer obtained information in the prior representation..." In other words, get rid of the "normally would have obtained" language. As we explain in Comment [5], in disqualification cases that receipt of confidential information is presumed. In other cases it is or may be a matter of proof. However it is proved, the issue is whether the lawyer obtained the information, not whether one would expect that the lawyer obtained the information.

2. We still use "disqualification" in the last sentence of Comment [9]. We should revise the last sentence to state, "In such an inquiry, the burden of proof should rest upon the firm to which the Rule applies." Alternatively, we could just end the sentence after the word "firm." (Should we be saying "law firm" here?)

3. Unless, I am missing something, we have yet to prepare a response to the OCTC comments. I agree with their concern regarding "generally known" information. I recommend that we remove the phrase "'or when the information has become generally known" from (c)(1) and deal with what is and is not confidential in the context of 1.6. I remain concerned that people are going to see the "generally known" reference following a citation to 1.6 and 6068(e) and think that we are carving out an additional category of information that otherwise would be protected by 1.6 and 6068(e). I think the point of Kevin's footnote is that 1.6 and 6068(e) would permit use of generally known information if it is not confidential. If that is the case (and I think we all agree that is the case) why do we need the last clause of (c)(1)?

If we are not going to change the rule, then I would go with the approach in Kevin's footnote, which references Comment [6] to our 1.6. I would incorporate that concept in the Comment if we are going to keep the last clause in (c)(1).

4. I do not agree with OCTC's comment regarding the substantial relationship test in disciplinary proceedings. The bottom line is, if a lawyer is permitted in such a proceeding to present evidence about what the lawyer actually learned, why should the court be using a

standard that is designed for cases where the lawyer cannot put on such evidence.? It would mean that the Bar could discipline a lawyer who could prove he or she did not receive material confidential information based on a presumption to the contrary. Concerns about revelation of confidential information beyond the court room is an issue in just about every lawyer malpractice case and in many disciplinary cases. That concern can be addressed with protective orders and other procedures that limit the dissemination of the information beyond the court room.

January 11, 2010 Kehr E-mail to Difuntorum & McCurdy, cc Drafters, Chair & Staff:

I am immersed in attempting to unravel the several comments I received on Rule 1.7, and there is no way that I will be able to get to this before the end of the work day. If you need to put the agenda materials together before you leave today, please use my last drafts of the Rule 1.9 materials and Stan's email will appear in the email compilation. If you can wait until tomorrow, I will do my best to review Stan's message tonight.

January 11, 2010 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

With any luck, this is the version that should have been attached to my earlier email.

January 11, 2010 Kehr E-mail to Lamport, cc Drafters, Chair & Staff:

With any luck, this is the version that should have been attached to my earlier email.

Proposed Rule 1.9 [RPC 3-310(E)] “Duties to Former Clients”

(Draft #6.3, 1/7/2010)

Summary: This amended rule addresses conflicts of interest that arise when a lawyer’s current representation is adverse to a client that the lawyer or the lawyer’s firm (while the lawyer was still at the firm) formerly represented in the same or a substantially related matter.

Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input 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(E)

Statute

Bus. & Prof. Code §6068(e)

Case law

Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564

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

New Jersey Rule 1.9.

- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: Yes No

(See the introduction and the explanation of paragraph (b) in the Model Rule comparison chart.)

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

See the introduction and the explanation of paragraph (b) of the proposed rule in the Model Rule comparison chart.

Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.9* Duties to Former Clients

September 2009/January 2010

(Draft rule to be considered for public comment/adoption.)

INTRODUCTION:

Proposed Rule 1.9, which governs a lawyer's duty to former clients, is substantially the same as Model Rule 1.9. The minor changes to the language in Model Rule 1.9 are for clarity and to include the same reference to the California State Bar Act that has been made in a number of other Rules. The Comments contain substantive additions and deletions to the Model Rule counterparts that, in part, explain relevant California case law and elaborate on the meaning of the phrase "substantially related" as used in the rule.

Minority. A minority of the Commission takes the position that the Commission's proposed Rule 1.7(d) (concerning current client conflicts of interests) does not require the informed written consent of the current client and, therefore, the formulation of Rule 1.9, which requires the informed written consent of a former client, incongruously gives more protection to a former client than to a current client. Second, the minority believes that Rule 1.9(b)(2) is inadequate because it references the Commission's proposed Rule 1.6 which, according to the minority, limits the scope of confidential information to only "information related to the representation." The minority thus maintains that Rule 1.6 is narrower than Business and Professions Code section 6068(e)(1), and by referencing only Rule 1.6, Rule 1.9(b)(2) provides inadequate protection to the client. (See also, the minority position on the Rule 1.6 Model Rule comparison chart.)

* Proposed Rule 1.9, Draft 6.3 (1/7/10).

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.</p>	<p>(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed <u>written</u> consent, confirmed in writing.</p>	<p>The Commission proposes the adoption of Model Rule paragraph (a) except for the substitution of the more client-protective requirement that the lawyer obtain the client's <i>written</i> consent to the lawyer's adverse representation. This change affords more client protection and is consistent with California's requirement of <i>written</i> consent in other conflict situations.</p>
<p>(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client</p> <p>(1) whose interests are materially adverse to that person; and</p> <p>(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;</p> <p>unless the former client gives informed consent, confirmed in writing.</p>	<p>(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client</p> <p>(1) whose interests are materially adverse to that person; and</p> <p>(2) about whom the lawyer, <u>while at the former law firm</u>, had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;</p> <p>unless the former client gives informed <u>written</u> consent, confirmed in writing.</p>	<p>Proposed paragraph (b) is substantially the same as the corresponding Model Rule paragraph. The first change in (b)(2) is non-substantive; it clarifies that paragraph (b) applies when a lawyer learned information about a former client while in an earlier law firm association. The purpose of paragraph (b) is to describe the application of Rule 1.9 when the lawyer has departed that earlier law firm; the additional phrase in subparagraph (2) clarifies this connection. Proposed paragraph (b) also substitutes the requirement of <i>written</i> consent in place of the MR's laxer "confirmed in writing" standard.</p> <p><u>Minority</u>. A minority of the Commission believes the reference to Rule 1.6 can be misconstrued as narrowing the duty of confidentiality and would substitute a reference to Business and Professions Code section 6068(e)(1). (See above introduction to this Rule and the minority position in the Rule 1.6 Model Rule comparison chart.</p>

* Rule 1.9, Draft 6.3 (1/7/10). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:</p>	<p>(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter.</p>	<p>Proposed paragraph (c) is identical to the Model Rule paragraph, except for the elimination of one unnecessary word.</p>
<p>(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or</p>	<p>(1) use information relating to the representation to the disadvantage of the former client except as these Rules <u>or the State Bar Act</u> would permit or require with respect to a <u>current</u> client, or when the information has become generally known; or</p>	<p>This paragraph adds a reference to the State Bar Act. It also has one substantive change, which is the removal of the concept that a lawyer might be required to disclose a client's confidential information. That might be possible under MR 1.6, but there is no such requirement either in the California Rules or in the State Bar Act. Finally, this adds the clarifying adjective "current". The Model Rules apparently only once refer to a current client as "current client", but they otherwise use the unmodified word "client" to refer to a current client. Because this Rule is concerned with duties owed to former client, the Commission recommends adding "current" in all places in the rule that the reference is to a "current client.". The Commission believes this should avoid misunderstanding by making immediately clear the meaning of provisions that otherwise might be more difficult to read.</p>
<p>(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.</p>	<p>(2) reveal information relating to the representation except as these Rules <u>or the State Bar Act</u> would permit or require with respect to a <u>current</u> client.</p>	<p>The proposed changes in (c)(2) track those proposed for (c)(1).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.</p>	<p>[1] After termination of a lawyer-client relationship, the lawyer has certain continuing <u>owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. (<i>Wutchumna Water Co. v. Bailey</i> (1932) 216 Cal. 564) These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide information to the lawyer that will be protected as required by Rule 1.6 without fear that any such information later will be used against the client.</u></p> <p>[42] Paragraph (a) addresses both of these duties. <u>It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client</u> with respect to confidentiality and conflicts of interest and thus may not represent another client except a matter in conformity with this Rule <u>which the lawyer represented the former client. Under this Rule, for</u> For <u>example, a lawyer could not properly seek to</u></p>	<p>Proposed Comments [1] and [2] materially revise Model Rule Comment [1] in order to more fully explain how and why Rule 1.9 protects former clients, and to avoid any suggestion that proposed Rule 1.9 modifies long-standing California authority regarding a lawyer's duties to former clients. The Supreme Court's opinion in <i>Wutchumna Water Co. v. Bailey</i> (1932) 216 Cal. 564 (cited in proposed Comment [1]) and other authority such as <i>People ex rel. Deukmejian v. Brown</i> (1981) 29 Cal.3d 159, emphasize that a lawyer has two duties to former clients. Both of these duties are described and explained in these proposed Comment paragraphs. The Commission believes that it is essential to preserve this case law, and it further believes that Model Rule 1.9 is consistent with these California principles. However, adopting the Model Rule Comment risked obscuring these points and thus causing misunderstanding of the Rule's extremely important restrictions on lawyer conduct.</p>

* Proposed Rule 1.9, Draft 5.3 (9/1/09). Redline/strikeout showing changes to the ABA Model Rule.

