

From: [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#)
Cc: [Jerome Sapiro](#); [Robert L. Kehr](#); [Kurt Melchior](#); [Kevin Mohr G](#); [Harry Sondheim](#)
Subject: RRC - 1.11 [3-310] - III.C. - Agenda Materials
Date: Thursday, March 18, 2010 3:26:09 PM
Attachments: [RRC - 3-310 \[1-11\] - Public Comment Chart - By Commenter - DFT2.4 \(03-18-10\)JS-KEM.doc](#)
[RRC - 3-310 \[1-11\] - Rule - DFT8.3 \(03-18-10\) - Cf. to DFT7.doc](#)

Greetings:

Thanks to Jerry's Herculean efforts, I'm attaching the following, both in Word:

1. Public Comment Chart, Draft 2.4 (3/18/10).
2. Rule, Draft 8.3 (3/18/10), redline, compared to Draft 7 (12/14/10) [public comment draft].

Notes & comments:

1. Jerry and I were working in parallel on these documents but I think I was able to merge them successfully, including incorporating Bob's comments. To the extent an issue has not been laid out appropriately, it is my fault.
2. There are a fair number of drafters' agreements that are ID'd as such in the footnotes.
3. We have not included George Cardona's lengthy comments concerning paragraph (e) and Comment [9B] in the Public Comment Chart because they arrived to late for a fair consideration. The drafters intend to supplement the chart before the next meeting. Draft 2.3 of the Chart includes his comments and I will circulate that document to the drafters once the dust settles.
4. I have not included any of the other submission documents because there are too many issues that remain to be resolved before we can return to the comparison charts, etc.

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

Kevin

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

TOTAL =5 **Agree = 3**
Disagree =0
Modify = 2
NI =0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
8	Cardona, George S. U.S. Attorney's Office, Central Dist. California	M		1.11(e)	Mr. Cardona's comment is too lengthy and was received too late to be adequately summarized and responded to here by the submission deadline. Jerry and/or the drafting committee will submit it and a response prior to the March meeting.	
7	Committee on Professional Responsibility and Conduct ("COPRAC")	M		1.11(b)	Paragraph (b): COPRAC respectfully disagrees with the Minority position objecting to the inclusion of the Model Rule's "knowingly" standard in paragraph (b) of this Rule. It is our belief that a lawyer should not be subject to discipline for taking on a representation where he or she is not aware of the conflict. Our belief is no less applicable with respect to former government lawyers, especially since it may be likely that the conflict database system for government lawyers is often not as thorough or effective as that used by law firms, perhaps making it difficult for the former government lawyer to properly input all potential conflicts into a law firm's	Kevin agrees with this comment as does OCBA. San Diego County Bar Association, OCTC, Bob, and Jerry disagree with the comment. See remarks and recommendations in response to San Diego County Bar Association remarks.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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

TOTAL =5 **Agree = 3**
Disagree =0
Modify = 2
NI =0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Cmt. [8]	<p>conflict system.</p> <p>Similarly, COPRAC respectfully disagrees with the Minority position to Comment [8], in which the Minority objects to the inclusion to the Model Rule's "actual knowledge" standard applying to paragraph (c) of the Rule. We believe that the former government lawyer should not be subject to discipline for representing a client who could benefit from such information unless the lawyer in fact has actual knowledge of such information.</p>	<p>Kevin agrees with this disagreement. Bob, Jerry, OCTC, and San Diego County Bar Association do not. See response to comment of San Diego County Bar Association.</p>
				1.11(e) & Cmt. [9B]	<p>Paragraph (e) and Comment [9B]: COPRAC believes that the head of the office exception to screening addressed in the <i>Cobra</i> case is too important to be relegated to a Comment [see second sentence of Comment [9B]], and that the exception should be included in the Rule itself. That said, however, we believe the wording of the second sentence of Comment [9B] [which summarizes the exception] misstates the law, and in that sense is not supported by the cases referenced at the end of the Comment. Specifically, we agree that, where the personally prohibited lawyer is the head of the office, agency or department (or a lawyer with comparable managerial authority), it may be appropriate to prohibit</p>	<p>See response to comment of San Diego County Bar Association. The drafting committee recommends that this issue be discussed by the full Commission.</p>

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TOTAL =5 **Agree = 3**
Disagree =0
Modify = 2
NI =0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>other lawyers in such office, agency or department from working on such matter. However, where the personally prohibited lawyer only has supervisory authority over other lawyers, only those lawyers – and not the entire office, agency or department – should be prohibited. Also, we note that for consistency the term “disqualified” as used in this sentence should be changed to “prohibited from participating;” and in the second instance in clause (ii), the incomplete reference to “office” should be replaced with the full reference to “office, agency or department.” Accordingly, we recommend that the second sentence of Comment [9B] be deleted and the following sentence be added to paragraph (e) of the rule:</p> <p>“However, (i) if the lawyer personally prohibited from participation in a matter is a lawyer with direct supervisory authority over other lawyers, then such prohibited lawyer and such other supervised lawyers (but not necessarily the entire office, agency or department) may be prohibited from participating in the matter, and (ii) if the lawyer personally prohibited from participation in a matter is the head of the office, agency or department, or a lawyer with</p>	<p>Although the drafting committee agrees with the observation of COPRAC about the scope of the disqualification, we recommend different rewording of the second sentence of Comment [9B]. See redlined revision of the rule, submitted herewith. However, the changes there are only Jerry’s suggestions, and Bob disagrees with them. We request that they be discussed in connectin with the suggestion that the comment be clarified in light of the misinterpretationof paragraph (e) and this comment discussed in respect to comments by</p>

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TOTAL =5 **Agree = 3**
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NI =0

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				1.11(c)	conflicts. The Commission minority suggests using the term “knows or reasonably should know;” this appears to be the correct standard, and OCTC supports this language. OCTC does not object to the concept contained in paragraph (c), but suggests that the Commission might want to tighten the language.	Association on this subject. By telephone, Alan Blumenthal, Esq., explained to Jerry the nature of the concern OCTC has with the wording. Jerry agrees that the first sentence of paragraph (c) is obtuse. He recommends that it be clarified and has revised it as set forth in the redlined version of the rule submitted herewith. However, the other members of the drafting committee have not seen or commented on it. Jerry requests that it be discussed in the next meeting.
				1.11(d)(2)(ii)	Paragraph (d)(2)(ii), prohibiting government officers and employees from negotiating for private employment, might be too broad. For example, read literally, it would appear to prohibit any criminal prosecutor from negotiating with the public defender’s office for a job.	The Commission disagrees. If the prosecutor is prosecuting a criminal case against a client of the public defender’s office, he or she should not be negotiating for employment by defense counsel. See <i>Stanley v. Richmond</i> (1995) 35 Cal App. 4 th 1070. <i>Quaere</i> : would this be an attempt to commit a felony under Business & Professions Code section 6131(b)?
				1.11(e)	OCTC notes that paragraph (e) has no comparable provision in the ABA Rules. While OCTC understands the intent is to screen the conflicted attorneys, this creates a rule which could negatively impact government agencies’ ability to handle matters. Further, there is the issue of when	OCTC correctly points out that paragraph (e) is not in the Model Rule. However, RRC disagrees with OCTC’s concerns, which appear to confuse disciplinary liability with disqualification. The screening exception can immunize lawyers in the office from vicarious risk of discipline. Government agencies do deal with the disqualification issue. For example, a district attorney can call in the Attorney

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TOTAL =5 Agree = 3
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				1.11(f)	disclosure must occur. This could impact the government's ability to conduct investigations without advising their targets. While the Commission appears to be trying to accommodate this concern by including language that notice to the former client is not required if prohibited by law or a court order, this language is probably inadequate to cover all situations. Overall, this provision is problematic.	general. The United States Attorney deals with the situation very well. RRC does not perceive a prohibition against disclosure of the conflict other than in the indictment situation. If the government agency cannot disclose, for reasons not compelled by law, then the agency should not allow its lawyers to participate in the matter. To the Commission, a government office should not be allowed to hire an opposing party's lawyer and avoid vicarious responsibility for the conflict of interest thereby created unless the lawyer's former client has notice and consents or is given the opportunity to scrutinize the adequacy of the screen.
				Comments generally	Paragraph (f) unnecessarily repeats the definition used in Proposed Rule 1.1(e). [NOTE: the correct reference should have been to proposed Rule 1.9, cmt. [4].] As a general observation, there are too many Comments and most do not appear to serve any purpose. For example, Comments [1] – [5], [7] – [9], [9C], and [10] explain in general terms the purpose of the rule and screening. They seem unnecessary given the language of the	RRC disagrees. The definition of "matter" in paragraph (f) and the definition of "matter" in Rule 1.9, cmt. [4], have different emphases. The description in Rule 1.9, cmt. [4] is generally applicable to all lawyers; the definition of matter in paragraph (f) is more specific to the kinds of practice in which government lawyers are regularly involved. NOTE: Nearly all of the proposed deletions and revisions by Bob and Jerry require discussion by the entire Commission. For the most part, KEM (a drafter) disagrees with them. Bob and Jerry agree in part. They recommend that Comment [2] be deleted. It adds nothing to the rule,

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TOTAL =5 Agree = 3
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					<p>Rule itself. Comment [9B] has some value, but it provides no real guidance as to when the entire office should be disqualified.</p>	<p>but summarizes part of it.. KEM disagrees; it provides valuable guidance.</p> <p>In any event, the reference to Rule 1.10 in Cmt. [2] must be deleted. KEM agrees with this latter deletion.</p> <p>Bob and Jerry would delete the last sentence of Comment [3]. KEM is OK with this.</p> <p>In Comment [5], they would modify the first sentence to make explicit that, when a lawyer moves from one government agency to another, the agencies are treated as successive clients. They request that this be discussed by the full Commission. KEM agrees that this needs full discussion.</p> <p>They recommend that Comment [7] be deleted; it adds nothing to the rule except an inconsistent standard regarding timing of notice. KEM disagrees.</p> <p>They would delete Comment [8], particularly if the Commission adopts the "reasonably should know" standard. Even if "knowingly" is the standard, that comment adds nothing to the rule because imputed knowledge is inconsistent with actual knowledge. KEM disagrees with both points. This also needs to be discussed.</p> <p>Bob and Jerry would retain the other comments as useful explanations of the rule. KEM agrees.</p>

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TOTAL =5 Agree = 3
Disagree =0
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NI =0

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5	Orange County Bar Association ("OCBA")	M		Comment [9B]	<p>Disagrees with minority position opposing screening in the private to government context.</p> <p>Supports use of "knowingly" in paragraphs (b) and (e).</p> <p>Agrees with proposed changes from Model Rule in paragraphs (b), (1), and (e) using "prohibited" instead of "disqualified."</p> <p>The head of the office exception to screening addressed in the <i>Cobra</i> case seems too important a concept to be relegated to a Comment. We suggest that the principle should be incorporated into the Rule itself, rather than Comment [9B].</p>	<p>No response required.</p> <p>No response required, although Bob and Jerry disagree. See response to San Diego Bar Association.</p> <p>No response required.</p> <p>Two bar associations share this concern. See comment 3 above. The drafting committee believes that the SDBA and the OCBA misread the rule and the comment. The former is a matter of discipline, but Comment [9B] addresses disqualification. If the current draft of Comment [9B] continues to be the majority position, Jerry suggests that the response state: A majority of the RRC disagrees. The black letter rule provides for potential discipline in the case of a vicarious conflict of interest. Comment [9B] cautions about the possibility of disqualification, not discipline. Lawyers in a government office, the head of which, or in which a supervisory attorney, is conflicted, should be immune from discipline if the head of the office or supervisory attorney is properly screened, even if the office might be disqualified in a</p>

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TOTAL =5 Agree = 3
Disagree =0
Modify = 2
NI =0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [9C]	<p>Comment [9C] indicates the Rule does not address whether a “law firm” will be disqualified. While we see that the proposed definition of the term “law firm” will include a government agency, we respectfully suggest that because this Rule necessarily differentiates between a “firm” (as opposed to a “law firm”) and a “government agency,” the reference to a “law firm” in Comment [9C] easily could be misread or misinterpreted to exclude government agencies, that is, to suggest that the Rule does address the disqualification of a government agency. Given that the definition of “law firm” in proposed Rule 1.0.1 includes an office of a government entity, to avoid confusion, it would be appropriate to make this clearer, perhaps by referencing proposed Rule 1.0.1 in Comment [9C]. Alternatively, the Commission could use the undefined terminology from proposed Rule 1.11 itself, that is, “firm” and “government agency” to</p>	<p>given case. A minority of the RRC agrees with the commenter and would include in the black letter rule an exception from screening if the tainted lawyer is the head of the government office or a supervisory lawyer, similar to the second sentence of Comment [9B].</p> <p>The RRC disagrees with this comment because the definition of a “law firm” in Rule 1.0.1 does include a government office; and defining the single word “firm” is unnecessary. However, because the commenter expresses concern about whether Comment [9C] will properly be interpreted, Jerry recommends that the Commission amend Comment [9C]. In the first sentence of the Comment, the phrase “law firm” be replaced by the phrase “. . . lawyer or a governmental or nongovernmental law firm” In the second sentence of that Comment, Jerry recommends that the phrase “a lawyer or law firm” be replaced by the phrase “. . . any of them”</p> <p>RRC disagrees. The independent word “firm” as used in context does not need to be defined. It</p>

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TOTAL =5 **Agree = 3**
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Modify = 2
NI =0

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					<p>clarify that the Rule does not address disqualification of a firm or government agency.</p> <p>We note that the Commission has chosen not to include the term “firm” in the terminology rule, proposed Rule 1.0.1, and instead opted to define only the term “law firm.” We are concerned that this approach will create confusion and/or arguments concerning the definition of the term “firm” as used in this proposed Rule.</p>	<p>refers to the firm in which the lawyer is practicing.</p> <p>Jerry asks that the Commission consider whether to substitute “law firm” for the word “firm” as used in the comment to avoid the concern expressed by the Orange Count Bar association. To Jerry, the word “firm” as used in the Comment does not need definition, because it refers to the lawyer’s firm. However, we can obviate OCBA’s comment by making that substitution.</p>
3	San Diego County Bar Association Legal Ethics Committee (“SDCBA”)	M		(e)	The commenter notes the minority objection to screening in the private to government context. .	No response required. However, because they did not indicate whether they agree or disagree with the minority, Jerry contacted Richard D. Hendlin, Esq., the author of the comment. Mr. Hendlin said he was concerned about the inability of the former client to monitor the effectiveness of the screen but, on balance, concluded that screening is the correct approach in the situation in which the lawyer does not become head of the office or a supervisory lawyer
				(e)(2)	Commenter agrees with the proposed wording of paragraph (e)(2) but expresses concern about how the client could monitor the screen and ensure it retains its effectiveness.	RRC agrees that the effectiveness of monitoring is a bona fide concern. However, the majority of RRC concludes that screening should be permissible to avoid vicarious violation of the rule when a lawyer moves from nongovernmental to governmental

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TOTAL =5 Agree = 3
Disagree =0
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NI =0

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				(e)	Commenter points out that paragraph (e) does not address the head of office and supervisory lawyer situation and thereby is <i>de facto</i> overruling <i>Cobra Solutions</i> .	employment or from one governmental entity to another. The drafting committee recommends that the Commission re-discuss this issue. Mr. Hendlin has substantial wxperience handling such cases. If a commenter who has substantial experience on the with these cases on the prosecution side interprets the proposed rule as in effect <i>overruling Cobra Solutions</i> and similar cases, then there is a drafting problem. Orange County Bar Association raised a similar concern. See its comment. Bob Kehr and Jerry think that SDCBA and OCBA misread the rule; the rule addresses disciplinary consequences of potential vicarious conflicts; the comment addresses the possibility of disqualification. <i>Quaere</i> whether the comment should be clarified, even if the black letter rule is not changed.
				(b) & (c)	San Diego County Bar Association agrees with the Commission minority that paragraphs (b) and (c) of Rule 1.11 should be modified to prohibit lawyers in a firm who "know or reasonably should know" that a lawyer in his or her firm is prohibited from representation, from undertaking or continuing representation in such a matter unless the screening is conducted and notice given as set forth in 1.11(b)(1) and (2).	Bob and Jerry agree with this comment and recommend that the phrase in paragraph (b) that ". . . no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation . . ." be changed to state: ". . . no lawyer in a firm with which that lawyer is associated and who knows or reasonably should know about the prohibition may undertake or continue representation . . ." They also recommend that, in paragraph (c), the phrase ". . . that the lawyer knows is confidential government information . . ." be changed to state ". . . that the lawyer knows or reasonably should know is confidential government

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TOTAL =5 Agree = 3
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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						<p>information. . .” Although the commenter does not comment on the use of the word “knowingly” in paragraph (e), that is an obviously parallel concept, and Bob and Jerry recommend that the phrase “. . . no other lawyer serving in the same government office . . .” in that paragraph be changed to state “. . . no other lawyer who knows or reasonably should know about the prohibition and who serves in the same government office. . .” The word “knowingly” in paragraph (e) should be deleted if this change is made. OCTC agrees with San Diego County Bar Association on this point.</p> <p>Orange County Bar Association, COPRAC and Kevin disagree with San Diego, Bob and Jerry. In addition, the full Commission voted 9-3-2 to recommend adoption of the “knowledge” standard.</p> <p>Because this is a minority position, Bob and Jerry recommend that the matter be discussed at the next meeting.</p>
4	Santa Clara County Bar Association (“SCCBA”)	A			No comment.	No response required.

9930.16:577

Rule 1.11: Special Conflicts Of Interest For Former And Current Government Officers And Employees
 (Commission's Proposed Rule – Draft 8.3 (3/18/10) – COMPARED TO DFT7 (12/14/10))

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
 - (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent~~r~~ to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).