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>rescind on behalf of a new client a contract the lawyer drafted on behalf of the former client. So also a A lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.</p>	
<p>[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The</p>	<p>{2} The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The</p>	<p>Because proposed Comments [1] and [2] replace Model Rule Comments [1], the balance of the proposed Comment is renumbered.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.</p>	<p>underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.</p>	
<p>[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are</p>	<p>[3] Matters are "substantially related" for purposes of this Rule if they involve Paragraph (a) also addresses the same transaction or legal dispute or if second of the two duties owed to a former client. It applies when there otherwise is a substantial risk that confidential factual information as would normally have been protected by Rule 1.6 that was obtained in the prior representation would materially advance the client's position be used or disclosed in the a subsequent matter representation in a manner that is contrary to the former client's interests and without the former client's informed written consent. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person <u>ordinarily</u> may not then later represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing connection with the environmental permits review associated with the land use approvals to build a shopping center <u>ordinarily</u> would be precluded from later representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations <u>that existed when the lawyer represented the client</u>; however, the lawyer paragraph (a) would not be precluded.</p>	<p>The Model Rule Comment discusses in its paragraphs [2] and [3] the vital question of when a lawyer's retention is "substantially related" to a former matter as to which the lawyer owes continuing duties to the former client under this Rule. Proposed Comments [3], [4], [5], and [6] substantially expand on the Model Rule discussion in order to provide a fuller explanation and context for this topic. Also, proposed Comment [3] revises the Model Rule Comment's reference to "environmental permits" in order to conform the terminology to California law.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.</p>	<p>on apply if the grounds of substantial relationship, from defending lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client if there is not required to reveal the confidential information learned by the lawyer in order to establish a no substantial risk that relationship between the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client zoning and information that would in ordinary practice be learned by a lawyer providing such services eviction matters.</p>	
	<p><u>[4] Paragraph (a) applies when the lawyer's representation is the same matter as, or in a matter substantially related to, the lawyer's representation</u></p>	<p>Proposed Comment [4] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is. Also, it includes a reminder of the important concept</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation) and Rule 1.7, Comment [15].</u></p>	<p>that a lawyer sometimes can avoid the violation of duties owed to a former client, just as a lawyer sometimes can avoid the violation of duties owed to a current client, by limiting the scope of a new representation. This reminder includes cross-references to Rule 1.2(c) (limiting the scope of a representation) and to Rule 1.7, Comment [15] (discussing the same point in the context of a lawyer's duties to a current client).</p>
	<p><u>[5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney. (H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal.App.3d 1445, 1454) This disqualification application exists, at least in part, to protect the former client by avoiding an</u></p>	<p>Proposed Comment [5] has no direct corollary in the Model Rule Comment. It also is part of the expanded explanation of what a "matter" is and includes citations to pertinent California appellate opinions.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. (See <i>In re Complex Asbestos Litigation</i>, (1991) 232 Cal.App.3d at p. 592; <i>Woods v. Superior Court</i> (1983) 149 Cal.App.3d 931, 934.) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes might not be necessary because the lawyer can provide evidence concerning the information actually received in the prior representation.</u></p>	
	<p><u>[6] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.</u></p>	<p>Proposed Comment [6] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is and is intended to underline that the concept of a "matter" should be understood within the context of the purposes of Rule 1.9 as they are explained in Comment [1].</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>[7] Paragraph (a) applies when the new client's interests are materially adverse to the former client's interests. In light of the overall purpose of the Rule to protect candor and trust during the lawyer-client relationship, the term "materially adverse" should be applied with that purpose in mind. Accordingly, a client's interests are materially adverse to the former client if the lawyer's representation of the new client creates a substantial risk that the lawyer either (i) would perform work for the new client that would injuriously affect the former client in any manner in which the lawyer represented the former client, or (ii) would use or reveal information protected by Rule 1.6 and Business and Professions Code section 6068(e) that the former client would not want disclosed or in a manner that would be to the disadvantage to the former client.</p>	<p>Proposed Comment [7] has no direct corollary in the Model Rule Comment. It supplements proposed Comment [6].</p>
<p>Lawyers Moving Between Firms</p> <p>[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the</p>	<p>Lawyers Moving Between Firms</p> <p>[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the</p>	<p>The Commission proposes to remove all of Model Rule Comment [4] as being discursive and not helpful to understanding the Rule.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.</p>	<p>rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.</p>	
<p>[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.</p>	<p>[5] Paragraph (b) operates <u>addresses a lawyer's duties to disqualify a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest</u> only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.</p>	<p>Proposed Comment [8] is substantially the same as Model Rule Comment [5]. The wording change is intended to avoid a possible misreading of Rule 1.9(b), which as written might be seen as referring only to former clients of a lawyer's former firm, while it should also include current clients of a lawyer's former firm. Rather than attempting to revise paragraph (b), which would have caused considerable drafting difficulties, the Commission chose to clarify through this Comment. <u>As has been done throughout, the Commission has removed the reference to disqualification, these being disciplinary rules and disqualification being a matter within the authority of a court in the exercise of its responsibility to control the proceedings.</u></p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.</p>	<p>[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.</p>	<p>Proposed Comment [9] retains the first sentence of is identical to Model Rule Comment [6] but removes the balance of the Comment as being discursive and potentially intruding on the province of courts.</p>
<p>[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).</p>	<p>[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).</p>	<p>Proposed Comment [10] is substantially the same as Model Rule Comment [7]. However, the proposed Comment removes the reference to lawyer disqualification. Although the Commission understands that Rule 1.9 will be cited when disqualification issues are raised, it has written the Rule primarily for disciplinary purposes and does not want to suggest that it presumes to dictate to courts how to exercise their authority, for example, under C.C.P. § 128(a)(5).</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.9 Duties to Former Clients Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.</p>	<p>[8]11 Paragraph (c) provides that <u>confidential</u> information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the <u>former</u> client. However, <u>See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information.</u> The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.</p>	<p>Proposed Comment [11] is substantially the same as Model Rule Comment [8]. The changes clarify that it (and Rule 1.9) speak only of confidential information that is protected by Rule 1.6, not to non-confidential information that a lawyer might have learned in the course of representing a former client.</p>
<p>[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.</p>	<p><u>Client Consent</u></p> <p>[9]12 The provisions of this Rule are for the protection of former clients and can be waived if the <u>former</u> client gives informed <u>written</u> consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver <u>consent</u>, see Comment [22] to Rule 1.7. With regard to disqualification <u>the application of a lawyer's conflict to</u> a firm with which a lawyer is or was formerly associated, see Rule 1.10.</p>	<p>Proposed Comment [12] is much the same as Model Rule Comment [9]. There are two substantive changes. First, the proposed Comment substitutes California's more client-protective requirement of "informed written consent" in place of the Model Rule's requirement of "consent confirmed in writing" (this change can be seen in paragraphs (a) and (b) of the proposed Rule, and is consistent with the same change made in other proposed conflicts Rules). Second, as explained with respect to Comment [10], this removes the reference to disqualification.</p>

Rule 1.9 – Public Comment – File List

E-2009-292e OCBA [1.9]

E-2009-293d State Bar OCTC [1.9]

E-2009-310d COPRAC [1.9]

E-2009-350b CPDA [1.9 & 1.10]

E-2009-351e SDCBA [1.9]

E-2009-358k Santa Clara County Bar [1.9]

E-2009-370d LACBA [1.9]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

*Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213*

MEMORANDUM

Date: October 16, 2009

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.9 – Duties to Former Clients**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA endorses the adoption of proposed Rule 1.9, which is similar to Model Rule 1.9, subject to the comments set forth below.

The OCBA is concerned that the change from the Model Rule in paragraphs (c)(1) and (2), to substitute "current client" for "client," potentially introduces ambiguity. As former clients continue to enjoy various protections against use and disclosure of their confidential information, it is not clear whether the modified reference to "current client" is intended to narrow the exception to apply only to rules applicable to current clients, to the exclusion of rules permitting disclosures as to former clients. The OCBA accordingly asks the Commission to clarify the meaning and intent behind the reference to "a current client" in the exception.