- (b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated and who knows or reasonably should know about the prohibition¹ may

- knowingly undertake or continue representation in such a matter unless:
- (1) the personally prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

¹ **Drafters' Disagreement:**

JS: If my recollection is correct, Bob and I were either all or part of the minority that disagreed with limiting paragraph (b) and (c) to actual knowledge. The San Diego County Bar Association agrees with us. Accordingly, I have recommended a language change in the RRC Response column of the Public Comment Chart and the draft rule. I also recommend a counterpart of that change in paragraph (e). Please let me know whether you agree or disagree. If you agree, I will make that recommendation to the full commission.

RLK: I don't remember the vote, but I do think that the addition of "reasonably should know" would improve the Rule. I think the statement of the S.D. comment on this would make more sense if you were to begin it by saying that the S.D. Bar Assn. agrees with the

reasoning of the Commission minority that paragraphs (b) and (c) should be modified, etc. I think that is what the S.D. letter says, and including this in the chart makes the S.D. comment reasoned. Also, I would re-order the chart so that the comments are in rule paragraph order.

KEM: I disagree with changing the "knowingly" standard. Although S.D. might have urged the know or should know standard (as did OCTC), both COPRAC and OCBA favor "knowingly," the former taking pains to expressly disagree w/ the minority's position. I don't see the public comment as a justification for changing the standard in the draft rule, but there is nothing wrong with the minority making a motion at the meeting to change the standard.

The vote to use "knowingly" was 9-3-2. See 7/24-25/09 KEM Meeting Notes, III.C., at para. 5A. The term was also impliedly approved when the Commission approved paragraph (e).

- (c) Except as law may otherwise expressly permit, a lawyer who was a public officer or employee and, during that employment, acquired² ~~having~~ information that the lawyer knows or reasonably should know³ is confidential government information about a person ~~acquired when the lawyer was a public officer or employee~~, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
- (1) is subject to Rules 1.7 and 1.9; and
 - (2) shall not:

² **For Discussion:** The revisions to the first sentence of paragraph (c) represents Jerry’s attempt to remove an ambiguity perceived by OCTC. Neither RLK nor KEM have had an opportunity to review the change.

³ **Drafters’ Disagreement:** See footnote 1.

- (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or while employed by another governmental organization,⁴ unless the appropriate government agency gives its informed written consent; or

⁴ **Drafters’ Disagreement:**

JS: In paragraph (d)(2)(i), I think that a concept should be added. If a lawyer changes jobs, for example from a city attorney office to the office of the Attorney General, this rule should apply. However, the way it is now worded, this rule only applies if the lawyer moves from private practice or non-government employment to government employment. I recommend that we add, after the phrase “non-governmental employment” the phrase “. . . , or while employed by another governmental organization. . . .” Please let me know whether you agree or disagree.

RLK: Paragraph (a) seems to me to include government to government whenever there is a new client, such as by moving from the office of a city attorney to the state a.g. See the first sentence of Comment [1]. Its reference to current governmental lawyer I think would make no sense except in your city attorney to a.g. example.

KEM: I don’t see any need for a change. There is nothing in paragraph (a) that limits its application to a lawyer who moves from government into private employment. The first sentence of Comment [2] clarifies that the paragraph applies to government-government, as well as government-private movement. By its terms, paragraph (d) is limited to prior private and non-governmental employment.

See also footnote 15.

- (ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer— who knows or reasonably should know about the prohibition and who is⁵ serving in the same governmental law firm, office, agency or department⁶ as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:
- (1) the personally prohibited lawyer is timely and effectively screened from any participation in the matter; and
 - (2) the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements. However, notice to the former client is not required if prohibited by law or a court order. [See Public Comment Chart for additional concerns.]

⁵ **Drafters' Disagreement:** See footnote 1.

⁶ **Drafters' Disagreement:** KEM would like this proposed revision discussed at the RRC meeting.

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

COMMENT

- [1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to these Rules, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0.1(e) for the definition of “informed written consent.”
- [2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph ⁷Paragraph (b) sets

⁷ **Drafters' Disagreement:** In light of the BOG's decision not to adopt proposed Rule 1.10, this sentence has been deleted. RLK and JS would

forth a special imputation rule for former government lawyers that provides for screening and notice. Similarly, paragraph (e) provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, but also provides for screening and notice in certain situations.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). ~~As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by paragraphs (a)(2) and (d)(2).~~⁸

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the

delete the balance of the Comment. KEM disagrees as he believes this is a very important Comment that lays out the structure of the Rule and when certain provisions are applicable.

⁸ See footnote 7. All drafters are in agreement with this deletion.

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

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

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

[11] Even if authorized by this rule to represent a client, a lawyer may not violate Business and Professions Code section 6131 in the circumstances in which it applies.⁹

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, ~~it may be appropriate to treat~~¹⁰ that second agency ~~as is~~ another client for purposes of

⁹ This is new Comment [11], drafted to address a concern raised by OCTC. It will be re-numbered after the RRC meeting.

RLK would revise the Comment to provide:

Even if authorized by this Rule to represent a client, a lawyer may not violate Business and Professions Code section 6131 in the circumstances in which it applies.

¹⁰ RLK would like to discuss this language and Jerry recommends the

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

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.¹¹

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

[6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule 1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the

revision. KEM would also like to discuss this.

¹¹ Former Comment [9] has been moved to this position.

screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.¹²

[8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.¹³

~~[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.¹⁴~~

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

[9A] A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment or while working for another governmental organization¹⁵ only if: (i) the government

¹² **Drafters' Disagreement:** RLK and JS want to delete Comment [7]. KEM disagrees. There is no compelling reason to delete this comment taken verbatim from the Model Rule.

¹³ **Drafters' Disagreement:** RLK and JS want to delete this Comment if the Commission agrees w/ adding the "reasonably should know" standard. KEM disagrees w/ both points.

¹⁴ Comment [9] has been moved to earlier in the Comment section.

¹⁵ **Drafters' Disagreement:**

agency gives its informed written consent as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).

Screening of Current Government Lawyers Pursuant to Paragraph (e)

[9B] Under paragraph (e), lawyers in a government office, agency, or department are not prohibited from participating in a matter because another lawyer in it the agency has¹⁶ participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely and effectively screened and notice is given promptly to the former client to enable it to

JS: For the reasons stated two paragraphs above, I would insert in proposed Comment [9A], third line, after the word "employment" the phrase ". . . , or while working for another governmental organization" Do you agree?

RLK: This works for me, but if the change were made the (i) reference to government agency would become ambiguous. I suggest: "only if (i) the former governmental employer gives"

KEM: I disagree with this proposed change. As I noted earlier, see footnote 4, paragraph (a) would apply to the former government lawyer, whether the lawyer has moved to private employment or a different government agency. For the same reason, I also disagree with the corresponding change Jerry has made to (d)(i). Paragraph (d)(i) and Comment [9A] by their terms are limited to "private practice or non-governmental employment."

¹⁶ **Drafters' Disagreement:** Jerry proposes the foregoing changes to the first sentence of Comment [9B]. Both RLK and KEM disagree.

ensure the government's compliance with the screen. However, if the personally prohibited lawyer is (i) the head of the office, agency or department, or a lawyer with comparable managerial authority, then both the personally prohibited lawyer and the office may not participate in the matter; or (ii) a lawyer with direct supervisory authority over any of the lawyers participating in the matter, then both the personally prohibited lawyer and those who work under that lawyer's supervision may not participate in the matter.¹⁷ ~~then both the personally prohibited lawyer and the office may not participate in the matter~~¹⁸ ~~be disqualified from the representation.~~ See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006);

¹⁷ **Drafters' Disagreement:**

JS has made the changes to the two romanette clauses of Comment [9B] in response to a COPRAC comment.

Both RLK and KEM disagree with the proposed change.

¹⁸ **Drafters' Disagreement:**

JS: The last sentence in proposed Comment [9B] uses the phrase "may be disqualified." Should we be using that phrase in light of our attempts not to address disqualification in this rule? We could substitute for it a phrase such as "may not participate in the matter." Do you agree?

RLK: Your suggestion seems to me to be an improvement.

KEM: Actually, the word "disqualification" was intentionally used here. The concept being communicated is that a court might disqualify a lawyer even if there is no specific provision (i.e., codification of *Cobra* in the black letter) that would subject the lawyer to discipline. The word "disqualification" or a variant should be kept in both [9B] and [9C]. See also footnote 19, below.

Younger v. Superior Court (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34].¹⁹

This Rule Not Determinative of Disqualification

¹⁹ **Drafters' Disagreement:**

JS: In the draft spreadsheet about the public comments, I raise the issue that two bar associations have raised, namely whether by not including the *Younger* and *Cobra Solutions* problem in the black letter rule we are implicitly overruling them. I have not addressed that issue in the attached redraft of the rule because I was outvoted on that issue by the Commission. I raised the issue in the spreadsheet but do not suggest a change in the draft of the rule that is attached to this email because I suspect I will still be a minority of one. What are your recommendations?

RLK: I do not agree that we are overruling *Younger* and *Cobra Solutions*. They are disqualification cases that do not speak of possible discipline. I would make no change on this point.

KEM: *This may be a moot point if a majority of the Commission were to agree with George Cardona and decide that we should not have a paragraph (e).*

*However, I think the way in which we are addressing this -- not codifying *Cobra* in the black letter but instead putting lawyers on notice in the comment that a court may DQ them and their office under the appropriate circumstances -- is the appropriate approach.*

*The vote to include a comment on *Cobra* was approved by a 11-0-0 vote. See 12/12-13/09 KEM Meeting Notes, III.E., at para. 2.*

I also think that our approach goes a long way to assuage George Cardona's concerns stated in his point #3.

[9C]²⁰ This Rule does not address whether a lawyer or a governmental or nongovernmental law firm will be disqualified from a representation.

²⁰ **Drafters' Disagreement:** JS favors the change to this Comment, RLK favors a different change. KEM sees no reason for a change.

JS: Although I disagree with the Orange County Bar Association's analysis of Comment [9C], its concerns caused me to revisit the first sentence of proposed Comment [9B]. I would replace the word "agency" in the first line of the first sentence with the "office, agency or department" In the third line of the first sentence, I would delete the phrase "the agency" and substitute for it the word "it" in order to avoid having to repeat the longer phrase. Do you agree?

RLK: I don't understand the O.C. comment on [9C]. The Rule does not address the disqualification of law firms, governmental or other. Also, it is not possible for a government entity to be disqualified unless it is a law firm. The Rule addresses the duties of the individual lawyer. The duties of other lawyers in a law firm are covered by imputation concepts of civil law, at least now that the Board has killed Rule 1.10. The Rule 1.0.1 definition of law firm refers to "government entity". While I agree with the spirit of your change, I would say: "... or while employed by another government entity" I would make the same change at the beginning of [9B]

KEM: *The specifics are unnecessary here as our definition of "law firm" includes "the legal department, division or office of a corporation, a government entity or other organization." Rule 1.0.1(c). I would leave it the same.*

Perhaps I am misreading RLK's statement, above, but I disagree with him that the definition of "law firm" refers to a "government entity." It is not

Whether any of them a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal.

Matter

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

whether the lawyer is employed by the government entity but rather, it is whether the lawyer is employed in the "law department, division or office" of a government entity." Resolution of this issue might resolve an issue that George Cardona has raised in his memo re this Rule. See Cardona Point #3.



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February 12, 2010

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San Francisco, CA 94105-1639

**Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 6)**

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 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,

Patrick L. Hosey, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6
LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010
SDCBA Deadline March 12, 2010

Coversheet

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

Format for Analyses:

(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 [] 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 [] 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 [] 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 [] No []

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

Format for Recommendations:

[] 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.*

Summaries Follow:

~~In sum, present Rule 3-410 requires written disclosure where a lawyer does not carry professional liability insurance. It exempts government lawyers and in-house counsel, and legal services rendered in an emergency.~~

~~Proposed Rule 1.4.1 proposes adoption of existing Rule 3-410 with a single, substantive change. Added to the engagements excluded from written disclosure (i.e., of the lack of professional liability insurance coverage) is “a court appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed.” This exception is intended to encourage acceptance of such appointments, and applies in a setting where customarily the client is not in a position to be “shopping” for legal services, such that the disclosure is likely to be of little moment, an appointee being atypical of legal-service consumers.~~

~~As a practical matter, the title of the proposed rule continues a sort of misnomer, in speaking to “Disclosure of Professional Liability Insurance,” when in fact disclosure by its terms is triggered not by professional liability insurance, but rather the absence of such. However, inasmuch as this issue did not trouble the California Supreme Court in its August order, the text has been exhaustively considered and the matter does not appear to be one which would provoke material confusion, I suggest our Committee defer.~~

~~The author proposes approval of the new rule in its entirety, in that (1) this rule has only recently been adopted, hence opponents (if any) have had their opportunity to be heard on the issues, (2) adoption came after lengthy, deliberate and at times contentious consideration by the State Bar, and has since been approved by the California Supreme Court, and (3) the addition of an excepted class is modest, is of limited application, and premised on sensible, worthy considerations.~~

~~**CONCLUSION:** We approve the new rule in its entirety.~~

LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 1.11 “Special Conflicts of Interest for Former and Current Government Officers and Employees”

(5) Proposed Rule 1.11 addresses conflicts arising from a lawyer moving to or from government service. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule’s topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4th 839; *City of Santa Barbara v. Superior Court* (2004) 122 Cal. App. 4th 17.

The Commission deemed Proposed Rule 1.11 “Moderately Controversial” because the proposed Rule departs from the Model Rule by requiring, pursuant to California case law, that a government lawyer’s disqualification be imputed to other lawyers in the governmental organization that employs the lawyer unless the former client consents or the prohibited lawyer is

timely and effectively screened. Under the Model Rule

A minority of the Commission objected to paragraph 1.11 (e) to the extent that screening is permitted to rebut the presumption of shared confidences between a former private lawyer now in the employ of the government and other lawyers in the prohibited lawyer's office or agency. They believed that this will undermine the ability of lawyers to promote client candor. For example, where a private lawyer representing a client with respect to matters that are the subject of a governmental investigation becomes employed by that governmental agency, the former client will fear that he or she has revealed information to the lawyer now working for the government that could further an investigation against the former client, and that the former client cannot object to the screen and has no way to verify that the screen is actually working.

Although (e) (2) requires that former client be "notified in writing of the warranted implementation of the screening procedures ... and of the actions taken to comply with those requirements" it is unclear how the client could monitor the screen and ensure it retains its effectiveness. On this point, while I agree that effective monitoring is troublesome to say the least. Nevertheless, it appears consistent with existing California law (*City of Santa Barbara v. Superior Court*, *supra*, 122 Cal.App.4th 17; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108) and I recommend we approve the majority's wording.

Rather surprisingly, proposed Rule 1.11 does not address the situation where the prohibited lawyer is now the head of the government office. As noted by the Supreme Court in *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4th 839:

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

"There is another reason to require the disqualification of the conflicted head of a government law office. That reason arises from a compelling societal interest in preserving the integrity of the office of a city attorney. . . ."

In *Cobra Solutions*, the court disqualified the new City Attorney and the entire Office of the City Attorney of San Francisco. This is an area that the Commission may wish to address. Otherwise, the adoption of Rule 1.11 would seemingly *defacto* overrule the holding in *Cobra Solutions*.

A second minority of the Commission objected to the recommended adoption of the Model Rule's "knowingly" standard as applied to imputation in paragraphs (b) and (c). Section

1.11 (b) states in part:

“When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may **knowingly** undertake or continue representation in such a matter unless: [the prohibited lawyer is screened...].”

The minority argue that the use of the word “knowingly” will require **actual** knowledge before a lawyer who has a conflict of interest under this Rule may be disciplined. They believe that this will “immunize from discipline a lawyer who does not bother to check for conflicts of interest” and thereby evades actual knowledge of the conflict. They assert “the lawyer who **knows or reasonably should know** that he or she is prohibited from representation under this Rule ought to be subject to discipline, and not merely the lawyer that OCTC can prove had actual knowledge.” (Emphasis added.)

I agree with the minority on this point and believe that paragraphs (b) and (c) of Rule 1.11 should be modified to prohibit lawyers in a firm who “know or reasonably should know” that a lawyer in his or her firm is prohibited from representation, from undertaking or continuing to representation in such a matter unless the screening is conducted and notice given as set forth in 1.11 (b)(1) and (2).

CONCLUSION: We approve the new rule with modifications.*

~~LEC Rule Volunteer Name(s): Radmila Fulton~~

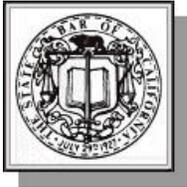
~~Old Rule No./Title: RPC 2-300 (Sale or Purchase of a Law Practice of a Member, Living or Deceased)~~

~~Proposed New Rule No./ Title: 1.17 “Purchase and Sale of a Law Practice”~~

~~(5) The Proposed Rule includes provisions recently added by the ABA to Model Rule 1.17 that permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. This Rule moots many of the criticisms of earlier proposals and also addresses one of the recommendations of the Executive Director to the Board of Governors concerning Appointment of a Career Transition Planning Taskforce. In her memo, the Executive Director suggested that the Commission consider whether the rule permitting the sale of entire law practice should be changed to permit the sale of a part of a law practice. She pointed out that greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement. The Proposed Rule addresses that subject.~~

~~However, the Model Rule provisions concerning the required notice to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current rule 2-300 to provide better protection for the interests of the clients whose matters are being transferred. Additions to the rule and changes in the comments have been made for better client protection as follows:~~

- ~~1. The sale of the practice, or a substantive field of practice, or of a geographic area of practice must include the entire practice or entire field or area of practice — lawyers~~



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

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[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

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[Rule 6.2 \[n/a\]](#)

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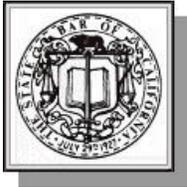
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| Rule 1.4.1 [3-410] | Rule 1.17 [2-300] | Rule 4.4 [n/a] | Rule 7.6 |
| Rule 1.8.4 [n/a] | Rule 1.18 [n/a] | Rule 6.1 [n/a] | Rule 8.2 [1-700] |
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OC WOMEN LAWYERS ASSOC.