Comment [1] should be amended to substitute "with respect to" for "in" on line five (with the phrase to read "...will injuriously affect his or her former client with respect to any matter...") so that the Comment is not read as restricted only to the very matter in which the attorney represented the former client.

Comment [4] should be amended to add "in" after "is" in the second line (simply to correct what appears to be a typographical error).

Comment [7] should be amended to substitute "...with respect to any matter in which the lawyer represented the former client" for "in any manner in which the lawyer represented the former client" (in the third sentence, subpart (i)), to clarify the meaning of the Comment, consistent with our suggestions for Comment [1].

Comment [7] also should be amended by substituting "of" for "to" in the last line (simply to correct what appears to be a typographical error).

Thus, the OCBA is opposed to any formal requirement for informed written consent from clients to implement an ethical screen to avoid disqualification.

A properly implemented and scrupulously maintained ethical screen is a proven and effective means of resolving conflicts. The ethical rules should not assume that lawyers migrating in private practice will be dishonest or violate their obligations of confidentiality by disregarding properly imposed screening procedures, while simultaneously assuming the contrary for former government lawyers, paraprofessionals and others. The lawyers involved are already subject to ethical rules pertaining to duties of confidentiality and loyalty. The screen adds additional protections. While screens do involve some level of disclosure risk for clients, there is little in the way of authority or empirical data to suggest that violations will occur, that defective screens have injured clients, or that other ethical problems have arisen where screens have been permitted and applied in federal courts and other states.

Accordingly, the OCBA supports the ABA's approach to screening and, therefore, encourages the Commission to adopt the non-consensual screening provisions of Model Rule 1.10(a)(2). Under the ABA's carefully considered approach, client interests are adequately protected, and the mobility interests of lawyers and law firms are reasonably satisfied as well. These are important issues that should not be disregarded in the rules.



THE STATE BAR OF CALIFORNIA

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November 4, 2009

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “ [l]aw [f]irm ’ ” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
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Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping initial "R".

Russell G. Weiner
Interim Chief Trial Counsel



November 9, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.9

Dear Mr. Sondheim:

The State Bar Standing Committee on Professional Responsibility and Conduct (“COPRAC”) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (“RAD”) for public comment. COPRAC has reviewed the provisions of proposed Rule 1.9 and offers the following comments.

COPRAC supports the proposed rule. We believe that the language of sub-section (b) is unclear as to what is required to be known.

We also agree with the minority as to the issue involving Business and Professions Code section 6068(e) and proposed Rule 1.6, in that it appears to COPRAC that the definition of confidential information set forth in proposed rule 1.6 is narrower than the scope of Section 6068(e).

The proposed rule references the State Bar Act; Comment [3] references Rule 1.6; Comment [7] then refers to both section 6068(e) and Rule 1.6; and finally Comment [10] then references yet a further iteration, a duty to preserve confidential information “about a client.” COPRAC suggests that uniformity of reference would assist practitioners in applying the rule. Reference to section 6068(e) and Rule 1.6 (assuming that rule is re-crafted to address the concerns of the minority) would be appropriate.

In light of these concerns, COPRAC proposes that section (b) be rewritten as follows:

- (b) A lawyer shall not represent a person in a matter which the lawyer knows to be the same or substantially related to a matter in which a law firm with which the lawyer formerly was associated had represented a client:
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer, while at the former law firm, had acquired information that is protected by Business and Professions Code section 6068(e) and Rule 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.

For grammatical purposes, we changed the word “knowingly” to “knows.” In addition, we dropped the word “previously” as unnecessary and confusing.

Comment [3] appears to have an incorrect reference to the type of work being performed by the lawyer who is the subject of the second example in this comment. The lawyer’s previous representation in a land use matter is compared, first, with a zoning matter (considered to be substantially related) and, second, with an eviction matter (considered to not be substantially related). The example incorrectly concludes by stating “there is no substantial relationship between the *zoning* and eviction matters.” [italics added] The word “zoning” in this phrase should be replaced with the words “land use” in order for the proper comparison to be made.

The last sentence of Comment [5] is confusing and unhelpful as drafted. It should be revised to state “The evidentiary presumption created for disqualification purposes should not apply in a disciplinary context.”

Finally, we note that the rule uses the terms “firm” and “law firm.” COPRAC recommends that a uniform term be used throughout.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner". The signature is written in a cursive, flowing style.

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on *one* Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

PLEASE SEE ATTACHED LETTER



CPDA

California Public Defenders Association
10324 Placer Lane
Sacramento, CA 95827
Phone: (916) 362-1690 x 8
Fax: (916) 362-3346
e-mail: cpda@cpda.org

A Statewide Association of Public Defenders and Criminal Defense Counsel

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- Fast Presidents
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- Sheldon Portland Portman, 1970
- Wilbur Littlefield, 1971-72
- William Higham, 1972, Paul Ligda, 1974
- Farris Salamy, 1975, Robert Nicco, 1976
- David A. Kidney, 1977
- Frank Williams, Jr., 1978-79
- John Cleary, 1979, Glen Mowrer, 1980
- Fred Herro, 1981, Stuart Rappaport, 1982
- Jeff Brown, 1983, James Crowder, 1984
- Laurel Rest, 1985-86, Charles James, 1986
- Allen Kleinkopf, 1987-88
- Michael C. McMahon, 1988-89
- Tito Gonzales, 1989-90
- Norwood Niedom, 1990-91
- Margaret Scully, 1991-92
- Kenneth I. Clayman, 1992-93
- James McWilliams, 1993-94
- Terry Davis, 1994-95
- Jack T. Weedon, 1995-96
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- Diane A. Bellas, 1999-2000
- Gary Windom, 2000-2001
- Michael P. Judge, 2001-2002
- Joe Spaeth, 2002-2003
- Louis Haifner, 2003-2004
- Paulino Duran, 2004-2005
- Gary Mandinich, 2005-2006
- Barry Melton, 2006-2007
- Kathleen Cannon, 2007-2008
- Leslie McMillan, 2008-2009

November 13, 2009

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rules 1.9 and 1.10

Dear Ms. Hollins:

The California Public Defenders Association has concerns about the application of these proposed rules to public defender offices and recommends that certain comments be rewritten to reflect existing California law.

The California Public Defenders Association (CPDA) is the largest public defender organization in the nation with a membership of over 4,000 public defenders and private defense counsel. Our attorney members act as legal counsel for the vast majority of indigents accused of criminal conduct in California. Established in 1969, CPDA is the state-designated continuing legal education provider for all local public defender offices in California, and also represents the interests of CPDA's criminal defense attorney members in legislative sessions and on significant issues in the appellate courts.

CPDA is generally in agreement with Proposed Rules 1.9 and 1.10 except for their failure to follow existing law in recognizing that imputed conflicts of interest must be analyzed differently between criminal cases and civil cases, especially in criminal cases where the clients are represented by a public defenders office or other indigent defense office. The problems with Proposed Rules 1.9 and 1.10 are not so much in the language of the proposed rules but instead arise from certain comments published in conjunction with these rules.

Specifically, CPDA points out that Comments 5 and 6 to Proposed Rule 1.9 are contrary to existing law.

Rule 1.9 generally disqualifies a lawyer or the lawyer's firm from representing a party where the lawyer or the law firm has previously represented another person "in the same or a substantially related matter" and the new potential client's interest is materially adverse to the former client, or the lawyer or law firm has previously obtained confidential information from the former client which is

November 13, 2009
Audrey Hollins
State Bar of California
Re: Proposed Rules 1.9 and 1.10
Page Two

material to the present action, without the written consent of the former client. CPDA has no quarrel with this rule, at least in the abstract.

However, Comments 5 and 6 to the proposed rule are problematic, contrary to existing law, fail to take into consideration various factors concerning public defender and other indigent offices, and would result in wasteful expenditures of limited public funds without resulting in any additional protection of the confidences and secrets of former clients (see, Business and Professions Code section 6068 (e)).

While recognizing that “the same or a substantially related matter” will have different applications in different types of proceedings, Comment 5 nevertheless proposes a blanket application of Rule 1.9 to require disqualification of the law firm “when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney”, citing *H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454.

But the application of the *Ahmanson* presumption to criminal cases was expressly rejected in *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, 1575, which observed that “a rigid rule of disqualification can create hardship to the new client and can also be abused as an improper tactical maneuver.” To the contrary, *Rhaburn* relied on a series of California Supreme Court decisions in criminal cases in holding that it was error to disqualify an entire public defender office from representing an indigent criminal defendant over the defendant’s objection simply because the public defender’s office previously represented a prosecution witness, where the individual attorney assigned to represent the current defendant did not “have a ‘direct and personal’ relationship with the witness [i.e., the former client]” (140 Cal.App.4th at p. 1581.)

November 13, 2009
Audrey Hollins
State Bar of California
Re: Proposed Rules 1.9 and 1.10
Page Three

Condemning the application of “a rigid rule of vicarious disqualification”, the court held that, “[i]nstead, the trial court should evaluate the totality of the circumstances in determining whether there is a reasonable possibility that the individual attorney representing defendant either has obtained confidential information about the witness collected by his or her office, or may inadvertently acquire such information through file review, office conversation, or otherwise.... We also stress in a case that does not involve ‘direct and personal’ representation of the witness, the courts should normally be prepared to accept the representation of counsel, as an officer of the court, that he or she has not in fact come into possession of any confidential information acquired from the witness and will not seek to do so.” (*Ibid.*)

Comment 6 suffers from the same problem; it relies on *Ahmanson* and ignores *Rhaburn*. As held in *Rhaburn*, a conflict of interest should not be found on the basis of the public defender’s office previous representation of a former client unless “there is a reasonable possibility that confidential information may be acquired and used by counsel.” (140 Cal.App.4th at p. 1582.) Further, the establishment and maintenance of procedures by the public defender which prevent any attorney representing a client in a present case from gaining access to information obtained from a former client in a previous case is a significant factor tending to eliminate any “possibility that confidential information may be acquired and used” in the representation of the present client.

Thus, CPDA respectfully suggests that Comments 5 and 6 must be modified to limit their application to civil cases, or at least recognize that the vicarious disqualification rule must be applied more flexibly in criminal cases. They should be supplemented to expressly acknowledge that the usual rules and presumptions concerning disqualification of law firms from successive representation of different clients concerning related topics do not apply to a public defender’s office. Instead, the comments should expressly provide

November 13, 2009
Audrey Hollins
State Bar of California
Re: Proposed Rules 1.9 and 1.10
Page Four

that a public defender's office or other indigent defense office is not disqualified from representing a client in a current proceeding where a former client of the office is an adverse witness in the current proceeding, unless there is a reasonable possibility that confidential information previously obtained from the former client will be acquired and used in the current proceeding. Finally, in making this determination, the court and counsel should consider the factors identified in *Rhabum*, including whether the office has established, and maintains, procedures which ensure that the information obtained from the former client in the previous cases is not accessible to any attorney in the course of representing any other client. Unless Comments 5 and 6 are revised accordingly, they will be in conflict with existing law and prudent public policy.

In addition, since Comment 5 to Proposed Rule 1.10 incorporates Rule 1.9, and applies the same disqualification rules where the former client was represented by a lawyer who is no longer employed by the firm, Rule 1.10, subdivision (b)(1), and Comment 5 must likewise be modified accordingly.

Sincerely,



Bart Sheela
President,
California Public Defenders Association



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit
the attached comments to Batch 5 of the Proposed Amendments to the Rules of
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics
Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

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SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

- Rule 1.2 Scope of Representation [N/A]
APPROVE
- Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.8.2 Use of Confidential Information [3-100, 3-310]
APPROVE
- Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE
- Rule 1.9 Duties to Former Clients [3-310]
APPROVE
- Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to imimic ABA Model Rule 1.10)
- Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE
- Rule 2.1 Advisor [N/A]
APPROVE
- Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments
- Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: **RPC 3-310(E)**

Proposed New Rule No./ Title: **1.9 - Duties to Former Clients**

QUESTIONS (please use separate sheets of paper as necessary):

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.

Yes [X] No []

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

(3) Is the new rule **worded correctly and clearly**? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [X] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here

CONCLUSIONS (pick one):

[X] We approve the new rule in its entirety.

[] We approve the new rule with modifications.*

[] We disapprove the new rule and support keeping the old rule.

[] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on *one* Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Commenting on behalf of an organization

Yes
 No

* Name

* City

* State

* Email address (You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- | | | |
|-----------------------------------|----------------------------------|--|
| Rule 1.2 [n/a] | Rule 1.9 [3-310] | Rule 2.1 [n/a] |
| Rule 1.6 [3-100] | Rule 1.10 [n/a] | Rule 3.8 [5-110] |
| Rule 1.8.2 [n/a] | Rule 1.12 [n/a] | Rule 8.5 [1-100(D)] |
| Rule 1.8.13 [n/a] | Rule 1.14 [n/a] | Discussion Draft [all rules] |

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
 DISAGREE with this proposed Rule
 AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.



LACBA

**LOS ANGELES COUNTY
BAR ASSOCIATION**

MAILING ADDRESS:
P O Box 55020
Los Angeles CA 90055-2020
TELEPHONE: 213.627.2727
FACSIMILE: 213.833.6717
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ROBIN L. YEAGER

November 12, 2009

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Comment Regarding Proposed Rule of Professional Conduct 1.9 – Duties
to Former Clients

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.9 regarding Duties to Former Clients:

PREC is generally supportive of the proposed rule and its comments. However there is some concern that the Comments are too long, give practice pointers, and are suggestive of means to avoid disqualification in a way that may be viewed as attempting to create substantive law for civil proceedings.

Comments 8 and 9 in particular seem directed to provide guidance not just to lawyers but also to Courts on the subject of disqualification. Comments that refer to disqualification are not just for disciplinary purposes – they seem calculated to specifically address how Courts will handle disqualification.

While PREC is concerned that the Rules of Professional Conduct are too often used as tactical weapons in litigation to seek disqualification, the question of resolving that concern is a matter for the Legislature or the Courts. The Comments to the rules are supposed to be interpretive aids to the rules and should not set forth burdens of proof, nor should they state whether a lawyer or a firm will be disqualified. The rule is the rule. It is up to the State Bar to apply the rule to disciplinary proceedings, and it is up to Courts to determine whether or how to apply a rule to civil litigation. The fact that the Commission is including disqualification issues in Comments 8 and 9 makes a policy statement that the rules are to be used and considered in civil proceedings, an issue that is one of much debate. We don't necessarily disagree with the Comments, but we point this out only to be certain that the Commission considers the consequences of taking the step of including such guidance in the context of disciplinary rules. It may be viewed as contrary to the stated purposes of the rules, over which the Commission has struggled for many years.

With respect to Comment 8, the disqualification reference could be avoided by saying that such representation is not a violation of this rule.

With respect to Comment 9, the suggestion that a lawyer may have only limited access to files and no access to information about particular clients seems to approve non-consensual screening, a position that the Commission appears to have resisted in Proposed Rule 1.10. The Commission seems split on the screening issue, and this split appears in the drafting of various rules. Comment 9 of Proposed Rule 1.9 and Proposed Rule 1.10 should be consistent.

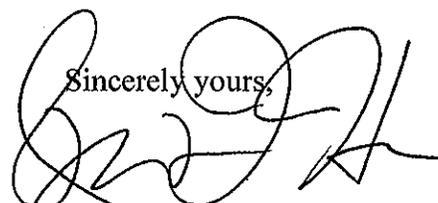
If Comment 9 is to be retained, the last sentence should be modified to make it clear that the burden of proof should rest upon the firm *and the lawyer* whose disqualification is sought. Paragraph (b) of the Proposed Rule is about a lawyer, not just a firm. We note, however, that the disciplinary rules are no place to set civil burdens of proof or regulate disqualification.

PREC also has some concern about the repeated references to the State Bar Act, in subsections (c)(1) and (2). We note that the reference to the State Bar Act in a disciplinary rule is too broad, and carries with it the same lack of clarity that would come with language such as “except as otherwise provided by law.”

PREC notes that what appears to be the primary concern by reference to the State Bar Act is Section 6068(e), and if that is the intent, the rule should simply refer to that section. If the Commission has in mind some other provisions of the State Bar Act that are relevant to the Rule, it should state what those are, rather than making wholesale reference to the entire Act.

Finally, regarding Comment 11, we are concerned about the last sentence that seems to convey that a lawyer is free to disclose any information about a former client that is “generally known information.” This is not well defined and leaves open the possibility of being construed by lawyers as *carte blanche* to reveal information from the public record. If you are going to retain this sentence, we believe the meaning of “generally known information” should be clarified, and distinguished from public record information.

Thank you for the opportunity to comment on this batch of proposed new and amended Rules of Professional Conduct.