March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske
Executive Director

MEMORANDUM

Date: February 24, 2010

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 1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees**

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 law firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

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

The OCBA generally supports the adoption of the proposed rule affirming the policies and obligations set forth in California case law, which address conflicts of interest involving former and current government lawyers. We offer the following suggestions for clarification of and revisions to the proposed Rule and Comments.

The OCBA supports the provisions of the proposed Rule that permit screening, in view of the public policy considerations articulated in the Comments, as well as existing California case law. We disagree with the minority view that permitting screening will undermine client candor, particularly in view of the fact that: (1) California law generally permits screening in the circumstances governed by this proposed Rule; and (2) most other states have a similar rule, and there is no evidence suggesting this has created an adverse effect on client candor.

The OCBA also supports the use of the "knowingly" standard in paragraphs (b) and (e) of the proposed Rule. We do not believe that lawyers would be incentivized by these provisions not to conduct conflict checks because, although discipline under the Rule might be avoided by such an approach, a lawyer's firm or government office could still be subject to disqualification under applicable case law. Applying discipline to a lawyer who accepts a client without knowledge that another lawyer in a firm is prohibited from the representation also could result in harsh consequences for clients.

We agree with the Commission's proposed changes from the Model Rule in paragraphs (b), (b)(1), and (c), and the concept used in paragraph (e), where the Commission has substituted the word "prohibited" in place of the word "disqualified," to clarify that a violation of the Rule results in discipline, but that disqualification is subject to a determination by a tribunal.

As for the Comments, we have several additional concerns. First, the head of the office exception to screening addressed in the *Cobra* case seems too important a concept to be relegated to a Comment. We suggest that the principle should be incorporated into the Rule itself, rather than Comment [9B].

Second, Comment [9C] indicates the Rule does not address whether a "law firm" will be disqualified. While we see that the proposed definition of the term "law firm" will include a government agency, we respectfully suggest that because this Rule necessarily differentiates between a "firm" (as opposed to a "law firm") and a "government agency," the reference to a "law firm" in Comment [9C] easily could be misread or misinterpreted to exclude government agencies, that is, to suggest that the Rule *does* address the disqualification of a government agency. Given that the definition of "law firm" in proposed Rule 1.0.1 includes an office of a government entity, to avoid confusion, it would be appropriate to make this more clear, perhaps by referencing proposed Rule 1.0.1 in Comment [9C]. Alternatively, the Commission could use the undefined terminology from proposed Rule 1.11 itself, that is, "firm" and "government agency," to clarify that the Rule does not address disqualification of a firm or government agency.

Finally, we note that the Commission has chosen not to include the term "firm" in the terminology rule, proposed Rule 1.0.1, and instead opted to define only the term "law firm." The OCBA is concerned that this approach will create confusion and/or arguments concerning the definition of the term "firm" as used in this proposed Rule.



THE STATE BAR OF
CALIFORNIA

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March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

~~**Rule 1.0.1 Terminology/Definitions.**~~

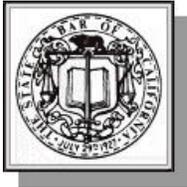
- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

- ~~4. It is confusing to have comments which simply define terms. For example, Comment 2 discusses the term "of counsel;" if this term needs defining, it should be done in the rule, not a comment. Additionally, Comments 1, 3, 4, 5, 11 and 12 are so general as to provide no meaningful assistance.~~
- ~~5. Comments 6 - 10 attempt to provide a very broad description of the factors involved in informed consent and informed written consent; factors involved in determining whether consent has been given; and the issues involved in screening. OCTC agrees with these Comments but suggests that they belong in the rules involving conflicts, not here.~~

Rule 1.11 Special conflicts of interest for Former and Current Government Officers and Employees.

1. Paragraph (a) is incomplete and confusing. Business and Professions Code section 6131 prohibits a former prosecutor from representing or receiving valuable consideration from a defendant he or she formerly prosecuted. Unlike paragraph (a) of proposed rule 1.11, section 6131 does not permit the government agency to waive this conflict. In OCTC's opinion, the rule must be harmonized with section 6131 regarding the waiver issue.

Paragraph (b) prohibits an attorney in a firm from "*knowingly*" undertaking or continuing representation in such a matter unless the conflicted attorney is timely and effectively screened, is apportioned no part of the fee, and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of the rule. OCTC agrees with the Commission minority view that use of the term "*knowingly*" would inappropriately immunize attorneys who do not bother to check for conflicts. The Commission minority suggests using the term "knows or reasonably should know;" this appears to be the correct standard, and OCTC supports the use of this language.
2. OCTC does not object to the concept contained in paragraph (c), but suggests that the Commission might want to tighten the language.
3. Paragraph (d)(2)(ii), prohibiting government officers and employees from negotiating for private employment, might be too broad. For example, read literally, it would appear to prohibit any criminal prosecutor from negotiating with the public defender's office for a job.
4. OCTC notes that paragraph (e) has no comparable provision in the ABA rules. While OCTC understands the intent is to screen the conflicted attorneys, this creates a rule which could negatively impact government agencies' ability to handle matters. Further, there is the issue of when disclosure must occur. This could impact the government's ability to conduct investigations without advising their targets. While the Commission appears to be trying to accommodate this concern by including language that notice to the former client is not required if prohibited by law or a court order, this language is probably inadequate to cover all situations. Overall, this provision is problematic.
5. Paragraph (f) unnecessarily repeats the definition used in proposed rule 1.1(e).
6. As a general observation, there are too many comments and most do not appear to serve any purpose. For example, comments 1- 5, 7- 9, 9C, and 10 explain in general terms the purpose of the rule and screening. They seem unnecessary given the language of the rule itself. Comment 9B has some value, but it provides no real guidance as to when the entire office should be disqualified.



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: MARCH 12, 2010

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 1.0.1 [1-100] | Rule 1.11 [n/a] | Rule 4.1 [n/a] | Rule 6.5 [1-650] |
| Rule 1.4.1 [3-410] | Rule 1.17 [2-300] | Rule 4.4 [n/a] | Rule 7.6 |
| Rule 1.8.4 [n/a] | Rule 1.18 [n/a] | Rule 6.1 [n/a] | Rule 8.2 [1-700] |
| Rule 1.8.9 [n/a] | Rule 3.9 [n/a] | Rule 6.2 [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.

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

FROM: George S. Cardona.
Chief Assistant United States Attorney
Central District of California

RE: Proposed California Rules of Professional Conduct 4.1 and 1.11(e)

DATE: March 12, 2010

As an initial matter, I want to again thank the Commission for all the hard work it has done in arriving at its proposed revisions to the California Rules of Professional Conduct and for its willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors. I write on behalf of my office to provide additional comments on Proposed Rule 4.1, Truthfulness in Statements to Others, which we believe could invite confusion by appearing to authorize private attorneys to authorize or engage in deception in situations beyond those narrow circumstances in which courts have found it permissible, and a subsection of Proposed Rule 1.11, Special Conflicts of Interest for Former and Current Officers and Government Employees, that we believe is contrary to current California law and could negatively affect our ability to maintain the confidentiality necessary to certain investigations.

A. Proposed Rule 1.11(e)

Unlike the ABA Model Rule, which has no equivalent provision, subsection (e) of Proposed Rule 1.11 imputes conflicts of individual government lawyers to their entire “office, agency or department” unless there is: (a) timely and effective screening; and (b) written notice to the former client, unless such notice is “prohibited by law or a court order.” We believe that adoption of this subsection and its accompanying comments, and the resulting variance from the ABA Model Rule, would run contrary to current California and Federal law, improperly limit the ability of our office to maintain the confidentiality necessary to certain investigations, and be difficult to administer in practice. Accordingly, we urge the Commission to adopt the approach taken by ABA Model Rule 1.11 and reject the addition of subsection (e).

As a starting point, we note that, as the result of “special problems raised by imputation within a government agency,” ABA Model Rule 1.11 “does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees.” ABA Model Rule 1.11, comment 2. As a result, ABA Model Rule 1.11 contains no counterpart to proposed subsection (e), and instead merely notes in its comments that “ordinarily it will be prudent to screen such lawyers.” ABA Model Rule 1.11, comment 2.

California and Federal cases recognize that imputation of conflicts within government offices pose the same “special problems” noted by the ABA. See, e.g., In re Charlissee C., 45 Cal. 4th 145, 162-65 (2008) (discussing cases that have “cited several considerations in declining to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices”); United States v. Bolden, 353 F.3d 870, 878 (10th Cir. 2003) (“disqualification of

Government counsel is a drastic measure and a court should hesitate to impose it except where necessary”); United States v. Caggiano, 660 F.2d 184, 190-91 (6th Cir. 1981) (“disqualification of an entire government department, because of a conflict of interest of a government attorney arising from his former employment, would not be appropriate”) (discussing ABA Formal Op. 342 (1975)). Nevertheless, as proposed by the Commission, subsection (e) diverges from the ABA Model rule by imputing conflicts within a “government office, agency or department.” As drafted, proposed subsection (e) applies to all government offices, and does not differentiate between government offices engaged in criminal prosecution and other government offices. Moreover, proposed subsection (e) has no limitation on the scope of the imputation within a government “office, agency or department,” thus potentially imputing conflicts on the part of a single attorney in a single United States Attorney’s Office to the entire Department of Justice, and prohibits the government office from relying on screening to avoid the conflict where the government office is unable to notify the former client “in writing of the circumstances that warranted implementation of the screening procedures” and “the actions taken to comply with those requirements” unless such notice is “prohibited by law or a court order.” See Proposed Subsection (e)(1), (2). In addition, the comments to proposed subsection (e) suggest that screening may not be available, and the government office “may be disqualified from the representation” if the “personally prohibited lawyer” is either the “head of the office, agency or department” or a “lawyer with direct supervisory authority over any of the lawyers participating in the matter,” citing to California cases as support. See Proposed Comment 9(b).

For the following reasons, we do not believe that proposed subsection (e) and its accompanying comments should be adopted:

1. As applied to prosecuting offices, proposed subsection (e) appears contrary to California law. In City & County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839 (2006), which involved a city attorney’s office engaged in civil litigation, the court relied in part on the decision in Younger v. Superior Court, 77 Cal. App. 3d 892 (1978), in which the Court of Appeal upheld an order disqualifying the entire Los Angeles County District Attorney’s Office from prosecuting a defendant because that defendant had previously been represented by the recently appointed Assistant District Attorney (Johnie Cochran), “notwithstanding the ethical screen erected between Cochran and the prosecution of defendants formerly represented by his law firm.” Cobra Solutions, 38 Cal. 4th at 850. As Cobra Solutions recognized, however, its continued reliance on Younger was appropriate only because the disqualification issue before it did not involve a prosecuting agency:

The disqualification standard that the Court of Appeal applied in Younger no longer controls *criminal* prosecutions because the Legislature in 1980 enacted Penal Code Section 1424 (Stats. 1980, ch. 780, S 1, p. 2373), which provides for the recusal of local prosecuting agencies only when “the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.” (Pen. Code, S 1424, subs. (a)(1) & (b)(1)).

38 Cal. 4th at 850; see also In re Charlyse C., 45 Cal. 4th at 164 n.9 (2008) (noting Cobra Solutions’ observation that “the Legislature, by statute, had ‘superseded’ Younger’s holding”); People v. Conner, 34 Cal. 3d 141, 147 (1983) (after § 1424 conflict permitting disqualification

must be one “of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered”); People v. Jenan, 140 Cal. App. 4th 782, 791 (2006) (Section 1424 “supersedes the case law rule that previously allowed a defendant to recuse the district attorney by showing ‘a conflict of interest which might prejudice him [or her] against the accused and thereby affect, *or appear to affect*, his [or her] ability to impartially perform the discretionary functions of his [or her] office.’”) (emphasis in original) (citation omitted); United States v. Nosal, 2009 WL 482236 (N.D. Cal. Feb. 25, 2009) (holding that even though recently appointed United States Attorney had personal conflict based on prior representation of defendant in current criminal case, in light of Penal Code Section 1424, “even if California law were applied there would be no basis to force the recusal of the prosecutor’s office in this case,” and directing United States Attorney to file declaration under seal detailing screening procedures implemented to ensure his lack of influence over matter); Grand Jury Investigation of Targets, 918 F.Supp. 1374, 1379 (1996) (noting that § 1424 and People v. Conner “overruled” earlier, broader recusal rules). We recognize that discipline and disqualification/recusal are different matters. By essentially returning to the Younger standard for disciplinary purposes, however, proposed subsection (e) would, as applied to prosecuting offices, effectively require those offices and their attorneys, as a means of avoiding discipline, to apply the Younger standard as the basis for recusal, a result that would run directly contrary to the supercession of Younger by the legislature’s enactment of Penal Code Section 1424. It would also run contrary to the policy underlying Penal Code Section 1424, which was “a legislative response to a substantial increase in the number of unnecessary prosecutorial recusals” under the earlier standard. See Jenan, 140 Cal. App. 4th at 791. As a result, if the Commission adopts proposed subsection (e) as drafted, it will, as applied to prosecuting offices, run contrary to California law.

2. Even for government and public offices engaged in activities other than criminal prosecution, California law generally permits screening, and requires judicial consideration of the effectiveness of the screening and a multitude of other factors in assessing whether vicarious disqualification of a government or public office is required based on an individual attorney’s personal conflict, even if that individual attorney is a senior supervisor. In Cobra Solutions itself, the court recognized that it was not deciding “whether ethical screening might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney’s supervision” and continued to note that:

In ruling on such a motion, the trial court should undertake a factual inquiry into the actual duties of the supervisor with respect to those attorneys who will be ethically screened and to the supervisor’s responsibility for setting policies that might bear on the subordinate attorneys’ handling of the litigation. In addition, the trial court should consider whether public awareness of the case, or the conflicted attorney’s role in the litigation, or another circumstance is likely to cast doubt on the integrity of the governmental law office’s continued participation in the matter.

38 Cal. 4th at 850 n.2. In In re Charlissee C., the court cited this portion of Cobra Solutions in concluding that in deciding whether to disqualify a public office, CLC, based on prior representation of a client adverse to its current client, the court “should have determined whether CLC has adequately protected, and will continue to adequately protect, [the former client’s]

confidences through timely, appropriate, and effective screening measures and/or structural safeguards.” 45 Cal. 4th at 165. More generally, the court stated:

[W]e begin by noting that there are court-created limitations to the vicarious disqualification rule, which itself was “judicially created.” As here relevant, California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices. Instead, in this context, courts have looked to whether the public law office has adequately protected, and will continue to adequately protect, the former client’s confidences through timely, appropriate, and effective screening measures and/or structural safeguards.

45 Cal. 4th at 161-162.

Thus, for government and public offices, California law requires courts addressing disqualification motions to consider the adequacy of screening measures, coupled with consideration of other factors, before disqualifying a government or public office based on an individual attorney’s conflict. Federal law is similar. See Bolden, 353 F.3d at 876 (“disqualifying an entire United States Attorney’s office is almost always reversible error regardless of the underlying merits of the case”); United States v. Whitaker, 268 F.3d 186, 194-96 (3d Cir. 2001) (disqualification of entire United States Attorney’s office improper); United States v. Vlahos, 33 F.3d 758, 762-63 (7th Cir. 1994) (error to disqualify entire United States Attorney’s Office; even if individual AUSA had conflict of interest, weight of authority indicates court should have ordered another AUSA To handle case rather than disqualify entire office); United States v. Lorenzo, 995 F.2d 1448, 1453 (9th Cir. 1993) (no basis for disqualification because “even were we to hold that the vicarious disqualification rules apply to a U.S. Attorney’s Office, the appellants have not demonstrated prejudice”).

Nowhere do the California cases adopt (and to the contrary, they appear to reject) a bright line, inflexible rule of the type included in proposed subsection (e) that would require notice to the former client to render screening effective. Indeed, the California cases’ placement of the burden of establishing the effectiveness of screening on the government or public office defending against a disqualification motion appears to be in part based on recognition that the party seeking disqualification will not have had notice or an opportunity to obtain advance access to the relevant information relating to screening. See In re Charlissee C., 35 Cal. 4th at 166. We appreciate the Commission’s apparent recognition, as evidenced by its addition to proposed subsection (e)(2) of a sentence recognizing that such notice need not be given where “prohibited by law or a court order,” that there are instances where other laws (for example, Federal Rule of Criminal Procedure 6(e)’s secrecy limitations prohibiting disclosure of grand jury information, or Proposed Rule 1.6’s prohibitions on the disclosure of confidential client information) may preclude such notice. But this does not address all the situations in which notice may be impossible. For example, the very nature of an ongoing investigation (for example, an investigation using individuals posing as prospective tenants to investigate housing discrimination) may require that the existence of the investigation remain confidential. In such circumstances, notice to the target of the investigation of screening, which would be notice of the investigation’s existence, would render the investigation impossible to complete. There is no law that would prohibit the notice, and it may be impossible to obtain from any court

(particularly if there is no pending proceeding) what would essentially be an advisory opinion that such notice is not required. Under these circumstances, however, proposed subsection (e) would require notice, even though we think it clear the California cases would not, and would instead consider all the circumstances to determine whether the screening implemented by the government office remained, even in the absence of notice, effective. We believe the flexible approach taken by the California cases to be far the better one, and accordingly urge that proposed subsection (e), which requires notice as a prerequisite for effective screening, should not be adopted.

3. The decisions in which California courts have relied on policy considerations to impute and require vicarious disqualification based on personal conflicts of the head of a government or public office have arisen in situations involving relatively localized government or public offices. The policy concerns underlying these decisions simply do not apply to large, complex government offices of the size and scope of the Department of Justice, which has approximately 11,000 lawyers operating through a number of distinct divisions and offices. Yet, proposed subsection (e) has no limitation on the scope of the “office, agency or department” to which it would apply its requirements, posing the possibility of absurd results. For example, it would make no sense to require that the entire United States Department of Justice, including the local United States Attorney’s Office handling the matter, be recused from an ongoing undercover investigation of a relatively small defense procurement fraud in California simply because current Attorney General Eric Holder happened to be involved in that matter before he was appointed to his position. All that should be required is that the Attorney General, who typically is not involved in local investigations in any event, be screened from participating in or supervising the investigation in any way.

What this demonstrates is that issues of this type are far better dealt with, as they have been by both California and Federal courts, on a case by case basis that can take into account the multitude of factors that must be assessed based on particular facts to determine whether screening is timely and effective, factors that include the relative position of the individual with the personal conflict, the mechanics of the screening implemented, and the likelihood that the individual’s position would influence the handling of the case regardless of these screening efforts. Attempting to suggest or define bright lines governing certain of these factors (such as the position of the individually conflicted lawyer, as in proposed comment 9(B)) or requiring written notice (as in proposed subsection (e)) in a disciplinary rule will invariably result in lines that are, for particular cases, either over or under broad, and will deter the development of case law that can more effectively fashion and define standards to be used in assessing when screening will be effective or ineffective in preventing the imputation of personal conflicts to require vicarious disqualification.

4. The policy factors cited by California and Federal courts in their discussion of vicarious disqualification of government and public offices also weigh in favor of leaving imputation of conflicts to the disqualification arena, and not addressing them in a disciplinary rule. In particular, California courts have repeatedly recognized the “heavy” “burdens” imposed by vicarious disqualification of government legal offices. Cobra Solutions, 35 Cal. 4th at 852. Moreover, courts have recognized that the incentives to breach client confidences are less in a public office because “public sector lawyers do not have a financial interest in the matters on

which they work.” In re Charlisse C., 45 Cal. 4th at 163 (quoting City of Santa Barbara v. Superior Court, 122 Cal. App. 4th 17, 24-25 (2004)). It is in light of these dual considerations that screening (without more) has generally been permitted to avoid conflicts within government and public offices:

As the Christian court put it, “in the public sector, in light of the somewhat lessened potential for conflicts of interest and the high public price paid for disqualifying whole offices of government-funded attorneys, use of internal screening procedures or ‘ethical walls’ to avoid conflicts within government offices . . . have been permitted. [Citations.]”

45 Cal. 4th at 163 (quoting People v. Christian, 41 Cal. App. 4th 986, 998 (1996)). In the federal system an additional Constitutional concern weighing against vicarious disqualification of an office as a whole is the separation of powers issue posed by a judicial order that effectively will prevent an executive office from carrying out its statutorily authorized duties. See United States v. Bolden, 353 F.3d 870, 879 (2003) (noting that “disqualifying government attorneys implicates separation of powers issues” and that “every circuit court that has considered the disqualification of an entire United States Attorney’s office has reversed the disqualification”); Cf. United States v. Silva-Rosa, 275 F.3d 18, 22 (1st Cir. 2001) (rejecting disqualification even of individual AUSAs because “appellants are asking this Court to dictate to the executive branch whom it can appoint as its prosecutors. Such a position would expand the power of judicial officials to such a degree as to trigger weighty separation of powers concerns.”).

In addition to the effectiveness of screening, California courts consider other policy-based factors in assessing whether conflicts should be imputed to justify vicarious disqualification, including in particular, the likelihood of whether the overall circumstances concerning the individually conflicted attorney are “likely to cast doubt on the integrity of the governmental law office’s continued participation in the matter.” In re Charlisse C., 45 Cal. 4th at 165 (quoting Cobra Solutions, 38 Cal 4th at 850 n.2). Neither the actual effectiveness of screening nor these other policy-based factors are readily amenable to ex ante evaluation. By forcing government and public office attorneys to run the risk of discipline based on their ex ante evaluation of these factors, however, proposed subsection (e) will likely lead these attorneys to err on the side of disqualification, a result that will cause more disqualifications of government and public offices, and a result thus at odds with the very policy considerations that have led California courts to recognize the general validity of screening as a means of avoiding disqualification of government and public offices. To avoid this unjustified result, and leave in place the policy-based balance already reached by California courts, the Commission should follow the ABA Model Rules and delete subsection (e).

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F-2010-396a US Attorney's Office [1.11]

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**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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 1.11

Dear Mr. Sondheim:

The State Bar of California's 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 1.11 and offers the following comments.

COPRAC generally supports the adoption of the rule (subject to our comments below). COPRAC respectfully disagrees with the two minority positions set forth in the proposal: First, COPRAC supports the use of screening in the limited context set forth in the rule. Second, COPRAC does not agree that adoption of the Model Rule's "knowingly" standard will immunize lawyers who fail to conduct adequate conflicts checks.

Paragraph (b) and Comment [8]: COPRAC respectfully disagrees with the Minority position objecting to the inclusion of the Model Rule's "knowingly" standard in paragraph (b) of this rule. It is our belief that a lawyer should not be subject to discipline for taking on a representation where he or she is not aware of the conflict. Our belief is no less applicable with respect to former government lawyers, especially since it may be likely that the conflict database system for government lawyers is often not as thorough or effective as that used by law firms, perhaps making it difficult for the former government lawyer to properly input all potential conflicts into a firm's conflict system. Similarly, COPRAC respectfully disagrees with the Minority position to Comment [8], in which the Minority objects to the inclusion of the Model Rule's "actual knowledge" standard applying to paragraph (c) of the rule. We believe that the former government lawyer should not be subject to discipline for representing a client who could benefit from such information unless the lawyer in fact has actual knowledge of such information.

Paragraph (e) and Comment [9B]: COPRAC believes that the head of the office exception to screening addressed in the *Cobra* case is too important to be relegated to a comment [see second sentence of Comment [9B]], and that the exception should be included in the rule itself. That said, however, we believe the wording of the second sentence of Comment [9B] (which summarizes the exception) misstates the law, and in that sense is not supported by the cases referenced at the end of the comment. Specifically, we agree that, where the personally prohibited lawyer is the head of the office, agency or department (or a lawyer with comparable managerial authority), it may be appropriate to prohibit other lawyers in such office, agency or department from working on such matter. However, where the personally prohibited lawyer only has supervisory authority over other lawyers, only those lawyers – and **not** the entire office, agency or department – should be prohibited. Also, we note that for consistency the term “disqualified” as used in this sentence should be changed to “prohibited from participating;” and in the second instance in clause (ii), the incomplete reference to “office” should be replaced with the full reference to “office, agency or department.” Accordingly, we recommend that the second sentence of Comment [9B] be deleted and the following sentence be added to paragraph (e) of the rule:

“However, (i) if the lawyer personally prohibited from participation in a matter is a lawyer with direct supervisory authority over other lawyers, then such prohibited lawyer and such other supervised lawyers (but not necessarily the entire office, agency or department) may be prohibited from participating in the matter, and (ii) if the lawyer personally prohibited from participation in a matter is the head of the office, agency or department, or a lawyer with comparable managerial authority, then both such prohibited lawyer and the office, agency or department may be prohibited from participating in the matter.”

Comment [9C]: For consistency and in order to maintain the parallel references in the two sentences of this comment, we recommend inserting “lawyer or” in front of “law firm” in the first sentence of this comment.

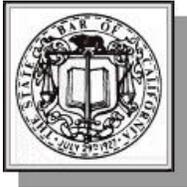
Thank you for your consideration of our comments.

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: MARCH 12, 2010

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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

OFFICE USE ONLY.

* Date

01/26/2010 

Period

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File :

F-2010-378 Esther [multiple].pdf

Commented On:

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Submitted via:

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Proposed Rule 1.11 [N/A]
**“Special Conflicts Of Interest For Former And Current
Government Officers And Employees”**

(Draft #7, 12/14/09)

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

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

Primary Factors Considered

Existing California Law

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

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

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

Other Primary Factor(s)

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. (See Introduction): Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

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

Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.11* Special Conflicts of Interest for Former and Current Government Officers and Employees

December 2009

(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 1.11 is based on Model Rule 1.11 and addresses conflicts arising from a lawyer moving to or from government service. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule's topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403]; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893 [175 Cal.Rptr. 575]; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864]. In consideration of the policy reflected in the case law, the proposed Rule departs from the Model Rule by requiring that a government lawyer's conflict that arises from representation of either a former private or employment by a different government entity be imputed to other lawyers in the governmental organization that employs the lawyer unless the former client consents, or the prohibited lawyer is timely and effectively screened. See Explanation of Changes for paragraph (e) and Comment [9B]. In addition, Paragraph (a)(2) tracks the approach of Model Rule paragraph (a)(2). However, the Commission has changed the Model Rule's standard of "consent, confirmed in writing" to "informed written consent" because the latter provides more client protection.

Minority. A minority of the Commission objects to paragraph(e) to the extent that screening is permitted to rebut the presumption of shared confidences between a former private lawyer now in the employ of the government and other lawyer's in the prohibited lawyer's office or agency. The minority takes the position that paragraph (e) will undermine the ability of lawyers to promote client candor, an attribute that is essential to the effective functioning of the attorney-client relationship. See full Dissent, below.

* Proposed Rule 1.11, Draft #7 (12/14/09).

A second minority of the Commission objects to the recommended adoption of the Model Rule’s “knowingly” standard as applied to imputation in paragraphs (b) and (e). This minority takes the position that it will immunize lawyers who fail to conduct an adequate conflicts check. See Explanation of Changes for paragraph (b).

Variations in Other Jurisdictions. Every jurisdiction has adopted the concept found in Model Rule 1.11, i.e., a loosening of a strict application of conflicts principles in the government lawyer context, and all permit screening of a former government lawyer who moves to private practice. See Selected State Variations, below.

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule[*]</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:</p> <p>(1) is subject to Rule 1.9(c); and</p>	<p>(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:</p> <p>(1) is subject to Rule 1.9(c); and</p>	<p>Paragraphs (a) and subparagraph (a)(1) are identical to Model Rule 1.11(a) and (a)(1).</p>
<p>(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.</p>	<p>(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed <u>written</u> consent, confirmed in writing, to the representation. <u>This paragraph shall not apply to matters governed by Rule 1.12(a).</u></p>	<p>Paragraph (a)(2) tracks the approach of Model Rule paragraph (a)(2). However, the Commission has changed “consent, confirmed in writing” to “informed written consent” because the latter provides more client protection.</p> <p>The last sentence of this paragraph has been added to make clear that matters that come within the scope of proposed Rule 1.12(a) are governed by that rule and not by Rule 1.11. Lawyers should not be confused about which rule applies in a given circumstance.</p>
<p>(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:</p>	<p>(b) When a lawyer is disqualified<u>prohibited</u> from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:</p>	<p>Paragraph (b) is substantially the same as Model Rule 1.11(b). However, the word “disqualified” has been changed to “prohibited.” Whether a lawyer is potentially subject to discipline will be determined by this Rule, but whether a lawyer will be disqualified by representation will be a matter for decision by the tribunal before whom the lawyer appears.</p> <p>Under paragraph (b), a law firm is permitted to use screening in order to avoid imputation of a conflict from one lawyer to the rest of the law firm.</p>

^{*} Proposed Rule 1.11, Draft 7 (12/14/09); Redline/strikeout showing changes to the ABA Model Rule

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

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission’s Proposed Rule⁺</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.</p>	<p>(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified personally prohibited lawyer is timely <u>and effectively</u> screened from any participation in the matter and is apportioned no part of the fee therefrom.</p>	<p>Paragraph (c) largely tracks the wording of Model Rule 1.11(c). However, in the second sentence, the subordinate clauses have been broken up by commas , and the word "that" is used for clarity and for correct parallel construction.</p> <p>In the third sentence, "prohibited" has been substituted for the word "disqualified" because this Rule will be applied in disciplinary matters, while whether a law firm will or will not be disqualified is a matter for decision by the tribunal before which the law firm is appearing.</p> <p>The phrase "and effectively" has been added in order to require that, before a law firm may avoid imputation of a lawyer's conflict to the rest of the firm, the firm's screen must be effective.</p>
<p>(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:</p>	<p>(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:</p>	<p>Paragraph (d) and its subparagraphs are nearly identical to Model Rule 1.11(d).</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission’s Proposed Rule⁺</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(1) is subject to Rules 1.7 and 1.9; and</p>	<p>(1) is subject to Rules 1.7 and 1.9; and</p>	
<p>(2) shall not:</p> <p>(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or</p>	<p>(2) shall not:</p> <p>(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed <u>written</u> consent, confirmed in writing; or</p>	<p>In subparagraph (d)(2)(i), “informed written consent” has been substituted for “consent confirmed in writing” because the phrase “informed written consent,” which is used throughout the proposed Rules, provides greater client protection than the Model Rule formulation.</p>
<p>(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).</p>	<p>(ii) negotiate for private employment with any person who is involved as a party, or as <u>a lawyer for a party, or with a law firm for a party</u>, in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).</p>	<p>The phrase “or with a law firm for a party” has been added to broaden the scope of the prohibition on negotiation to encompass not only negotiating with the particular lawyer who is representing the party, but also that lawyer’s law firm.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission's Proposed Rule⁺</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(e) <u>If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government office, agency or department as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:</u></p>	<p>Paragraph (e) has no counterpart in the Model Rule. The Commission recommends the adoption of paragraph (e) and its subparagraphs because it reflects current California law and policy that fosters the important duties of confidentiality and loyalty to clients. Under the introductory clause to paragraph (e), when a former private lawyer who is now working for the government is personally prohibited from being involved in a law suit, that lawyer's prohibition is imputed to all other lawyers in the same government, office, agency or department. Unlike California, e.g., <i>City of Santa Barbara v. Superior Court</i> (2004) 122 Cal.App.4th 17 [18 Cal.Rptr.3d 403], the Model Rule does not impute a former private lawyer's prohibition to other lawyers in government. The Commission has determined that the policy underlying imputation in these situation is sound, whether the private lawyer moves to another private firm (see Explanation of Changes for proposed Rule 1.10) or moves to the government employment. In either situation, the lawyer's former private clients have a reasonable expectation that the lawyers they have retained will not switch sides and work in the same firm or office as their opponents.</p> <p>Nevertheless, the imputation of the former private lawyer's prohibition to other lawyers in the government office is not irrebuttable. Other lawyers in the office will be permitted to continue the representation so long as the requirements of subparagraphs (1) and (2) are satisfied, i.e., the prohibited lawyer is timely and effectively screened, and appropriate notice is given to the former client to enable the client to monitor the screen and ensure it retains its effectiveness.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Commission’s Proposed Rule⁺</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>(1) <u>the personally prohibited lawyer is timely and effectively screened from any participation in the matter; and</u></p>	<p>See Explanation of Changes for paragraph (a).</p>
	<p>(2) <u>the personally prohibited lawyer’s former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements. However, notice to the former client is not required if prohibited by law or a court order.</u></p>	<p>See Explanation of Changes for paragraph (a).</p> <p>The second sentence has been added to avoid creating a situation where requiring notice might unduly prejudice the public interest, for example, an ongoing criminal investigation. However, because of concerns with due process rights of an accused, the exception to giving notice is available only if there is law prohibiting the notice or a court has ordered that notice not be given. Otherwise, the responsible government lawyers will be in violation of the subparagraph if notice is not given.</p>
<p>(e) As used in this Rule, the term “matter” includes:</p> <p>(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and</p> <p>(2) any other matter covered by the conflict of interest rules of the appropriate government agency.</p>	<p>(ef) As used in this Rule, the term “matter” includes:</p> <p>(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and</p> <p>(2) any other matter covered by the conflict of interest rules of the appropriate government agency.</p>	<p>Proposed paragraph (f) and its subparagraphs are identical to Model Rule 1.1(e) and its subparagraphs. That paragraph has been re-lettered because of the addition of new paragraph (e), which does not have a counterpart in the Model Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.</p>	<p>[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the<u>these</u> Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 <u>and conflicts resulting from duties to former clients as stated in Rule 1.9</u>. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 4.0<u>1.0.1</u>(e) for the definition of “informed <u>written</u> consent.”</p>	<p>Proposed Comment [1] is substantially the same as Model Rule 1.11, cmt. [1]. However, the reference to the Rules of Professional Conduct has been changed to “these Rules” to conform with the drafting convention the Commission is following. The reference to Rule 1.9 has been added because a lawyer who served or who is currently serving as a public officer or employee is subject to both Rule 1.7 and Rule 1.9. “Informed consent” has been changed to “informed written consent” in the last sentence because it affords greater protection to the government agency.</p>
<p>[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.</p>	<p>[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency <u>Similarly</u>, paragraph (d) does not impute<u>provides that</u> the conflicts of a lawyer currently serving as an officer or employee of the government <u>shall be imputed</u> to other associated government officers or employees, although ordinarily it will be prudent to screen such</p>	<p>The first three sentences of proposed Comment [2] are identical with its counterpart in the Model Rule. The fourth sentence has been modified to provide the exact opposite of the Model Rule, which has no counterpart to proposed paragraph (e) and, contrary to California law, does not impute the personal prohibition of a former government lawyer to other lawyers in the same office or agency as the prohibited lawyer.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>lawyers but also provides for screening and notice in certain situations.</p>	
<p>[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.</p>	<p>[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs <u>(a)(2) and (d)(2)</u>.</p>	<p>Comment [3] is nearly identical to Model Rule 1.11, cmt. [3]. The references to specific paragraphs of Rule 1.11 have been added for clarity.</p>
<p>[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional</p>	<p>[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional</p>	<p>Comment [4] is substantially the same as Model Rule 1.11, cmt. [4].</p> <p>The reference to "this Rule" has been changed because this Rule does not dictate how a tribunal may rule on the subject of disqualification and because the rewording makes the next to last sentence active voice instead of passive.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.</p>	<p>functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule<u>this Rule</u> from imposing too severe a deterrent against entering public service. The limitation<u>limitations</u> of disqualification<u>representation</u> in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification<u>imputing conflicts</u> to all substantive issues on which the lawyer worked, serves a similar function.</p>	<p>The last sentence has been revised because this Rule does not dictate whether a lawyer or law firm will be disqualified. Instead, the subject of disqualification will be decided by tribunals on a case by case basis. See also Comment [9C].</p>
	<p>[4A]By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client.</p>	<p>Comment [4A] has no counterpart in the Model Rule. The Commission recommends it addition to clarify the purposes of Rule 1.11(a)(1) and (c). This comment has been copied from proposed New York Rule 1.11, cmt. [4A].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely and effectively screened. Thus, the purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.</p>	