Sincerely yours,


James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee

**RRC – Rule 1.9 [3-310(E)]
E-mails, etc. – Revised (1/19/2010)**

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December 14, 2009 McCurdy E-mail to Drafters (Kehr, Lamport, Melchior, KEM & Vapnek),
cc Chair, Vice-Chairs & Staff:

Rule 1.9 Drafting Team (KEHR, Lamport, Melchior, Mohr, Vapnek):

This message provides the assignment background materials for Rule 1.9 on the January agenda. **The assignment deadline is Monday, January 11, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (staff prepared template)
4. introduction (text of public comment version of the introduction – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (version of chart as issued for public comment)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attached:

RRC - 3-310 [1-9] - Dashboard - ADOPT - DFT2 (09-03-09)RD.doc
RRC - 3-310 [1-9] - Compare - Introduction - DFT2 (09-03-09)RD.doc
RRC - 3-310 [1-9] - Compare - Rule & Comment Explanation - DFT3 (09-03-09)RD2.doc
RRC - 3-310 [1-9] - Rule - DFT5.3 (09-01-09) - CLEAN-LAND.doc
RRC - 3-310 [1-9] - Public Comments Complete (12-14-09).pdf
RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT1 (12-14-09)AT.doc
RRC - 3-310 [1-9] - State Variations (2009).pdf

December 29, 2009 Kehr E-mail to Drafters (Lamport, Melchior, KEM, Vapnek), cc Chair & Staff:

I have attached the commenter chart and a revised draft of the Rule and Comment. This requires careful review. The commenters made some interesting points.

I will hold off on the remaining documents until I've heard from you on this.

Attached:

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT2 (12-29-09)RLK.doc

RRC - 3-310 [1-9] - Rule - DFT6 (12-29-09) - Cf. to DFT5.3.doc

December 31, 2009 Melchior E-mail to Drafters, cc Chair & Staff:

I will make comments as I go along.

1. (b)(1) seems confusing due to the use of the word "are." Do we mean a person whose interests in the current matter are adverse, or whose interests in the prior matter were? I think that we mean the former and should say so. I have had my say about the vagueness of "materially adverse" and will not repeat that here.

2. I thought that we had decided that a lawyer's disclosure of information received from a client, even if it has since become public through other means, could reveal that the client had previously had occasion to seek legal advice about that subject or otherwise compromise the client's privacy, and that this should NOT be allowed. But (b)(1) allows it.

3. Captions for the subdivisions would really help one find their way through this maze. And the language is quite forbidding.

4. The third sentence of Comment [1] is a lengthy, sententious and pompous statement which adds nothing to one's comprehension. I would delete it.

5. And it follows that much of Comments [2] and [3] is infected by this virus, carried over from [1].

6. I will stop reading the Comments, but note that we have managed to have 3 MORE comments than the ABA has -- if that can be believed! -- but are retaining or expanding on the ABA bloviations, to no discernible benefit. Going to the public comments, I am fine with the responses until we get to the CPDA, where I think we could be more responsive. I have just read (scanned) the Rhaburn case which CPDA cites; and while the case states that in civil matters, disqualification standards have become more flexible recently (a debatable proposition to me), it plainly states that the rule should be less rigidly applied in criminal cases. HOW MUCH less rigidly, remains to be seen. So it is my opinion that we must recognize their point.

We might best be able to do that by ADDING (really!) an additional Comment to the effect that the standards for disqualification in criminal cases are evolving (indeed, so are they in civil cases), cf. Rhaburn, and that for DQ purposes in criminal cases, practitioners are advised to consult current case law -- or some variant of this.

Trying to shoehorn that into the current comment would make the illegible, impenetrable, IMO.

7. I agree with PREC's comment 11. See my comment 2 above.

January 5, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

I haven't had a chance to review your proposals but I did notice that the chart you circulated did not include the OCTC comments, which are quite pointed about the rule's treatment of the substantial relationship test.

I've attached a revised draft 2.1 (1/4/10)RLK-KEM of the chart. I've added OCTC's comments but they await your response. Please also note that I've resorted the Commenters in alphabetical order but otherwise have not made any changes to the chart.

I will review its substance of the chart as well as the draft rule you circulated last week later tonight.

I've also attached the OCTC letter, converted to Word. I haven't proofed it for accuracy but the OCR program I used for the conversion is usually very accurate.

Please let me know if you have any questions.

Attached:

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT2.1 (01-04-09)RLK-KEM.doc

RRC - PubCom - 11-04-09 OCTC Letter to RRC re Batch 5-F(2).doc

January 5, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

Now that I'm done with the CEB program materials, I will get back to the RRC agenda items. Except for your message about the number of Rule 1.8 and your and Kurt's messages on Rule 1.9, I haven't heard back from anyone on those items on which I'm taking the lead. Because time is beginning to grow short, I will plow ahead beginning tonight and try to get completed drafts out as quickly as I can.

January 5, 2009 Kehr E-mail to Melchior, cc Drafters, Chair & Staff:

I agree with the criticism of paragraph (b)(1) in your paragraph 1, and I've attempted a revision. See the attachment. Please tell me what you think of this.

I don't recall the decision you describe in your paragraph 2. Kevin: Can you assist on this?

As for captions, that is an interesting idea, but I don't see how to accomplish it.

Attached:

RRC - 3-310 [1-9] - Rule - DFT6.2 (01-05-10)RLK - Cf. to DFT5.3.doc

January 6, 2009 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

I'll get out a revised chart that covers the OCTC comment, perhaps this evening, but I have a preliminary question. You highlighted selected language, but I don't follow how you selected what to highlight. Can you clarify?

January 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

That was just to flag where you indicated agreement with a commenter and made a change to the rule. See also the footnote I included by which I addressed the "public record" vs. "generally known" issue. I also note that although you mention you changed comments [8] and [9] in response to LACBA, there are no markings in Comment [8].

By the way, I finally got to this a little while ago. I disagree with the changes you propose for 1.9(b), as well as the proposed change to 1.9(c). E-mail to follow shortly.

January 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

1. I see no reason to make the changes to paragraph (b). I realize COPRAC suggested it but there is no compelling reason to make any change except perhaps to add the reference to section 6068(e). In particular, with respect to subparagraph (1), all that's been done is to reverse the order of the language and in doing so diverged markedly from the Model Rule language. It will leave folks scratching their heads at what we meant and, when we explain that it is the exact same meaning as what is already in the Model Rule language, why we had to do it (other than to be different). The paragraph is quite simple to understand. None of my students have a problem with it; they understand immediately what is at issue. More important, the court in *Adams v. Aerojet-General* had no problem in understanding what was intended by Model Rule 1.9(b) when it adopted that provision for use in California in what is now known as the "modified substantial relationship test". We've already been over this paragraph and discussed it endlessly before. We've already spent numerous e-mail exchanges discussing this provision. There is nothing wrong with it. The Commission approved the MR language, modified to include the phrase, "while at the former law firm," which was taken from New Jersey and was the only change that was necessary to remove the ambiguities that had been raised. I object to the changes other than the addition of the 6068(e) reference. They do not improve the rule.

2. Also, as to the change to (c)(1), it should remain "the State Bar Act." If the Legislature is going to provide an exception, it will be in the State Bar Act, but not necessarily in 6068(e). In the recent past, the Legislature has proposed new sections 6068.1 and 6068.5, respectively, both of which were attempts to carve out exceptions to 60608(e). I think we should leave it as the State Bar Act in the Rule, but leave the specific reference to 6068(e) in the comment.

January 6, 2009 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

1. What I wrote in 1, below, about (b)(1) applies equally to the revision to (b)(2). Again, the only change that should be made is to add the reference to 6068(e).

2. In your previous e-mail to Kurt, you also stated the following, w/ a question for me, which I neglected to answer in my previous e-mail:

I don't recall the decision you describe in your paragraph 2. Kevin: Can you assist on this?

Here is what Kurt wrote in his #2:

I thought that we had decided that a lawyer's disclosure of information received from a client, even if it has since become public through other means, could reveal that the client had previously had occasion to seek legal advice about that subject or otherwise compromise the client's privacy, and that this should NOT be allowed. But (c)(1) allows it.

I did a search of my meeting notes and did not find anything along the lines that Kurt relates. There were a few discussions concerning "generally known" vs. "public record," but there weren't any votes on it. I've recommended that we address this in the comment to Rule 1.6 (two commenters requested that the distinction be drawn). Here is how I revised proposed Rule 1.6, cmt. [6]:

[6] Confidential information relating to the representation and contained in lawyer work product is protected under this Rule. However, "confidential information relating to the representation" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known and outside the scope of this Rule. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

The same or a similar statement could be placed at the end of Rule 1.9, cmt. [11].

January 7, 2010 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

My responses to your comments are interlineated below, and new drafts are attached. In addition, I have edited Comments [8] and [9] and altered the commenter chart accordingly. Thank you for picking up the OCTC comment. I don't know how I missed it before, but in any event I've covered it now. As you will see, my understanding of Matter of Johnson is the same as yours.

I have taken the liberty of removing the Minority statement in the Introduction and the comparison chart b/c both of its elements no longer apply. The first element commented on a distinction between Rule 1.9 and 1.7(d) that no longer exists. The second commented on references only to Rule 1.6, but the current draft refers to Rule 1.6 and section 6068(e) in parallel. (Although I disagree with Rule 1.9 for a number of reasons, none of which were picked up with the prior Minority statement, I don't intend to file a minority report).

I have not edited the Dashboard b/c I lack the skill, but it is wrong in saying that we have made material additions to the Model Rule (and this statement also is inconsistent with the Introduction). The only real change is the "while at the former law firm" in paragraph (b)(2), but I view that as a clarification only.

As always, I hope that others will carefully review my drafting.

RRC – Rule 1.9 [3-310(E)]
E-mails, etc. – Revised (1/19/2010)

1. I see no reason to make the changes to paragraph (b). I realize COPRAC suggested it but there is no compelling reason to make any change except perhaps to add the reference to section 6068(e). In particular, with respect to subparagraph (1), all that's been done is to reverse the order of the language and in doing so diverged markedly from the Model Rule language. It will leave folks scratching their heads at what we meant and, when we explain that it is the exact same meaning as what is already in the Model Rule language, why we had to do it (other than to be different). The paragraph is quite simple to understand. None of my students have a problem with it; they understand immediately what is at issue. More important, the court in Adams v. Aerojet-General had no problem in understanding what was intended by Model Rule 1.9(b) when it adopted that provision for use in California in what is now known as the "modified substantial relationship test". We've already been over this paragraph and discussed it endlessly before. We've already spent numerous e-mail exchanges discussing this provision. There is nothing wrong with it. The Commission approved the MR language, modified to include the phrase, "while at the former law firm," which was taken from New Jersey and was the only change that was necessary to remove the ambiguities that had been raised. I object to the changes other than the addition of the 6068(e) reference. They do not improve the rule.

The last thing I would want to do is pointlessly extend the discussion on any Rule. Your comments convince me that any material change to paragraph (b) would cause that result, and I therefore have acceded to your recommendation. I want to say, however, that I think the ABA's drafting is wrong. Here one example. The MR language is: "A lawyer ... had previously represented a client ... about whom the lawyer had acquired [confidential] information" What makes information confidential is not that it is "about" a client. Information "about" a client is a subset of confidential information. The full category includes information about others. This means that MR 1.9 is limited in a way that does not appear in Rule 1.6.

2. Also, as to the change to (c)(1), it should remain "the State Bar Act." If the Legislature is going to provide an exception, it will be in the State Bar Act, but not necessarily in 6068(e). In the recent past, the Legislature has proposed new sections 6068.1 and 6068.5, respectively, both of which were attempts to carve out exceptions to 6068(e). I think we should leave it as the State Bar Act in the Rule, but leave the specific reference to 6068(e) in the comment.

I see your point on this.

Attached:

RRC - 3-310 [1-9] - Dashboard - ADOPT - DFT2 (09-03-09)RD.doc

RRC - 3-310 [1-9] - Compare - Introduction - DFT3 (01-07-10) - Cf. to DFT2.doc

RRC - 3-310 [1-9] - Compare - Rule & Comment Explanation - DFT4 (01-07-10)RLK.doc

RRC - 3-310 [1-9] - Rule - DFT6.3 (01-07-10)RLK - Cf. to DFT5.3 - LAND.doc

January 9, 2010 KEM E-mail to Kehr, cc Drafters, Chair & Staff:

Please send the version of the Public Comment chart with the responses to OCTC comments. You sent the version that has neither the OCTC comments nor any responses. For your convenience, I'm re-sending the draft that has the OCTC comments but not your responses. The file name is:

RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT2.1 (01-04-09)RLK-KEM.doc

January 11, 2010 Lamport E-mail to Kehr, cc Drafters, Chair & Staff:

The following are my comments:

1. The more I read Comments [5] and [6], the more I think [6] is inconsistent with [5] and needs to be fixed. Comment [5] correctly explains that the evidentiary presumption should not apply in disciplinary proceedings and may not apply in civil litigation when the lawyer actually can prove what information was received - a proposition with which I agree. But Comment [6] seems to suggest an evidentiary presumption in the second romanette, which states, "if the lawyer **normally would have obtained** information in the prior representation that is protected..." As phrased, the Comment states a presumption.

I think we need to revise [6] to state, "(ii) if the lawyer obtained information in the prior representation..." In other words, get rid of the "normally would have obtained" language. As we explain in Comment [5], in disqualification cases that receipt of confidential information is presumed. In other cases it is or may be a matter of proof. However it is proved, the issue is whether the lawyer obtained the information, not whether one would expect that the lawyer obtained the information.

2. We still use "disqualification" in the last sentence of Comment [9]. We should revise the last sentence to state, "In such an inquiry, the burden of proof should rest upon the firm to which the Rule applies." Alternatively, we could just end the sentence after the word "firm." (Should we be saying "law firm" here?)

3. Unless, I am missing something, we have yet to prepare a response to the OCTC comments. I agree with their concern regarding "generally known" information. I recommend that we remove the phrase ""or when the information has become generally known" from (c)(1) and deal with what is and is not confidential in the context of 1.6. I remain concerned that people are going to see the "generally known" reference following a citation to 1.6 and 6068(e) and think that we are carving out an additional category of information that otherwise would be protected by 1.6 and 6068(e). I think the point of Kevin's footnote is that 1.6 and 6068(e) would permit use of generally known information if it is not confidential. If that is the case (and I think we all agree that is the case) why do we need the last clause of (c)(1)?

If we are not going to change the rule, then I would go with the approach in Kevin's footnote, which references Comment [6] to our 1.6. I would incorporate that concept in the Comment if we are going to keep the last clause in (c)(1).

4. I do not agree with OCTC's comment regarding the substantial relationship test in disciplinary proceedings. The bottom line is, if a lawyer is permitted in such a proceeding to present evidence about what the lawyer actually learned, why should the court be using a

standard that is designed for cases where the lawyer cannot put on such evidence.? It would mean that the Bar could discipline a lawyer who could prove he or she did not receive material confidential information based on a presumption to the contrary. Concerns about revelation of confidential information beyond the court room is an issue in just about every lawyer malpractice case and in many disciplinary cases. That concern can be addressed with protective orders and other procedures that limit the dissemination of the information beyond the court room.

January 11, 2010 Kehr E-mail to Difuntorum & McCurdy, cc Drafters, Chair & Staff:

I am immersed in attempting to unravel the several comments I received on Rule 1.7, and there is no way that I will be able to get to this before the end of the work day. If you need to put the agenda materials together before you leave today, please use my last drafts of the Rule 1.9 materials and Stan's email will appear in the email compilation. If you can wait until tomorrow, I will do my best to review Stan's message tonight.

January 11, 2010 Kehr E-mail to KEM, cc Drafters, Chair & Staff:

With any luck, this is the version that should have been attached to my earlier email.

January 11, 2010 Kehr E-mail to Lamport, cc Drafters, Chair & Staff:

Now that I've looked at your comment, I see that your references are to an earlier version (Dft. 5.4) rather than to Dft. 5.5 that went out during the evening of January 7. It is hard to keep all this straight.

Randy and Lauren: This means that the drafts I sent on January 7 should be used for the agenda package as I cannot locate any subsequent comments.

January 11, 2010 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Staff:

I've attached the following, so you have all the 1.9 documents in one place. Please include them in the agenda materials in the following order:

1. Public Comment Chart, Draft 2.2 (1/6/10)RLK-KEM. In Word.
2. Rule, Draft 6.3 (1/7/10). This is the draft Bob circulated on 1/7/10. I've changed the draft number according to our (my?) draft numbering convention but it is identical to Bob's draft. In Word.
3. E-mail compilation excerpt, including communications among the drafters over the last week or so. In PDF.
4. Dashboard, Draft 3 (1/10/10)KEM. I've made the changes Bob requested. Marked in yellow. In Word.

5. Introduction, Draft 3.1 (1/11/10)RLK-KEM - Cf. to DFT2. I made a change to the legend under the date and highlighted where we'll have to make changes after the next meeting for submission to RAC/BOG.

6. Rule & Comment Comparison Chart, Draft 4.1 (1/11/10)RLK-KEM. This is identical to draft 4, which Bob circulated on 1/7, except that I've highlighted in yellow parts of the document that may require further change.

I have a few comments on the proposed changes that I will circulate during the next week. Otherwise, I think these are good to go.

Bob, if you would prefer a different order, please advise. I think items 1, 2 and 3 are the most important for consideration.

Stan, Draft 6.3 is the most recent draft of the Rule.

January 16, 2010 Sondheim E-mail to RRC:

1. Page 185: Unless I am overlooking something, the Rule set forth in items 2 and 6 do not appear to match up. For example, Comment 5 is deleted in item 2, but not in 6. Similarly, the additional reference to 6068(e) appear in item 2, but not in 6.