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission’s Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].</p>	<p>[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because <u>Because</u> the conflict of interest is governed by paragraph<u>paragraphs (d) and (e)</u>, the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9]. <u>See also <i>Civil Service Commission v. Superior Court</i> (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].</u></p>	<p>The first sentence of proposed Comment [5] is identical with that in Comment [5] of the Model Rule. The second sentence has been amended to conform to California law.</p> <p>In the last sentence, the citation has been changed to Comment [14] of proposed Rule 1.13 because that is the California counterpart of Comment [9] of Model Rule 1.13.</p> <p>A reference to <i>Civil Service Commission v. Superior Court</i> has been added to direct readers to that important case on the issue of when a government entity is the same or a different client.</p>
<p>[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.</p>	<p align="center"><u>Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)</u></p> <p>[6] Paragraphs (b) and (c) contemplate a screening arrangement <u>for former government lawyers</u>. See Rule 1.0.1<u>1.0.1</u>(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.</p>	<p>Comment [6] is nearly identical to Model Rule 1.11, cmt. [6]. The phrase, “for former government lawyers” has been added to distinguish the screening arrangement permitted by these provisions from the screening arrangement provided in paragraph (e) that may be utilized by former private lawyers who are now in government service.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.</p>	<p>[7] Notice <u>to the appropriate government agency</u>, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.</p>	<p>Comment [7] is nearly identical to Model Rule 1.11, cmt. [7]. The phrase "to the appropriate government agency" is added in order to clarify the appropriate recipient of the notice.</p>
<p>[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.</p>	<p>[8] Paragraph (c) operates only when the lawyer in question has <u>actual</u> knowledge of the information; which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.</p>	<p>Comment [7] is based on Model Rule 1.11, cmt. [8]. It has been reworded for brevity. New York made the same change.</p> <p><i>Minority.</i> A minority of the Commission disagrees with the substance of this comment because both this comment and the Model Rule permit easy evasion of the client protections of Rule 1.11 by a lawyer who does not, for example, run a conflicts of interest check and thereby evades actual knowledge of the conflict.</p>
<p>[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.</p>	<p>[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.</p>	<p>Comment [9] is identical to Model Rule 1.11, cmt. [9].</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially.</u></p> <p><u>[9A] A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).</u></p>	<p>Comment [9A] has no counterpart in the Model Rule. The Commission recommends its addition to make clear precisely what consents a former government lawyer must obtain to <i>personally</i> participate in a matter. Although subparagraph (d)(2)(ii) appears on its face to require only the consent of the government agency, the consent of the private lawyer's former client is also required because (d)(1) makes that lawyer subject to Rule 1.9, under which a former client's consent is required for an otherwise prohibited lawyer's personal participation in a matter. The Commission is concerned that without this clarifying comment, the requirement of the former client's consent will not be apparent.</p>
	<p><u>Screening of Current Government Lawyers Pursuant to Paragraph (e)</u></p> <p><u>[9B] Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely and effectively screened and notice is given promptly to the former client to enable it to ensure the government's compliance with the screen. However, if the personally prohibited lawyer is (i) the head of the office, agency or department, or a lawyer</u></p>	<p>Comment [9B] has no counterpart in the Model Rule, in part because the Model Rule does not have paragraph (e). More important, however, this Comment calls the reader's attention to important California decisional law, including <i>Cobra Solutions</i> and <i>Younger</i>, that reject screening when the personally-prohibited lawyer is the head of the office or has direct supervisory responsibility over the lawyers actually handling the matter. The Commission determined that rather than codify these cases in the Rule itself and subject lawyers to discipline in an area of the law that is still developing, these cases should be referenced in a</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center">Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>with comparable managerial authority, or (ii) a lawyer with direct supervisory authority over any of the lawyers participating in the matter, then both the personally prohibited lawyer and the office may be disqualified from the representation. See <i>City & County of San Francisco v. Cobra Solutions, Inc.</i>, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); <i>Younger v. Superior Court</i> (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34].</p>	<p>comment as guidance.</p>
	<p><u>This Rule Not Determinative of Disqualification</u></p> <p>[9C] This Rule does not address whether a law firm will be disqualified from a representation. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal.</p>	<p>Comment [9C] has no counterpart in the Model Rule. It has been added in order to clarify that, although this Rule affects discipline, whether a lawyer or law firm will or will not be disqualified is a matter to be determined by the appropriate tribunal and is not necessarily dictated by this Rule.</p>
<p>[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.</p>	<p><u>Matter</u></p> <p>[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.</p>	<p>Comment [10] is substantively identical to Model Rule 1.11, cmt. [10].</p>

Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

Minority Dissent

A minority of the Commission dissents to the inclusion of screening in Rule 1.11(e), which allows screening, without a former client's consent, when a lawyer, possessing a former client's confidential information, becomes employed by a government agency. For example, a lawyer representing a client with respect to matters that are the subject of a governmental investigation, may, while the investigation is ongoing, become employed by that agency. Under Rule 1.11(e) the agency could continue to pursue the investigation as long as the lawyer is screened. In the meantime, the now former client must live in fear that he or she has revealed information to the lawyer now working for the government that could further the investigation against the former client. The now former client cannot object to the screen and has no way to verify that the screen is actually working. The legal profession cannot expect promote client candor when such situations are allowed to occur.

The duty of confidentiality expressed in Business & Professions Code section 6068(e)(1) and Rule 3-100 prohibits a lawyer from using or disclosing any information that a client wants the lawyer to hold inviolate or the disclosure of likely would be embarrassing or detrimental to the client. This duty exists to assure that anyone can discuss with a lawyer how the law applies to his or her most intimate problem without fear of

consequence. This duty also exists because effective representation depends on open communication between lawyer and client. (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235 (1951) ["Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading."] .) California law presumes that confidential information possessed by one lawyer in a law firm is shared by all other lawyers in the firm. This presumption exists because the client has no means to assure that information in the possession of a firm representing the client's adversary will not be shared and used or disclosed against the client's interests. As the Court of Appeal stated in *Adams v. Aerojet General* (2001) 86 Cal.App.4th 1324 in adopting Cal. State Bar Formal Opn. 1998-152:

The vicarious disqualification rule has been established as a prophylactic device to protect the sanctity of former client confidences where a law firm with a member attorney who has acquired knowledge of confidential information material to the current controversy would otherwise be permitted to represent the former client's adversary. **"No amount of assurances or**

screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage. . . . No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent." (*Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], fn. omitted.) As the State Bar Committee observes: "the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, in a legal system that would permit such a situation to exist without the former client's consent." (Formal Opn. No. 1998-152, *supra*, at p. IIA-418.) (Emphasis added.)

Screening without client consent does not protect clients because it cannot be verified by a client. A client who has not expressed confidence in a screen by consenting to it should not be forced to accept screening by fiat. A client who has shared confidential information with a lawyer, justifiably would feel a sense of betrayal to learn after the representation has ended that information the client expected would be held in confidence is in the possession of a law firm representing the former client's

adversary in a situation where that information could benefit that adversary.

These considerations apply with equal force when a lawyer armed with a former client's confidential information becomes employed by a government agency that is adverse to the former client. The Bar cannot fulfill the purpose of the duty of confidentiality, and it cannot expect clients to trust that they can communicate with lawyers in confidence, when a government agency can harbor that confidential information behind an unconsented and unverifiable screen while the agency pursues a course of action against the former client in a situation where the information would advance the agency's position.

Commission members have not objected to screening in Rule 1.11(b), which applies to lawyers moving from public agencies to private practice or between public agencies. Screening in this context facilitates government service without jeopardizing the interests of private clients. Furthermore, the governmental legal community has participated actively in the Commission's deliberations and has not raised any concerns or objections to screening in this limited context. However, there are very different considerations when the former client is a member of the public. In such situations, screening is not appropriate and undermines public trust in the ability to communicate with a lawyer in confidence.

Rule 1.11: Special Conflicts Of Interest For Former And Current Government Officers And Employees
(Commission's Proposed Rule – Clean Version)

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

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

- (e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government office, agency or department as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:
- (1) the personally prohibited lawyer is timely and effectively screened from any participation in the matter; and
 - (2) the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements. However, notice to the former client is not required if prohibited by law or a court order.
- (f) As used in this Rule, the term "matter" includes:
- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

- [1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to these Rules, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0.1(e) for the definition of "informed written consent."
- [2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Similarly, paragraph (e) provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, but also provides for screening and notice in certain situations.
- [3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so

by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by paragraphs (a)(2) and (d)(2).

- [4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent this Rule from imposing too severe a deterrent against entering public service. The limitations of representation in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than imputing conflicts to all substantive issues on which the lawyer worked, serves a similar function.

- [4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or continue representation in the matter only if the lawyer who possesses the confidential government information is timely and effectively screened. Thus, the purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.

- [5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because the conflict of interest is

governed by paragraphs (d) and (e), the latter agency is required to screen the lawyer. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [14]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].

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

- [6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule 1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.
- [7] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.
- [8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.
- [9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

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

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

Screening of Current Government Lawyers Pursuant to Paragraph (e)

- [9B] Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely and effectively screened and notice is given promptly to the former client to enable it to ensure the government's compliance with the screen. However, if the personally prohibited lawyer is (i) the head of the office, agency or department, or a lawyer with comparable managerial authority, or (ii) a lawyer with direct supervisory authority over any of the lawyers participating in the matter, then both the personally prohibited lawyer and the office may be disqualified from the representation. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34].

This Rule Not Determinative of Disqualification

[9C] This Rule does not address whether a law firm will be disqualified from a representation. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal.

Matter

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

Rule 1.11: Special Conflicts for Government Employees

STATE VARIATIONS

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

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

California has no provision comparable to ABA Model Rule 1.11.

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

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

Georgia has adopted a Rule 9.5 that provides as follows:

Rule 9.5 Lawyer as a Public Official

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

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

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

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

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

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

Missouri: Rule 1.11(e) provides as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**RRC – Rule 1.11 [3-310]
E-mails, etc. – Revised (3/24/2010)**

September 26, 2009 KEM E-mail to Sapiro, cc Drafters, Kramer, Lamport, Difuntorum & McCurdy:..... 54

September 26, 2009 Sapiro E-mail to KEM, cc Drafters, Kramer, Lamport, Difuntorum & McCurdy:..... 55

October 7, 2009 KEM E-mail to Drafters, cc Lamport, Chair, Paul Kramer (BOG) and Staff:..... 56

October 27, 2009 Kehr E-mail to KEM, cc Drafters: 57

October 27, 2009 KEM E-mail to Kehr, cc Drafters: 57

October 27, 2009 KEM E-mail to Drafters, cc Chair, Staff & Paul Kramer (BOG):..... 57

October 27, 2009 Sapiro E-mail to Drafters, cc Kramer: 58

October 27, 2009 Lamport E-mail to KEM, cc Drafters, Chair, Staff & Kramer: 58

October 27, 2009 KEM E-mail to Sapiro, cc Drafters, Chair, Staff & Kramer:..... 58

October 27, 2009 KEM E-mail to Lamport, cc Drafters, Chair, Staff & Kramer: 59

October 27, 2009 Sapiro E-mail to KEM, cc Drafters, Chair, Staff & Kramer:..... 59

October 27, 2009 Kehr E-mail to Sapiro, cc Drafters, Chair, Staff & Kramer: 59

October 28, 2009 Lamport E-mail to Drafters, cc Chair, Staff & Kramer:..... 60

October 28, 2009 KEM E-mail to Drafters, cc Chair, Staff & Kramer: 61

November 3, 2009 Sondheim E-mail to RRC: 62

November 14, 2009 KEM E-mail to Drafters (Sapiro, Kehr, Melchior), cc Chair, Lamport & Staff: 63

November 16, 2009 Lamport E-mail to KEM, cc Kehr, Melchior, Chair & Staff:..... 63

November 21, 2009 Sapiro E-mail to Drafters, cc Lamport & Paul Kramer: 64

November 21, 2009 Sapiro E-mail to Drafters, cc Lamport & Paul Kramer re Comment [9A]: 70

November 22, 2009 Kehr E-mail to Drafters, cc Lamport & Kramer:..... 70

November 23, 2009 Sapiro E-mail to Drafters, cc Lamport & Kramer:..... 71

November 23, 2009 KEM E-mail to Sapiro, cc Drafters, Lamport & Kramer re Comment [9A]: 72

November 24, 2009 KEM E-mail to Marlaud, cc Drafters, Chair, Lamport, Staff & Kramer (forwarded to RRC on 11/24/09 by Marlaud): 72

November 24, 2009 KEM E-mail to George Cardona, cc Drafters, Chair & Staff: 73

November 24, 2009 Cardona E-mail to KEM:..... 74

November 24, 2009 KEM E-mail to Cardona:..... 74

November 25, 2009 McCurdy E-mail to KEM, cc Difuntorum & Marlaud: 74

November 25, 2009 KEM E-mail to McCurdy, cc Difuntorum & Marlaud: 74

December 1, 2009 KEM E-mail to Drafters, cc Chair & Staff: 74

December 4, 2009 Cardona E-mail to Difuntorum & KEM (forwarded to RRC on 12/7/09):..... 74

December 8, 2009 Sondheim E-mail to RRC: 79

December 10, 2009 Difuntorum E-mail to RRC:..... 79

December 15, 2009 KEM E-mail to Difuntorum, McCurdy, Lee, Yen & Andrew Tuft:..... 80

December 15, 2009 Andrew Tuft E-mail to KEM, cc Difuntorum, McCurdy, Lee & Yen: 80

March 10, 2010 McCurdy E-mail to Drafters (Sapiro, Kehr, Melchior, Mohr), cc Chair, Vice-Chairs & Staff: 81

March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff: 82

March 14, 2010 Sapiro E-mail to Drafters:..... 82

March 17, 2010 Kehr E-mail to Sapiro, cc Drafters: 83

March 15, 2010 Kehr E-mail to Sapiro, cc Drafters: 86

March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:..... 86

March 17, 2010 KEM E-mail to Drafters, cc Sondheim & Difuntorum: 86

March 17, 2010 Sapiro E-mail to KEM, cc Drafters, Sondheim & Difuntorum:..... 91

March 17, 2010 Kehr E-mail to Sapiro, cc Drafters, Sondheim & Difuntorum:..... 91

**RRC – Rule 1.11 [3-310]
E-mails, etc. – Revised (3/24/2010)**

March 18, 2010 Sapiro E-mail to KEM, cc Drafters, Chair & Staff:.....	92
March 18, 2010 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Staff:	92
March 19, 2010 Lamport E-mail to RRC:.....	93
March 19, 2010 Lamport E-mail to RRC re 1.10, 1.11 & Other Screening Rules:	94
March 19, 2010 KEM E-mail to Lamport, cc RRC:	94
March 19, 2010 Lamport E-mail to KEM, cc RRC:	95
March 21, 2010 KEM E-mail to RRC:	96
March 22, 2010 Tuft E-mail to RRC List:	96
March 23, 2010 Sapiro E-mail to Drafters:.....	97
March 23, 2010 Kehr E-mail to Sapiro, cc Drafters:	98
March 23, 2010 KEM E-mail to Sapiro, cc Drafters:	98
March 23, 2010 Kehr E-mail to Sapiro, cc Drafters:	98
March 23, 2010 KEM E-mail to Kehr, cc Drafters:	98
March 24, 2010 Melchior E-mail to RRC:	99
March 24, 2010 KEM E-mail to Sapiro:.....	99
March 24, 2010 Sapiro E-mail to RRC List:.....	99

March 10, 2010 McCurdy E-mail to Drafters (Sapiro, Kehr, Melchior, Mohr), cc Chair, Vice-Chairs & Staff:

Rule 1.11 Drafting Team (SAPIRO, Kehr, Melchior, Mohr):

This message provides the assignment background materials for Rule 1.11 on the March agenda. **The assignment deadline is Thursday, March 18, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received to date – public comment period ends March 12th)
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 (public comment version)
4. introduction (public comment version – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (public comment version)
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 [1-11] - Dashboard - ADOPT - DFT4 (03-10-10).doc
RRC - 3-310 [1-11] - Compare - Introduction - DFT2 (12-14-09)RD-KEM-ML.doc
RRC - 3-310 [1-11] - Compare - Rule & Comment Explanation - DFT4 (12-14-09)KEM-ML.doc
RRC - 3-310 [1-11] - Rule - DFT7 (12-14-10) - CLEAN-LAND.doc
RRC - 3-310 [1-11] -Minority Dissent-2COL-ML.doc
RRC - 3-410 [1-11] - Public Comment Chart - By Commenter - DFT1 (03-10-10)AT.doc
RRC - 3-310 [1-11] - Public Comment Complete - REV (03-10-10).pdf
RRC - 3-210 [1-11] - State Variations (2009).pdf

March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

To assist you in preparing the materials for the 3/26-27/10 meeting, I've attached the following for this Rule:

1. My cumulative meeting notes, revised 2/12/10.
2. Full E-mail compilation, revised 1/19/10.

Please let me know if you have any questions.

March 14, 2010 Sapiro E-mail to Drafters:

Although I know Kurt is on vacation, I send a copy of this email to him so that, if he wants to comment on the following, he may do so.

I attach my revision of the Public Comment Chart and the proposed rule, redlined to show changes I recommend.

1. In paragraph (a)(2) of the black letter rule, the end of the sentence states “consent, to the representation.” I would delete the comma after the word “consent.” Do you agree?
2. If my recollection is correct, Bob and I were either all or part of the minority that disagreed with limiting paragraph (b) and (c) to actual knowledge. The San Diego County Bar Association agrees with us. Accordingly, I have recommended a language change in the RRC Response column of the Public Comment Chart and the draft rule. I also recommend a counterpart of that change in paragraph (e). Please let me know whether you agree or disagree. If you agree, I will make that recommendation to the full commission.
3. In paragraph (c) I recommend inserting a comma in the next to last sentence after the word “public.”
4. In paragraph (d)(2)(i), I think that a concept should be added. If a lawyer changes jobs, for example from a city attorney office to the office of the Attorney General, this rule should apply. However, the way it is now worded, this rule only applies if the lawyer moves from private practice or non-government employment to government employment. I recommend that we add, after the phrase “non-governmental employment” the phrase “. . . , or while employed by another governmental organization. . . .” Please let me know whether you agree or disagree.
5. On reading the rule this time, I think proposed Comment [9] is under the wrong heading. Comment [9] has nothing to do with paragraphs (b) and (c). I would therefore move it so it follows Comment [5]. Do you agree?
6. For the reasons stated two paragraphs above, I would insert in proposed Comment [9A], third line, after the word “employment” the phrase “. . . , or while working for another governmental organization” Do you agree?
7. Although I disagree with the Orange County Bar Association’s analysis of Comment [9C], its concerns caused me to revisit the first sentence of proposed Comment [9B]. I would

replace the word “agency” in the first line of the first sentence with the “office, agency or department” In the third line of the first sentence, I would delete the phrase “the agency” and substitute for it the word “it” in order to avoid having to repeat the longer phrase. Do you agree?

8. The last sentence in proposed Comment [9B] uses the phrase “may be disqualified.” Should we be using that phrase in light of our attempts not to address disqualification in this rule? We could substitute for it a phrase such as “may not participate in the matter.” Do you agree?
9. Although I disagree with the Orange County Bar Association’s concerns about Comment [9C], if there is a perception that it might be misinterpreted, I suggest that we clarify that comment. Accordingly, I recommend that we substitute for the phrase “law firm” in the first sentence of the comment the phrase “. . . lawyer, law firm, or government office, agency, or department” In order to avoid repeating that phrase in the second sentence, I suggest that we delete the phrase “a lawyer or law firm” and substitute for it the phrase “. . . any of them” Again, do you agree?
10. In the draft spreadsheet about the public comments, I raise the issue that two bar associations have raised, namely whether by not including the Younger and Cobra Solutions problem in the black letter rule we are implicitly overruling them. I have not addressed that issue in the attached redraft of the rule because I was outvoted on that issue by the Commission. I raised the issue in the spreadsheet but do not suggest a change in the draft of the rule that is attached to this email because I suspect I will still be a minority of one. What are your recommendations?
11. You will see that, in the public comment chart, several places I suggest changes as my recommendations. If my recommendations turn out to be acceptable to you, I will reword my description of them accordingly.
12. I have not redone the Introduction or the dashboard pending your input.

Attached:

RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - DFT2 (03-14-10)JS.doc
RRC - 3-310 1-11 - Rule - DFT8 (03-14-10) - Cf. to DFT7.doc

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

I have interlineated my responses to your email. I don't have time this evening to finish looking at the commenter chart but hope to before the deadline.

1. In paragraph (a)(2) of the black letter rule, the end of the sentence states “consent, to the representation.” I would delete the comma after the word “consent.” Do you agree?

Yes, the comma seems to have been a random error.

2. If my recollection is correct, Bob and I were either all or part of the minority that disagreed with limiting paragraph (b) and (c) to actual knowledge. The San Diego County Bar Association agrees with us. Accordingly, I have recommended a language change in the RRC Response column of the Public Comment Chart and the draft rule. I

also recommend a counterpart of that change in paragraph (e). Please let me know whether you agree or disagree. If you agree, I will make that recommendation to the full commission.

I don't remember the vote, but I do think that the addition of "reasonably should know" would improve the Rule. I think the statement of the S.D. comment on this would make more sense if you were to begin it by saying that the S.D. Bar Assn. agrees with the reasoning of the Commission minority that paragraphs (b) and (c) should be modified, etc. I think that is what the S.D. letter says, and including this in the chart makes the S.D. comment reasoned. Also, I would re-order the chart so that the comments are in rule paragraph order.

3. In paragraph (c) I recommend inserting a comma in the next to last sentence after the word "public."

OK.

4. In paragraph (d)(2)(i), I think that a concept should be added. If a lawyer changes jobs, for example from a city attorney office to the office of the Attorney General, this rule should apply. However, the way it is now worded, this rule only applies if the lawyer moves from private practice or non-government employment to government employment. I recommend that we add, after the phrase "non-governmental employment" the phrase ". . . , or while employed by another governmental organization. . . ." Please let me know whether you agree or disagree.

Paragraph (a) seems to me to include government to government whenever there is a new client, such as by moving from the office of a city atty to the state a.g. See the first sentence of Comment [1]. Its reference to current governmental lawyer I think would make no sense except in your city atty to a.g. example.

5. On reading the rule this time, I think proposed Comment [9] is under the wrong heading. Comment [9] has nothing to do with paragraphs (b) and (c). I would therefore move it so it follows Comment [5]. Do you agree?

I don't follow. There is no Comment [9].

6. For the reasons stated two paragraphs above, I would insert in proposed Comment [9A], third line, after the word "employment" the phrase ". . . , or while working for another governmental organization" Do you agree?

This works for me, but if the change were made the (i) reference to government agency would become ambiguous. I suggest: "only if (i) the former governmental employer gives"

7. Although I disagree with the Orange County Bar Association's analysis of Comment [9C], its concerns caused me to revisit the first sentence of proposed Comment [9B]. I would replace the word "agency" in the first line of the first sentence with the "office, agency or department" In the third line of the first sentence, I would delete the phrase "the agency" and substitute for it the word "it" in order to avoid having to repeat the longer phrase. Do you agree?

I don't understand the O.C. comment on [9C]. The Rule does not address the disqualification of law firms, governmental or other. Also, it is not possible for a government entity to be disqualified unless it is a law firm. The Rule addresses the duties of the individual lawyer. The duties of other lawyers in a law firm are covered by imputation concepts of civil law, at least now that the Board has killed Rule 1.10. The Rule 1.0.1 definition of law firm refers to "government entity". While I agree with the spirit of your change, I would say: "... or while employed by another government entity" I would make the same change at the beginning of [9B]

8. The last sentence in proposed Comment [9B] uses the phrase "may be disqualified." Should we be using that phrase in light of our attempts not to address disqualification in this rule? We could substitute for it a phrase such as "may not participate in the matter." Do you agree?

Your suggestion seems to me to be an improvement.

9. Although I disagree with the Orange County Bar Association's concerns about Comment [9C], if there is a perception that it might be misinterpreted, I suggest that we clarify that comment. Accordingly, I recommend that we substitute for the phrase "law firm" in the first sentence of the comment the phrase ". . . lawyer, law firm, or government office, agency, or department . . ." In order to avoid repeating that phrase in the second sentence, I suggest that we delete the phrase "a lawyer or law firm" and substitute for it the phrase ". . . any of them . . ." Again, do you agree?

I don't agree with this one. The term "law firm" is defined in Rule 1.0.1 to include a "government entity", and I don't think we should stray in the use of our terminology. I would make no change in [9C].

10. In the draft spreadsheet about the public comments, I raise the issue that two bar associations have raised, namely whether by not including the *Younger* and *Cobra Solutions* problem in the black letter rule we are implicitly overruling them. I have not addressed that issue in the attached redraft of the rule because I was outvoted on that issue by the Commission. I raised the issue in the spreadsheet but do not suggest a change in the draft of the rule that is attached to this email because I suspect I will still be a minority of one. What are your recommendations?

I do not agree that we are overruling *Younger* and *Cobra Solutions*. They are disqualification cases that do not speak of possible discipline. I would make no change on this point.

11. You will see that, in the public comment chart, several places I suggest changes as my recommendations. If my recommendations turn out to be acceptable to you, I will reword my description of them accordingly.
12. I have not redone the Introduction or the dashboard pending your input.

March 15, 2010 Kehr E-mail to Sapiro, cc Drafters:

I have a few minutes before having to run to court and will try to add a few thoughts about the commenter chart ---

1. The reply to the S.D. comment on paragraph (e)(2) refers to when a lawyer moves from nongovernmental to governmental employment. I think you should add: "... or when a lawyer moves from one governmental employment to another"
2. As I think I said in my message late yesterday, I think that S.D. and O.C. have misread the Rule by failing to distinguish between disciplinary and civil consequences. Given my druthers, I would explain that the cited cases do not deal with the disciplinary side and the proposed Rule does not deal with the civil side.
3. Looking back at the Rule, I think there is a drafting error in the first portion of paragraph (e). The phrase "government office, agency or department" should be "governmental law firm". The use of "appropriate government agency" in (a) and (d)(2)(i) is correct b/c the references are to the client rather than the law firm.

March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

This message provides an updated public comment compilation adding comments received since the materials I transmitted with the message below. In addition, I've attached an updated commenter chart. Please note that not all of the comments received over the past several days have been synopsisized and added to this chart. Please go ahead and add any missing comment synopses and responses yourself in the extra row at the bottom of the table. If you run out of rows, simply press the TAB key in the last cell of the last row and a new row will appear.

Since the last transmission, comments from the following commenters were received:

OCTC
US Attorney's Office
COPRAC

Any additional comments received will be sent to you as soon as they are received.

Attached:

RRC - 3-310 [1-11] - Public Comment Complete - REV (03-15-10).pdf
RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - DFT1.1 (03-15-10)AT.doc

March 17, 2010 KEM E-mail to Drafters, cc Sondheim & Difuntorum:

Greetings:

I've interlineated my responses to Jerry's inquiries in italics, below. Bob's comments are in bold. I've taken the liberty of numbering Jerry's comments.

I've copied Harry and Randy for their input on a possible issue I've raised below in item #2 ("Separate Issue").

I've attached a draft 2.1 of the public comment chart. What I've done is the following:

- a. Added to the chart Jerry circulated last week the new comments received from COPRAC, OCTC and George Cardona. Note that I've simply pasted staff's summary of COPRAC and OCTC comments, but have inserted George's comments nearly verbatim (they are very lengthy but I wanted to make it easier to draft responses without having to go back and forth between the PDF Lauren circulated on Monday and the Chart).
- b. Re-sorted the comments alphabetically.
- c. I have not attempted to draft responses until we resolve the issues I've raised below.

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

Kevin

P.S. Jerry: If you've already replied to the comments submitted by OCTC and COPRAC, please send me your draft of the chart and I'll update the attached.

1. In paragraph (a)(2) of the black letter rule, the end of the sentence states "consent, to the representation." I would delete the comma after the word "consent." Do you agree?

Yes, the comma seems to have been a random error.

KEM: Fine.

2. If my recollection is correct, Bob and I were either all or part of the minority that disagreed with limiting paragraph (b) and (c) to actual knowledge. The San Diego County Bar Association agrees with us. Accordingly, I have recommended a language change in the RRC Response column of the Public Comment Chart and the draft rule. I also recommend a counterpart of that change in paragraph (e). Please let me know whether you agree or disagree. If you agree, I will make that recommendation to the full commission.

I don't remember the vote, but I do think that the addition of "reasonably should know" would improve the Rule. I think the statement of the S.D. comment on this would make more sense if you were to begin it by saying that the S.D. Bar Assn. agrees with the reasoning of the Commission minority that paragraphs (b) and (c) should be modified, etc. I think that is what the S.D. letter says, and including this in the chart makes the S.D. comment reasoned. Also, I would re-order the chart so that the comments are in rule paragraph order.

KEM: I disagree with changing the "knowingly" standard. Although S.D. might have urged the know or should know standard (as did OCTC), both COPRAC and OCBA favor knowingly, the former taking pains to expressly disagree w/ the minority's position. I don't see the public

comment as a justification for changing the standard in the draft rule, but there is nothing wrong with the minority making a motion at the meeting to change the standard. However, just as the majority of 1.10 drafters had to bring a motion to include the limiting screening provision in that Rule (where the Commission had been equally divided), the 1.11 drafters should have to bring a motion to change the standard.

By the way, the vote to use "knowingly" was 9-3-2. See 7/24-25/09 KEM Meeting Notes, III.C., at para. 5A. The term was also impliedly approved when the Commission approved paragraph (e).

SEPARATE ISSUE: *I am uncomfortable with recording in the Public Comment Chart a telephone conversation that is not part of the official public comment (I am referring to the reference to the telephone conversation w/ Mr. Hedlin that appears in the "Comment" column of Chart for SDCBA. I'm assuming those notes are intended to internally provide the Commission members with this information. However, I don't believe it belongs in the final draft of the chart that will be submitted to BOG and the S.Ct. For now, I would move Mr. Hedlin's telephone conversation to the last column to facilitate any last minute revisions staff might have to make to prepare the chart for submission to BOG. I've copied Harry and Randy with this e-mail for their input on this issue (if it is an issue).*

3. In paragraph (c) I recommend inserting a comma in the next to last sentence after the word "public."

OK.

KEM: Fine.

4. In paragraph (d)(2)(i), I think that a concept should be added. If a lawyer changes jobs, for example from a city attorney office to the office of the Attorney General, this rule should apply. However, the way it is now worded, this rule only applies if the lawyer moves from private practice or non-government employment to government employment. I recommend that we add, after the phrase "non-governmental employment" the phrase ". . . , or while employed by another governmental organization. . . ." Please let me know whether you agree or disagree.

Paragraph (a) seems to me to include government to government whenever there is a new client, such as by moving from the office of a city atty to the state a.g. See the first sentence of Comment [1]. Its reference to current governmental lawyer I think would make no sense except in your city atty to a.g. example.

KEM: I don't see any need for a change. There is nothing in paragraph (a) that limits its application to a lawyer who moves from government into private employment. The first sentence of Comment [2] clarifies that the paragraph applies to government-government, as well as government-private movement.

5. On reading the rule this time, I think proposed Comment [9] is under the wrong heading. Comment [9] has nothing to do with paragraphs (b) and (c). I would therefore move it so it follows Comment [5]. Do you agree?

I don't follow. There is no Comment [9].

KEM: I'm fine with moving Comment [9] in the public comment draft to after Comment [5] and renumbering it Comment [5B].

6. For the reasons stated two paragraphs above, I would insert in proposed Comment [9A], third line, after the word “employment” the phrase “. . . , or while working for another governmental organization” Do you agree?

This works for me, but if the change were made the (i) reference to government agency would become ambiguous. I suggest: "only if (i) the former governmental employer gives"

KEM: I disagree with this proposed change. As I noted earlier, see #4, paragraph (a) would apply to the former government lawyer, whether the lawyer has moved to private employment or a different government agency. For the same reason, I also disagree with the corresponding change Jerry has made to (d)(i). We've been down this road before. Paragraph (d)(i) and Comment [9A] by their terms are limited to "private practice or non-governmental employment." I believe the revisions that have been made should be stricken.

7. Although I disagree with the Orange County Bar Association's analysis of Comment [9C], its concerns caused me to revisit the first sentence of proposed Comment [9B]. I would replace the word “agency” in the first line of the first sentence with the “office, agency or department” In the third line of the first sentence, I would delete the phrase “the agency” and substitute for it the word “it” in order to avoid having to repeat the longer phrase. Do you agree?

I don't understand the O.C. comment on [9C]. The Rule does not address the disqualification of law firms, governmental or other. Also, it is not possible for a government entity to be disqualified unless it is a law firm. The Rule addresses the duties of the individual lawyer. The duties of other lawyers in a law firm are covered by imputation concepts of civil law, at least now that the Board has killed Rule 1.10. The Rule 1.0.1 definition of law firm refers to "government entity". While I agree with the spirit of your change, I would say: "... or while employed by another government entity" I would make the same change at the beginning of [9B]

KEM: I'm withholding my views on this until I've had an opportunity to consider further George Cardona's comment on paragraph (e) and associated comments. See especially his point # 3 beginning at page 6 of the attached chart.

8. The last sentence in proposed Comment [9B] uses the phrase “may be disqualified.” Should we be using that phrase in light of our attempts not to address disqualification in this rule? We could substitute for it a phrase such as “may not participate in the matter.” Do you agree?

Your suggestion seems to me to be an improvement.