2. Nit: Page 187, last line of Comment, "he" should be "the."

3. Nit: Page 191, penultimate line in last paragraph of RRC Response: change "interfere" to "create conflicts." Our rules cannot preclude the legislature from doing whatever it wishes.

4. Nit: Page 192, penultimate line in the first paragraph of RRC Response: Change "client" to "lawyer."

5. Page 193, I disagree with the RRC Response. The point that is being made by the Commenter is that (c)(1) has the phrase "or when the information is generally known" but (c)(2) does not. The Commission response is "the Commission does not see how a lawyer could be considered to have disclosed information that already is generally known." If this response is correct, it would also apply to (c)(1) and there would be no need for the phrase in question. Indeed, at p. 218, last paragraph in the Explanation column, it is stated that "the proposed changes in (c)(2) track those for (c)(1)." However, the changes do not track because the phrase is not in (c)(2). I would include the phrase in both (c)(1) and (c)(2) or delete it from both. I prefer the former. This issue also relates to the response on p. 197 to OCTC comment 11, as well as Stan's comment 3 on page 210.

6. Nit: Page 220: In the Explanation column, second line, "Comments" should be "Comment."

January 17, 2010 KEM E-mail to RRC:

1. I'm only responding to Harry's first point, below (I will be sending another e-mail concerning this Rule later today or tomorrow; although I'm a drafter on this Rule, I didn't have time between the demands of a new semester and other rules for which I had primary drafting

responsibility to comment on it), but I think it important to point out to the Commission members how staff goes about keeping track of changes to our drafts so that there is less confusion.

2. Harry correctly notes that the Rule draft in Item 2 [landscape Draft # 6.3 (1/7/10), beginning at p. 201 of the Agenda Materials] and item 6 [Rule & Comment Comparison Chart, beginning at p. 217], He states:

Unless I am overlooking something, the Rule set forth in items 2 and 6 do not appear to match up. For example, Comment 5 is deleted in item 2, but not in 6. Similarly, the additional reference to 6068(e) appears in item 2, but not in 6.

3. That is because changes to the Rules are made on two separate draft tracks: (1) the rule alone (as we have been doing, with each new draft compared to the previous draft). These are the draft versions that are, for the most part, in landscape format; and (2) the 3-column comparison charts, each draft of which shows in the middle column the cumulative changes to the Rule vis-a-vis the Model Rule.

a. The middle column of the Comment Chart is typically created by first creating a redline in track (1) by inputting the changes approved at the most recent meeting to the clean version of meeting draft, then creating a clean copy of that draft, and comparing that draft to the Model Rule. In creating the proposed Rule/MR comparison, we use a different program from Word. See #4, below. We then proceed to the track (2) document (i.e., Comparison Chart) and insert the new proposed Rule/MR redline into the comparison chart and, when necessary, update the third column (Explanation) of the Chart. This is the process we use when the Commission has made a substantial number of changes to the meeting draft (an example of this would be proposed Rule 1.11 during the last meeting).

b. When there are only a few changes (nits, etc.) to the Rule, we can often avoid having to create a new proposed Rule/MR redline and simply make the changes to the middle column. However, as explained in #4, below, we have requested that you not make any changes to the middle column to avoid time consuming detective work for us between meetings.

4. Staff has requested that the drafters only to make changes to the Rule alone and not to make any changes to the middle column of the Comparison Charts. The reason is simple. We have very little time between our meetings and the deadline for submission to RAC/BOG to implement all the changes the Commission has approved at its meeting. We have to put together a clean version of the Rule. If the drafters have made changes to the middle column, they are in relation to the Model Rule. The only way we can recreate a clean document from the middle column is to go through it manually and remove the underlines and strikeouts. The program we use to create the comparisons between the Model Rule and the most recent draft of the rule is not Word, which has a famously inept comparison function. We can not simply accept or reject changes simply by clicking a mouse as we could if the middle column had been created by Word's track changes.

5. In making changes to the Rule 1.9 documents, Bob has complied w/ our request not to mess w/ the middle column. He has only made changes to the Rule alone. However, anticipating that the Commission might agree with his proposed deletion of Comment [5], his explanation is based on that assumption.

a. However, the drafters are not in agreement on his proposed deletion of Comment [5]. Stan disagrees. See 1/11/10 Lamport E-mail to Kehr, cc Drafters, Chair & Staff at pp. 122-123, Points 1 & 4. I also disagree w/ its deletion, albeit for different reasons. I will elaborate on those in my subsequent e-mail.

6. in sum, when reviewing the agenda items, do not be put off by inconsistencies between the rule alone and the comparison chart (if it is included; because of the potential confusion, most drafting teams have not submitted a rule or comment comparison chart, preferring to await the Commission's decisions on the issues raised by the responses to public comment). Where both rule draft and comparison chart are included, however, the draft of the rule alone controls.

I hope I haven't added to the confusion. If you have any questions, please let me know. And thanks very much for complying with staff's requests in preparing these documents. It makes our task between meeting infinitely more manageable.

January 17, 2010 KEM E-mail #2 to RRC:

I have a few points concerning the changes Bob has proposed. As a drafter, I request that we discuss Bob's proposals.

1. Comment [5]. Bob has proposed deleting Comment [5] in response to OCTC's comment that it is inaccurate. I disagree, as I don't believe that OCTC is correct in its comment. OCTC stated:

OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but "might not be necessary" in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney's former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: "Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)" (Id at 747.)

The citation OCTC omitted from the quote is to *H.F. Ahmanson*. The Review Court in *Lane* made no mention that *Ahmanson* is a disqualification case. Moreover, *Lane* was involved primarily with the lawyer's involvement in his client's business affairs (former rule 5-101) and his concurrent representation of interests adverse to that client (former rule 5-102). Here is what the court concluded:

Indeed, if all respondent had done was to make a bad loan to a client without complying with former rule 5-101, in all likelihood he would not be facing suspension. The gravamen of his misconduct is the profound misjudgment which prompted lengthy litigation against an *existing* client and harmed the administration of justice. The applicable standards call for suspension,

unless the extent of the misconduct and harm to the client are minimal, in which case, the appropriate discipline would be reproof.

I think Comment [5] provides an important explanation in light of how this rule will be used. We can state it is a rule of discipline all we want, but it will be used by the courts in disqualification motions, and they will look to it for guidance on how to proceed. By striking Comment [5], we are removing one of the principal explanatory comments in the Rule. We would be inviting OCTC to use the substantial relationship test in disciplinary proceedings. The quote from *Lane* is almost a throwaway line; as the quotation above suggests, it had little if any impact on the resolution of that case. I do not think it is a position we should continue to advance. This is one of those situations where, as BOG has advised us, we should not follow case law simply because it exists. If we think the approach is incorrect, then we should reject it and continue to advance what we believe is correct. I think Comment [5] is a good balance and provides the kind of explication that comments are intended to provide. See also Stan's 1/11/10 E-mail to Kehr, cc Drafters, Chair & Staff, at pp. 210-11 of the Agenda Materials (122-23 of the compilation).

Recommendation: Keep Comment [5] in its entirety as drafted.

2. Comment [9]. Bob has deleted a good chunk of the comment in response to a LACBA comment. LACBA stated:

PREC is generally supportive of the proposed Rule and its Comments. However, there is some concern that the Comments are too long, give practice pointers, and are suggestive of means to avoid disqualification in a way that may be viewed as attempting to create substantive law for civil proceedings. Comments [8] and [9] in particular seem directed to provide guidance not just to lawyers but also to Courts on the subject of disqualification. Comments that refer to disqualification are not just for disciplinary purposes – they seem calculated to specifically address how Courts will handle disqualification.

Here is what Bob has proposed as the Commission's response:

On Comment [9], the Commission agrees that its discussion of burdens is not appropriate. The application will be worked out by case law. California already has some applicable case law, for example, *Adams v. Aerojet-General*, 86 Cal. App. 4th 1324 (2001). The allocation of the burden might depend on the situation in which the issue arises, such as in a damage claim by a former client, a disciplinary proceeding or a disqualification motion, so no single statement should be attempted.

Previously, I wrote concerning paragraph (b), to which Comment [9] applies. See my 1/6/10 e-mail to Bob, cc Drafters, Chair & Staff (p. 207 of Materials; 119 of Compilation). Comment [9] is identical to MR 1.9, cmt. [6]. As with paragraph (b), the court in *Adams v. Aerojet-General* relied upon Comment [6] in fashioning what has become known as the modified substantial relationship test. See 86 Cal.App.4th 1324, 1337. What message are we sending by deleting the very comment upon which the court relied in creating a test that affords lawyers a chance to rebut the presumption that they had acquired material confidential information. See also *Faughn v. Perez* and *Ochoa v. Fordel*. The fact that our rules will provide guidance to the courts, as LACBA has noted, is not necessarily a bad thing. It's being realistic. More to the point, why can't comment [9] also be characterized as providing guidance *to lawyers* on how these things will pan out? After all, they're the ones that have to prove or defend a DQ motion. Would we

suggest by making the deletions Bob proposes that lawyers no longer have an opportunity to rely on *Adams v. Aerojet-General* when their connection with the previous law suit is tenuous? Why do we want to hide this important guidance?