KEM: Actually, the word "disqualification" was intentionally used here. The concept being communicated is that a court might disqualify a lawyer even if there is no specific provision (i.e., codification of Cobra in the black letter) that would subject the lawyer to discipline. The word "disqualification" or a variant should be kept in both [9B] and [9C]. See also Point #10, below.

9. Although I disagree with the Orange County Bar Association's concerns about Comment [9C], if there is a perception that it might be misinterpreted, I suggest that we clarify that comment. Accordingly, I recommend that we substitute for the phrase "law firm" in the first sentence of the comment the phrase ". . . lawyer, law firm, or government office, agency, or department . . ." In order to avoid repeating that phrase in the second sentence, I suggest that we delete the phrase "a lawyer or law firm" and substitute for it the phrase ". . . any of them . . ." Again, do you agree?

I don't agree with this one. The term "law firm" is defined in Rule 1.0.1 to include a "government entity", and I don't think we should stray in the use of our terminology. I would make no change in [9C].

KEM: I'm with Bob on this one.

10. In the draft spreadsheet about the public comments, I raise the issue that two bar associations have raised, namely whether by not including the Younger and Cobra Solutions problem in the black letter rule we are implicitly overruling them. I have not addressed that issue in the attached redraft of the rule because I was outvoted on that issue by the Commission. I raised the issue in the spreadsheet but do not suggest a change in the draft of the rule that is attached to this email because I suspect I will still be a minority of one. What are your recommendations?

I do not agree that we are overruling *Younger* and *Cobra Solutions*. They are disqualification cases that do not speak of possible discipline. I would make no change on this point.

KEM : This may be a moot point if a majority of the Commission were to agree with George Cardona and decide that we should not have a paragraph (e).

However, I think the way in which we are addressing this -- not codifying Cobra in the black letter but instead putting lawyers on notice in the comment that a court may DQ them and their office under the appropriate circumstances -- is the appropriate approach.

The vote to include a comment on Cobra was approved by a 11-0-0 vote. See 12/12-13/09 KEM Meeting Notes, III.E., at para. 2.

I also think that our approach goes a long way to assuage George Cardona's concerns stated in his point #3.

11. You will see that, in the public comment chart, several places I suggest changes as my recommendations. If my recommendations turn out to be acceptable to you, I will reword my description of them accordingly.

12. I have not redone the Introduction or the dashboard pending your input.

Attached:

RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - DFT2.1 (03-17-10)JS-KEM.doc

March 17, 2010 Sapiro E-mail to KEM, cc Drafters, Sondheim & Difuntorum:

While you were doing that, I added and edited the responses to the public comments in light of the addition of OCTC and COPRAC by Lauren. I also revised some of the changes in the rule and comment in light of Bob's response to my emails.

What you did saves me keyboarding time for George's comments, for which I am grateful. However, I have not done the responses to George's arguments yet. Hope to do those tonight.

Because Bob and you have not seen these yet, I phrased many of my responses as my suggestions. However, I think most of them are consistent with what I understand Bob's positions are.

Blame any dumb remarks on the fact that I am still not fit for duty.

If you, Kurt, or Bob want changes, please let me know. If you want to speak by phone, call me at home: 415-661-7989.

Attached:

RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - DFT2A (03-17-10)JS.doc

RRC - 3-310 [1-11] - Rule - DFT8.1 (03-17-10) - Cf. to DFT7.doc

March 17, 2010 Kehr E-mail to Sapiro, cc Drafters, Sondheim & Difuntorum:

Jerry: I'm not clear on what editing you did and don't have the time to track it down. I therefore will limit my comments to the OCTC and COPRAC late filings and your draft responses to them as I can see they were not part of the prior draft ---

1. I suggest a minor revision to your proposed Comment [11]. The reason is that your draft refers to a prosecutor, but section 6131(b) distinguishes between the lawyer who was the prosecutor in a matter and any other prosecutor who "aided or promoted any action or proceeding in any court" I would not want to permit anyone to read the Comment as referring only to the prosecutor. My suggestion is: "Even if authorized by this Rule to represent a client, a ~~Notwithstanding paragraphs (a) and (b) of this Rule, no lawyer who has been a prosecutor may advise or take any part in a matter or receive any valuable consideration from or on behalf of a defendant in an action if doing so would~~ may not violate Business & Professions Code section 6131 in the circumstances in which it applies.
2. Rereading the Comments in light of the last of the OCTC concerns:
 - a. The reference to Rule 1.10 should come out of Comment [2]. Without Rule 1.10, I question the need for Comment [2] in its entirety. I think OCTC is right that it really adds nothing.

- b. The last sentence of Comment [3] needs to come out. I would keep the rest of the Comment.
 - c. I don't understand the "may be appropriate" language of the first sentence. I would like the Commission to address this.
 - d. I agree with OCTC about Comment [7]. Paragraph (b) already says the notice must be given "promptly". It adds nothing, perhaps except an inconsistent standard, to say in [7] that the notice should be given as soon as reasonably practical. I think we can remove [7].
 - e. Comment [8] will be wrong if the Commission adds the reasonably should know standard. In any event, I think [8] can be omitted.
 - f. Why does Comment [9] appear as something new. Wasn't it part of the public comment version of the Rule?
 - g. I disagree with OCTC about [1], [3] –[5], [9C] and [10], all of which I would retain.
3. I disagree with your [9B] changes. I expect this will be discussed at the March meeting.

March 18, 2010 Sapiro E-mail to KEM, cc Drafters, Chair & Staff:

As we discussed a while ago, I attach my current drafts of the revised rule and the public comment spreadsheet. I think I have addressed all of your and Bob's comments, either by agreeing with them or by stating where there are disagreements.

I was not able to rearrange the spreadsheet in alphabetical order, because I spent all my time revising the responses and considering alternatives.

As we discussed, I do not have time today to synopsise George Cardona's comments and complete my responses to them today if I am to submit this on 1.17 today. However, we agreed to submit George's comments in full and a response before the next meeting.

Call me at home if you want to discuss any of this.

Attached:

RRC - 3-310 [1-11] - Rule - DFT8A (03-18-10)JS - Cf. to DFT7.doc

RRC - 3-310 [1-11] - Public Comment Chart - By Commenter - DFT2B (03-18-10)JS.doc

March 18, 2010 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Staff:

Thanks to Jerry's Herculean efforts, I'm attaching the following, both in Word:

- 1. Public Comment Chart, Draft 2.4 (3/18/10).
- 2. Rule, Draft 8.3 (3/18/10), redline, compared to Draft 7 (12/14/10) [public comment draft].

Notes & comments:

1. Jerry and I were working in parallel on these documents but I think I was able to merge them successfully, including incorporating Bob's comments. To the extent an issue has not been laid out appropriately, it is my fault.
2. There are a fair number of drafters' agreements that are ID'd as such in the footnotes.
3. We have not included George Cardona's lengthy comments concerning paragraph (e) and Comment [9B] in the Public Comment Chart because they arrived too late for a fair consideration. The drafters intend to supplement the chart before the next meeting. Draft 2.3 of the Chart includes his comments and I will circulate that document to the drafters once the dust settles.
4. I have not included any of the other submission documents because there are too many issues that remain to be resolved before we can return to the comparison charts, etc.

Please let me know if you have any questions.

March 19, 2010 Lamport E-mail to RRC:

At Harry's recommendation, I am writing to give you my impressions of the RAC action and to recommend that we reconsider Rule 1.10 without screening.

My sense of the RAC meeting is that there was significant opposition to screening, but not to imputation. RAC had no problem adopting 1.8.11, which is an imputation rule. Jon Streeter and Rex Heinke told me that their opposition to 1.10 centered on screening. However, given the dynamics of the meeting, it was not possible to parse out the imputation portions of the Rule from the screening portions of the Rule, so the whole Rule was voted down.

There remains an opportunity to send a revised Rule 1.10 to RAC without screening. Michael Marcus told me that he would not be offended if we came back to RAC with a screeningless 1.10. I got the same reaction from Jon Streeter.

For these reasons, I recommend that we reconsider Rule 1.10 without the screening provisions and corresponding Comments. I expect most of us agree that we need an imputation rule.

The RAC action has implications for other screening provisions. I think the writing is on the wall that RAC will not support other screening provisions in the Rules. Government to government screening in 1.11 may fly, but I don't think RAC will support private to government screening in 1.11 even with the City of Santa Barbara case. The sense I got is that RAC would prefer to see this issue played out in the courts and not in the rules. At the same time, there are members who do not feel a private former client will trust an unconsented screen and that it should not be imposed without client consent for that reason. Since the latter concern seems more focused on the private client, it is possible that RAC might accept a government to government screen in 1.11, but it would be a close vote.

March 19, 2010 Lampport E-mail to RRC re 1.10, 1.11 & Other Screening Rules:

At Harry's recommendation, I am writing to give you my impressions of the RAC action and to recommend that we reconsider Rule 1.10 without screening.

My sense of the RAC meeting is that there was significant opposition to screening, but not to imputation. RAC had no problem adopting 1.8.11, which is an imputation rule. Jon Streeter and Rex Heinke told me that their opposition to 1.10 centered on screening. However, given the dynamics of the meeting, it was not possible parse out the imputation portions of the Rule from the screening portions of the Rule, so the whole Rule was voted down.

There remains an opportunity to send a revised Rule 1.10 to RAC without screening. Michael Marcus told me that he would not be offended if we came back to RAC with a screeningless 1.10. I got the same reaction from Jon Streeter.

For these reasons, I recommend that we reconsider Rule 1.10 without the screening provisions and corresponding Comments. I expect most of us agree that we need an imputation rule.

The RAC action has implications for other screening provisions. I think the writing is on the wall that RAC will not support other screening provisions in the Rules. Government to government screening in 1.11 may fly, but I don't think RAC will support private to government screening in 1.11 even with the City of Santa Barbara case. The sense I got is that RAC would prefer to see this issue played out in the courts and not in the rules. At the same time, there are members who do not feel a private former client will trust an unconsented screen and that it should not be imposed without client consent for that reason. Since the latter concern seems more focused on the private client, it is possible that RAC might accept a government to government screen in 1.11, but it would be a close vote.

March 19, 2010 KEM E-mail to Lampport, cc RRC:

I can agree with your first four paragraphs but not the last.

I agree that RAC's concern was primarily with the screening provisions. It is welcome news that at least three members of RAC appear willing to reconsider Rule 1.10 w/o the screening provisions. And we don't have to do anything to get it before them. We already have a draft (ALT1, which made only minor revisions to the public comment draft) that was prepared at the same time as ALT2 (the draft w/ the screening provision). Before we count the chickens, however, we need to noted that a couple of RAC members asked and we affirmed that imputation is well-settled in case law, and when I asked for clarification on the motion, i.e., whether the Committee should take the rule in parts, Lowell Carruth, the governor who made the motion, stated emphatically: "The motion is to reject the rule in its entirety." Also, when a vote was called on the adoption of 1.8.11, the imputation provision for the 1.8 series of rules, the principal argument made for it was that the law on imputation of conflicts arising from those duties was not so well settled as it is for the 1.10 variety of imputation. Nevertheless, I agree that RAC was preoccupied with the screening provision and the two concepts got mashed together for most of the Committee members.

I think, however, you might be extrapolating too far with your comments concerning 1.11. The reason that RAC wanted to see private-private firm screening "played out in the courts" is that the game is still being played and it's anyone's guess who will "win". They want the courts to

make the call on this. Unlike private-private firm screening, however, the screening provision in 1.11(e) has been played out; the refs have spoken. Regardless of what we might think about some of the language in the Santa Barbara case, it is now law in California. The Supreme Court didn't depublish it. It is settled. The Rule 1.11 situation thus is different from the proposed Rule 1.10 situation. There is no compelling reason not to reflect the current law in the rule.

Further (and perhaps more important), unlike MR 1.11, our rule imputes to the government agency the conflict of a lawyer who moves from private to government employment. That's why the Model Rule does not have a screening provision for that situation; there is no imputation. Would the fact that our proposed rule had imputation but no screening in that situation mean that a lawyer who moves from private to government practice -- and is screened -- is in violation of the rule? Are the lawyers who are working on the conflicted matter subject to discipline (after all, our 1.11(e) provides: "If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer who is serving in the same governmental office, agency or department as the personally prohibited lawyer may knowingly undertake or continue representation in the matter")? Curious result when the lawyers would simply be following settled case law that permits them to do exactly that, so long as the infected lawyer is screened. Should we simply adopt the Model Rule that does not impute in private to government migration "because of the special problems raised by imputation within a government agency"? It's one thing to leave out of the rule a prohibition on screening (i.e., Cobra Solutions). It's an entirely different thing to leave out authority that permits the conduct.

I know you don't like "package deals," but I think imputation and screening in proposed Rule 1.11(e) is a package deal. Alternatively, we better warn the BOG that they will rain down the wrath of government lawyers.

March 19, 2010 Lamport E-mail to KEM, cc RRC:

With respect to 1.10, I am not saying I know that RAC will adopt a screenless rule. I am just saying there is still an opportunity. You are right about Lowell Carruth's motion; but I don't think that everyone's reasons for voting for the motion were the same and the setting was not conducive a surgical rewriting of the rule. A screenless 1.10 might be voted down again, but I think it is worth trying and I am comfortable it will not be received badly if we decide to do it.

With respect to 1.11, first, I don't think it is just about the law. I think there is also a concern that an unconsented screen does not protect clients.

Second, I think you are extrapolating Santa Barbara too far. I don't think Santa Barbara is the last word on this issue. It was highly circumstantial. The court noted there could be circumstances where the screen would not be acceptable, such as if the case had considerable notoriety. The court couched its holding as accepting screening "in the presenting circumstances." Of course we have Cobra Solutions, where the Supreme Court thought a screen was not acceptable. So the gate isn't swinging just one way here. Plus, in Santa Barbara the party seeking disqualification conceded that no confidential information had been imparted. I'd like to see what another court does in a high profile, highly charged criminal case where a defense lawyer switches sides with a Santa Barbara screen and the defendant is not prepared to accept that confidential information has not been imparted. I don't think the law is settled in this area at all. Nor do I think 1.11 can account for those situations where a court might allow a screen and where it would not. Our draft certainly does not.

Third, if the concern is that a lawyer should not be disciplined for what a court would allow the lawyer to do, this is an issue for a Comment. We don't need to open the flood gates and allow screening in circumstances the courts have yet to consider. We certainly don't do that if the policy is to let the courts work this out. We can just say in a Comment something to the effect that paragraph (e) does not prevent a government agency from using a screening procedure that is permitted by law and does not apply to lawyers who comply with such screening procedures. We can then cite *Cobra* and *Santa Barbara* and other cases to signal what we are talking about. That way we get imputation, which protects clients. We don't push screening beyond where the courts may decide to take it, which protects clients. We don't punish the lawyers who used a screen courts would allow, which resolves your concern. Everybody lives. No one gets hurt. No rain of wrath.

So, no, I don't see imputation and screening as a package deal in 1.11 any more than I see it as a package deal in 1.10.

March 21, 2010 KEM E-mail to RRC:

With respect to this agenda item, please consider only those materials at pages 85-132 of the Agenda Materials.

The documents at pages 133-180 have either been superseded by the foregoing documents or are not ripe for consideration until the Commission resolves the many issues about which the drafters disagree.

With respect to those issues, please see especially the footnotes in the Rule Draft 8.3 (3/18/10), redline, compared to the public comment draft [#7] (12/14/10), at pages 99-106 of the agenda materials. There are other issues identified in the public comment chart at pages 87-98, but the focus will be on the issues identified in the former document.

PLEASE DO NOT spend time on the version of the public comment chart at pages 165-180.

March 22, 2010 Tuft E-mail to RRC List:

1. Paragraph (a) and proposed new Comment [11]: OCTC's comment that paragraph (a) is incomplete and confusing is incorrect and overlooks Comment [1] which states: "In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts of interest." A cross-reference, such as "See, e.g., Business and Professions Code Section 6131" in Comment [1] is sufficient without the need for a separate comment.
2. Paragraph (e): George Cardones' comments provide as good an explanation as I have seen in my research regarding the reasons why Model Rule 1.11 does not impute conflicts of a lawyer currently serving as an officer or employee of the government. I have never liked the throw-away sentence in Model Rule Comment [2] that "ordinarily it would be prudent to screen such lawyers." And I am mindful that the Supreme Court in *Cobra Solutions* approved the reasoning of the Court of Appeal in *Santa Barbara vs. Superior Court* which required that the conflicted lawyer be screened on joining the city attorney's office. However, as George points out, there are special circumstances, and in some cases statutes, that govern the imputation of a government lawyer's conflict to other lawyers serving in a government agency or "law firm".

**RRC – Rule 1.11 [3-310]
E-mails, etc. – Revised (3/24/2010)**

Unless we are prepared to change the landscape by imputing conflicts within a government office, agency or department in a rule professional conduct in contrast to statutory and case law, we should probably limit imputation to the confines of the Model Rule. This is consistent with the suggestion made by Bob and, I believe, Kevin that we should not legislate in a rule professional conduct the imputation consequences when the personally prohibited lawyer is the head of the office or a lawyer with direct supervisory authority.

George is correct that Rule 1.11 applies to a very broad and diverse range of federal, state and local criminal and civil government offices, agencies and departments, each of which may have varying imputation consequences. Therefore, in view of George's concerns, I am in favor of a comment addressing the imputation consequences of a personally prohibited current government lawyer with appropriate citations to *Cobra Solutions*, *Younger*, *In re Charlisse C.* and perhaps even Penal Code Section 1424 and with a stronger statement than Model Rule Comment [2] that unless there is overriding statutory or other law, the personally prohibited lawyer currently serving as an officer or employee of the government should be timely and effectively screened to avoid imputing that lawyer's conflict to other associating government officers or employees.