Recommendation: Keep Comment [9] intact and include citations to Adams, Ochoa and Faughn (at a minimum, include a citation to Adams). I don't agree w/ either of Stan's proposals to remove the reference to disqualification in the last sentence of the Comment.

3. **Comment [6].** I agree w/ Stan's proposed change to Comment [6]. He recommends substituting "(ii) if the lawyer obtained information in the prior representation ..." for "(ii) if the lawyer normally would have obtained information in the prior representation" See 1/11/10 Lamport E-mail to Kehr, etc., Point #1 (Materials, p.210; Compilation at p. 210).

Lee, Mimi

From: Raul Martinez [martinez@lbbslaw.com]
Sent: Tuesday, January 19, 2010 11:59 PM
To: Kevin Mohr; Stanley W. Lamport; Harry Sondheim
Cc: McCurdy, Lauren; Yen, Mary; Lee, Mimi; Difuntorum, Randall; iDominique Snyder (Home) (E-mail); Kevin Mohr (Home#1) (E-mail); Mark L. Tuft (E-mail); JoElla Julien (E-mail); Ignazio J. Ruvolo (E-mail); Linda Foy; Robert Kehr (E-mail); Kurt Melchior (E-mail); Ellen Peck (E-mail); Jerome Sapiro Jr. (E-mail); Paul W. Vapnek (E-mail); Kevin Mohr (Work) (E-mail)
Subject: RE: RRC - 1.9 [3-310] - III.E. - Comments [5], [6] & [9]

Stan:

The answer is that the substantial relationship test is really not a rule of evidence or proof, but a substantive rule. A conclusive presumption is a rule of substantive law, rather than an evidentiary rule. (*People v. McCall* (2004) 32 Cal.4th 175, 184-185. As *McCall* states: "[A] distinction must be drawn between mandatory rebuttable presumptions, which operate as evidentiary devices, and mandatory conclusive presumptions, which operate as rules of substantive law." (Id.) The lawyer may be able to prove there was no receipt of confidential information, but that's not the point of the rule. If the matters are related, the prohibition exists for policy reasons designed to safeguard client trust, and it doesn't matter whether, in fact, confidential information was received.

Alternatively, even if the rule is viewed as procedural, or a rule of evidence, we should not tell the State Bar Court how the rule should be applied under its own standards of proof or evidence. Let the State Bar Court determine for itself how the rule should be applied in those proceedings under its rules of procedure and evidence. There may be good reasons why the conclusive presumption should not apply in disciplinary proceedings. But that's not our call. It's also dangerous to start carving out different applications of our rules to different proceedings. If we do it here, I'm sure there are many other rules we could carve out for disparate treatment.

Raul

>>> On 1/19/2010 at 11:06 PM, in message

<C042D88446CF154B867F47C611CD2B290235E730@CCESVC01.ccnllp.com>, "Lamport, Stanley W."

<SLamport@coxcastle.com> wrote:

Kevin & Raul:

1. I agree with Kevin that we should not delete Comment [5]. I agree with his reasons. Raul, the Evidence Code establishes what is and is not admissible in a judicial proceeding. Evidence Code section 958 is an exception to the lawyer-client privilege that allows a lawyer and a client to prove or disprove a claim that a lawyer breached a duty to a client. In those proceedings where direct proof is possible, such as a disciplinary proceeding, there is no reason for a presumption. If a lawyer can prove that he or she did not receive material confidential information, why would we disregard that proof and rely on a evidentiary standard that does no more than look at the shadow of the lawyer-client relationship and guess at what one thinks may have been within that shadow? Put another way, if a lawyer could definitively prove there was no receipt of material confidential information, why would disregard that proof for a lesser standard of proof? A former client has no interest in protection under 1.9 beyond the two duties

the Rule addresses. Why would we use a standard that pushes the Rule further than it would need to go to protect those interests when there is direct evidence of what occurred in the lawyer-client relationship? Furthermore, why apply a different standard of proof for violation of 1.9 than would be necessary to prove a violation of any other Rule? The only reason for a presumption in disqualification cases is for the reasons stated in the Comment, which does not exist in a malpractice case, fee dispute or disciplinary proceeding.

Raul, I absolutely agree that we should afford clients peace of mind when it comes to protecting their confidential information. That is why I oppose unconsented screens in any context other than movement of lawyers within government. But applying the substantial relationship test when there is direct evidence of what occurred in the lawyer-client relationship does not advance that cause for the reasons just explained.

Clear and convincing evidence does not mean uncontested evidence. There are certainly disciplinary cases where there is a dispute between the lawyer and the client where the Bar Court imposed discipline. As I recall, *Matter of Dale* was such a case. In addition, you don't have to prove what is in a lawyer's head. You only have to prove what the lawyer received. That is not an impossible standard.

2. My problem with deletions in Comment [9] is that we are not replacing the sentences with anything. People will inevitably cite the Model Rule Comment. Courts, searching for a standard to apply, may very well rely on the language in the Model Rule Comment, since we are offering nothing else and are not suggesting that there would be any reason not to apply the sentences we deleted in applying the sentence that we retain. So why hide the ball here?

However, having said that, I do not agree with Kevin that the term "disqualification" should be retained if we retain the whole of Comment [9]. There are many reasons for not using "disqualification" in the Comments. I will not rehash them all here. However, in this instances there is another consideration. Comment [9] is not limited to disqualification. The standard expressed in that Comment applies in all types of proceedings. However, the Comment addresses the burden only with respect to disqualification, leaving people guessing what the burden is in other types of proceedings when it would be the same. People will think that we meant something by referring only to disqualification and not other proceedings, when we didn't mean anything. There is no reason to go there and create that issue for the profession.

STAN

From: Raul Martinez [mailto:MARTINEZ@lbbslaw.com]

Sent: Tuesday, January 19, 2010 3:54 PM

To: Kevin Mohr; Harry Sondheim

Cc: Lauren McCurdy; Mary Yen; Mimi Lee; Randall Difuntorum (E-mail); iDominique Snyder (Home) (E-mail); Lampport, Stanley W.; Kevin Mohr (Home#1) (E-mail); Mark L. Tuft (E-mail); JoElla Julien (E-mail); Ignazio J. Ruvolo (E-mail); Linda Foy; Robert Kehr (E-mail); Kurt Melchior (E-mail); Ellen Peck (E-mail); Jerome Sapiro Jr. (E-mail); Paul W. Vapnek (E-mail); Kevin Mohr (Work) (E-mail)

Subject: Re: RRC - 1.9 [3-310] - III.E. - Comments [5], [6] & [9]

Kevin,

Re Comment [5], I disagree that we should be telling the State Bar Court how or when it should apply the longstanding substantial relationship test. Your concern that we are "inviting OCTC to use the substantial relationship test in disciplinary proceedings" is telling since it's not our job to decide who gets invited to the party--or, in this case, how the rule is used in various contexts.

Second, I see the substantial relationship test as more than an evidentiary presumption. It's almost a substantive rule designed to safeguard the duty of loyalty. Even if expressed as a rule designed to safeguard confidential information, it certainly allows the former client to sleep better at night. (Note the objective standard in the test-- whether confidential information material *would normally* have been imparted to the attorney. Whether confidential information *was actually* imparted is not the test.)

Third, if this is truly an evidentiary test, as you suggest, and the lawyer denies receiving confidential information, how does the client (or OCTC) prove receipt of confidential information? It's impossible to "download" the information in the lawyer's mind. As *Ahmanson* explains: "it is not within the power of the former client to prove what is in the mind of the attorney." (229 Cal.App.3d 1443.) This supports the conclusion that the substantial relationship test is a substantive policy rule and not merely a rule of evidence. This also provides an alternative explanation as to why the presumption is conclusive, and not a rebuttable one.

Raul

>>> On 1/17/2010 at 8:14 PM, in message <4B53E013.2020004@charter.net>, Kevin Mohr <kemohr@charter.net> wrote:

Greetings again:

I have a few points concerning the changes Bob has proposed. As a drafter, I request that we discuss Bob's proposals.

1. Comment [5]. Bob has proposed deleting Comment [5] in response to OCTC's comment that it is inaccurate. I disagree, as I don't believe that OCTC is correct in its comment. OCTC stated:

OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but "might not be necessary" in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney's former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: "Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)" (Id at 747.)