If the Commission votes to conclude Paragraph (e), some of George's concerns could be alleviated by beginning the paragraph with the following introductory phrase: "Except as law may otherwise expressly permit,"

3. Comment [9B]: *Younger* and *Cobra Solutions* should not be part of a black letter rule, but should be included in a comment for the reasons expressed by Bob and Kevin. These are civil disqualification cases and I do not read this rule as overruling either case.

4. Deletion of references to Rule 1.10: I don't see how California will be able to justify having a special conflict of interest rule for former and current government officers and employees with its own imputation standard without having the basic imputation rule in Rule 1.10 - regardless of whether non-consensual screening is permitted. The same is true in regard to Rules 1.8(k), 1.12, 1.18 and 6.5. The proposed deletions to Rule 1.10 in this and other rules will assure confusion and consternation among lawyers who, as each day passes, are associating and practicing with lawyers governed by the Model Rules. We need to ask how public protection is being advanced without Rule 1.10 when so many other rules are impacted by the basic concept of imputation.

March 23, 2010 Sapiro E-mail to Drafters:

George Cardona's lengthy objection to 1.11 came in too late for me to address it before we had to submit our comments last week. Today, I finally got time to address it. I attach a copy of a draft response. It took several hours of research and drafting today, and this is still a draft. I do want to edit this before I send it to the commission, which I understand must be done tomorrow. However, I would be grateful if you would read it and give me the benefit of your comments and criticisms before I edit it.

Attached:

RRC - 3-310 [1-11] - 03-23-10 Sapiro Memo re Cardona - DFT1.doc

March 23, 2010 Kehr E-mail to Sapiro, cc Drafters:

I appreciate the opportunity to comment, and will try to do so tonight.

March 23, 2010 KEM E-mail to Sapiro, cc Drafters:

I'll try to get to this after my class tonight.

March 23, 2010 Kehr E-mail to Sapiro, cc Drafters:

I'm sorry that I cannot give your important memo the attention it deserves. In addition to other pressing matters, I cannot for the life of me locate George's letter and cannot fully appreciate your memo without it (can you forward it to me?). Nevertheless, I do have a few comments ---

1. I do not think the second sentence of your paragraph 4 is correct. *Cobra Solutions* involved a City Atty, which involves section 1424(b), and it applies only to criminal matters. *Cobra Solutions* did note the effect that section 1424 has on the holding of *Younger*, but the court then went on to say: "...the concerns that the Court of Appeal in *Younger* expressed about conflicted heads of public law offices, whose policymaking and supervisory duties are such as to preclude them from being effectively screened, have not lost their relevance." I take that to mean that the *Younger* analysis continues under 1424(a) but with a different standard and procedure.
2. On your paragraph 7, I am one of those concerned about making Rule 1.11 absolute b/c I am concerned about how the law might evolve. I do not consider it unsettled in California, in the sense that there is contrary authority, but I am extremely uncomfortable in thinking we can predict how the law will develop in the governmental context. We also should keep in mind that section 1424 and the CA cases have no application in the federal court context. We have a broader audience.
3. Your paragraph numbering seems to be off. You have a paragraph 7 that follows paragraph 23. The paragraph that precedes this inventory a number of cases, but I don't see how they add to the analysis. On your second paragraph 7, I agree that the Rule is not intended to govern DQ, but it also permits screening. The only problem I see is with (e)(2), which I have consistently opposed b/c of its potential for interfering with legitimate law enforcement activities.

That's all for now.

March 23, 2010 KEM E-mail to Kehr, cc Drafters:

Here is George's 3/12/10 memo re paragraph (e).

Attached:

RRC - 3-310 [1-11] - 03-12-10 Cardona Comment re Para (e).pdf

March 24, 2010 Melchior E-mail to RRC:

Last night, I reviewed the material including George Cardona's and Jerry's extraordinary research. This left me with the feeling that we are trying to fill in a small hole in a big and changing dam system (not damn system!). If time permits, I will try to capture some of my thoughts and distribute them before Friday. Meanwhile, I think that we are trifling while the landscape moves. As far as subsection (e) is concerned, it makes total sense from the perspective of purity but the law's direction is opposite. Just take a look at yesterday's decision in *People v. Gamache*, where the Supreme Court affirmed a death sentence case although one of the victims was a typist in the prosecuting DA's office and that office refused to disqualify itself.

I think that the direction the law is taking, Cobra Solutions notwithstanding, is that public offices get by by screening, and that the screening can be wholly internal and self-administered. Maybe I still haven't gotten over the gratuitous insult to private lawyers in the Santa Barbara case.

So I am willing to drop 1.11(e).

March 24, 2010 KEM E-mail to Sapiro:

I'm at the dentist. I'll be here another hour at least. Best to send it in now. I'll have to provide my comment later.

I do think the analysis is correct. However, it will come down to the policy issue: do we reflect the law in the rule or continue to make it inaccessible to most lawyers by not spelling out their obligations. I'm OK with putting Cobra in a comment but I think Santa Barbara has wider application and belongs in the rule.

March 24, 2010 Sapiro E-mail to RRC List:

As always, George Cardona presents well reasoned arguments in support of his opposition to Rule 1.11(e). In this email, I will attempt to respond to them. You will see that I agree with most of what he says, but I disagree with him about deleting paragraph (e). The other members of the drafting committee have not had time to review the following adequately, so these remarks should not be attributed to them.

1. Proposed paragraph (e) would apply if a lawyer leaves private practice or other employment and enters government employment. Under paragraph (d), that lawyer is subject to Rules 1.7 and 1.9. Paragraph (e) would impute the conflicts of that lawyer to other lawyers in the government office who know [or reasonably should know, depending on how that issue is resolved] about the conflict of the tainted lawyer unless she or he is screened and the former client is notified.

2. Let's set the scene. For brevity, I will limit the circumstances to criminal prosecution because that is Mr. Cardona's focus. However, paragraph (e) applies to nonprosecutorial governmental offices too.

3. Suppose a lawyer in private practice represents a client who is the subject of a criminal investigation, grand jury proceedings, or prosecution. The client tells all to the lawyer. Subsequently, the lawyer moves to the prosecutor's office. He or she withdraws from representing the client and moves into the prosecution role. From the former client's perspective, all his or her secrets are in the prosecution's hands, and his or her former lawyer is now the prosecutor. Or from the public's point of view, the prosecutor now has divided loyalty and may be biased in favor of his or her former client, so justice may not be done. I assume we all agree that the prosecutor is prevented by Rule 1.9 from participating in the prosecution of the former client.

4. If screening is not permitted, the conflict of interest of the individual lawyer may infect the entire office. Conversely, as pointed out by the dissent, the involuntary imposition of a screen as a disinfectant will leave the former client in fear that he or she has revealed confidential information that the prosecution can use.

5. In paragraph (e), we have proposed screening as a means of avoiding vicarious disciplinary consequences for other members of the prosecutorial office. Mr. Cardona argues from Penal Code section 1424 that imputed disqualification in a criminal case is no longer mandatory in the *Cobra Solutions* and *Younger* contexts. That is only correct to an extent. To cause recusal of an entire office, under section 1424 the accused must prove more than misconduct.^[1] But *Cobra* stated that “. . . the concerns that the Court of Appeal in *Younger* expressed about conflicted heads of public law offices, whose policymaking and supervisory duties are such as to preclude them from being effectively screened, have not lost their relevance.” Thus, the *Younger* analysis continues to govern the conduct/misconduct analysis, but disqualification may or may not occur because of section 1424.

6. On the other hand, proposed paragraph (e) of Rule 1.11 is not in the proposed rule as a means of avoiding recusal. We have attempted to distinguish between discipline and recusal in the Comment of Rule 1.11. I think that distinction can be improved by working on the wording of the Comments. But, as the Supreme Court has said:

Putting aside for the moment the absence of any trial court finding that [the prosecutor] committed misconduct, **we emphasize that recusal motions are not disciplinary proceedings against the prosecutor.** The ultimate focus of the section 1424 inquiry is on protection of the defendant's rights, not whether recusal may be just or unjust for the prosecutor. **Thus, in some cases a prosecutor may have committed misconduct but not be subject to recusal** because the misconduct does not impair the defendant's right to a fair proceeding; **in other cases, a prosecutor may commit no misconduct but nevertheless be subject to recusal** because a conflict, through no fault of the prosecutor's, jeopardizes the defendant's rights.

Hollywood v. Superior Court, 43 Cal. 4th 721, 731 (2008) [emphases added].

7. Thus, a glib response to Mr. Cardona could be that prosecutors who oppose paragraph (e) could get what they ask for. If something like paragraph (e) is not in the rule, both the side-shifting lawyer and others in the prosecutorial office might be subject to discipline.

**COBRA AND YOUNGER IMPUTED CONFLICTS OF INTEREST
AND DID NOT PERMIT SCREENING TO AVOID DISQUALIFICATION**

8. California decisions such as *San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 (2006), and *Younger v. Superior Court*, 77 Cal. App. 3d 892 (1978), involved, respectively, the head of a government office and a supervisory lawyer. In *Cobra*, 38 Cal. 4th at 846 (citations omitted), the Court summarized the ethical principles:

Two ethical duties are entwined in any attorney-client relationship. First is the attorney's duty of confidentiality, which fosters full and open communication between client and counsel, based on the client's understanding that the attorney is statutorily obligated . . . to maintain the client's confidences. . . . The second is the attorney's duty of undivided loyalty to the client. . . . These ethical duties are mandated by the California Rules of Professional Conduct. (Rules Prof. Conduct Rule 3-310(C) & (E).)

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

The Court pointed out that, "Normally, an attorney's conflict is imputed to the law firm as a whole on the rationale 'that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information.' (*SpeeDee, supra*, 20 Cal.4th at pp. 1153-1154, 86 Cal.Rptr.2d 816, 980 P.2d 371, fn. omitted.)" *Id.*, 38 Cal 4th at 847-48. The Court expanded on this concept to hold that the rule requiring vicarious disqualification of an entire law firm should apply to a government law office where the head of that office has a conflict because of side shifting, even though the office attempted to screen the conflicted lawyer.

4. **[8A]** In *Younger, supra*, Johnnie Cochran moved from private practice to the district attorney's office as a supervisory attorney. Although the office had screened Mr. Cochran, because he was near the top of the supervisory chain the entire office was recused because his personal conflicts of interest were imputed to the entire office. *Younger*, 77 Cal. App. 3d at 895-97.

5. **[8B]** *Younger* and *Cobra* are not the only California cases on this subject. For example, *People v. Superior Court (Greer)*, 19 Cal. 3d 255, 266-67 (1977), affirmed an order requiring the Attorney General to replace the office of a district attorney. The district attorney's office had a conflict of interest because the mother of the homicide victim was a "discovery clerk" in the district attorney's office.

6. **[8C]** In *People v. Lepe*, 164 Cal. App. 3d 685 (1985), the trial court recused the district attorney and his entire office from a prosecution. Before he became district attorney, the district attorney defended Mr. Lepe against charges of assault on a third person and for intimidation of two witnesses. The current prosecution was for assault on those same two witnesses. The court of appeal affirmed the disqualification. It held that the district attorney's prior representation of the defendant necessarily included obtaining confidential information from the defendant. Therefore, the defendant was at risk of disclosure of that confidential information. That caused a conflict of interest and made it unlikely that the defendant would receive a fair

trial, particularly because the defendant was contending that his plea bargain in the witness intimidation case was not valid and that the district attorney had not adequately represented him in the prior case. The court of appeal also affirmed the recusal of the entire office supervised by the district attorney.

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

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

YOUNGER AND COBRA ARE STIL RELEVANT

7. [8D] In our meetings, some have said that the law reflected in *Younger* and *Cobra* is “unsettled.” I disagree. In *Cobra, supra*, 38 Cal. 4th at 850, the Supreme Court said that the principles discussed in *Younger* “have not lost their relevance.” Following *Younger*, the Court held that the entire office of the San Francisco City Attorney was recused. The Court stated at 853-54:

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

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

OTHER STATES ALSO IMPUTE CONFLICTS IN GOVERNMENT OFFICES

8. [8E] California is not alone in recusing an entire prosecutorial office if the circumstances warrant.

9. Where the elected chief prosecutor who directed and supervised the entire office had represented the defendant in two prior convictions, the entire office was disqualified. “[I]n this case, the prosecutor who had the administrative control over the entire staff was the one who

had formerly represented the particular defendant involved and, therefore, the trial court properly disqualified the entire staff of deputies.” *State v. Tippecanoe County Court*, 432 N.E. 2d 1377, 1379 (Ind. 1982).

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

(4) Where the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has previously personally represented the accused in the same case or in a matter so closely interwoven therewith as to be in effect a part thereof, the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed. This is not to say, however, that anytime a prosecuting attorney is disqualified in a case for any reason that the entire prosecuting attorney’s office is also disqualified. Where the previous case is not the same case (or one closely interwoven therewith) that is being prosecuted, and where, for some other ethical reason the prosecuting attorney may be totally disqualified from the case, if that prosecuting attorney separates himself or herself from all connection with the case and delegates full authority and control over the case to a deputy prosecuting attorney, we perceive no persuasive reason why such a complete delegation of authority and control and screening should not be honored if scrupulously maintained.

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

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

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

12. *United States v. Catalanotto*, 468 F. Supp. 503 (D. Ariz. 1978), held that the entire Tucson office of the U.S. Attorney was disqualified vicariously because one Assistant United States Attorney had a conflict of interest. However, the court did not disqualify the entire office of the U.S. Attorney for the District of Arizona.

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

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

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

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

17. *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972), held that, where an attorney received confidential information from a client, and subsequently was employed by the prosecutor's office, the prosecutor's office may not be involved in a prosecution against the former client on a matter related to the confidential information that was given.

**MODEL RULE 1.11 DOES NOT IMPUTE CONFLICTS
AMONG GOVERNMENT LAWYERS**

18. The Model Rules do not impute disqualification within a government office. Model Rule 1.10 contains the general imputation rule. In 2002, it was revised to make explicit that Rule 1.11, and not 1.10, applies to the government lawyer context. Rule 1.10(d) states that the "disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." Contrary to some of the decisions I discuss above, such as *Cobra*, Rule 1.10, Comment [7] says that ". . . where a lawyer represents the government after having served clients in private practice, non-governmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer."

19. Model Rule 1.11 Comment [2] also conflicts with some decisions I discuss above. It says "Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."

**BY NOT IMPUTING, MODEL RULE 1.11
CONFLICTS THE RESTATEMENT SECTION 123**

20. Restatement Section 123 also differs from the Model Rule and is closer to California decisions. It prohibits representation by lawyers who are affiliated with a conflicted lawyer, even in a prosecutorial office. Illustration 4 of the Comment to Section 123 states:

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

**SOME COURTS HAVE NOT IMPUTED CONFLICTS
WITHIN PROSECUTORIAL OFFICES**

21. Not all courts disqualify an entire office when a personally conflicted lawyer moves from private practice. The Reporter's Note to Restatement, Section 123, Comment d(iii) cites *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981)[If an individual government attorney is disqualified, the " 'vicarious disqualification of a government department is not necessary or wise.' " 660 F.2d at 189-90]; *State v. Jones*, 180 Ct. 443, 429 A.2d 936 (1980); and *State v. Fitzpatrick*, 464 So. 2d 1185 (Fl. 1985).

22. *United States v. Vlahos*, 33 F.3d 758, 762-63 (7th Cir. 1994), reversed a district court order disqualifying an entire United States Attorney Office. This was not because of refusal to impute a conflict of interest. Instead, it held the Assistant United States Attorney did not have an actual conflict of interest.

23. In *Matter of Grand Jury Investigation of Targets*, 918 F. Supp. 1374 (S.D. Cal. 1996), the court denied a motion to disqualify the entire United States Attorney Office because of imputed conflicts of interest. One Assistant United States Attorney recused himself from investigating the Targets because of his prior representation of one of the Targets. There was no evidence that confidential information had been shared, and in fact an ethical screen had been imposed. *Id.*, 918 F. Supp. at 1378.

24. *United States v. Bolden*, 353 F.3d 870, 875-86 (10th Cir. 2003), said that "where it is shown that an Assistant United States Attorney is subject to a conflict of interest, the proper remedy [generally] is to remove that individual, not all of the attorneys in the district, from the case." The court went on to say that disqualification of the entire office is almost always reversible error because of separation powers issues. However, *Bolden* did not involve a conflict of interest because an assistant united states attorney changed sides. It appears that the district court had recused the office because attorneys in it were potential witnesses, not because of conflicts caused by former representation. The 10th Circuit did not address imputation because of side shifting.

**I CONCLUDE IT IS HIGHLY UNLIKELY THAT THE
ENTIRE DEPARTMENT OF JUSTICE WOULD BE RECUSED
IF WE ADOPT RULE 1.11(e) AND THE COMMENT. EVEN AN
INDIVIDUAL OFFICE CAN AVOID DISQUALIFICATION**

25. Mr. Cardona objects to proposed paragraph (e) in part because the Attorney General might have a conflict because of previous representation, and the entire Department of Justice should not be disqualified in that case. I agree with him that the entire Department should not be recused. However, the proposed rule would not dictate the results of a disqualification motion. Moreover, as I discuss *infra*, screening and substitution of a new supervisory attorney will suffice to avoid disqualification of the entire office in all but rare cases. In any event, the Department of Justice is handling the head of office scenario without losing disqualification motions. The Department of Justice seems to have developed a cure for the infection caused by a conflicted head of office. They change the head of the office for the purpose of the tainted case.

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

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

28. *Groot* and *Nosal* illustrate that the Department of Justice can avoid disqualification because of imputed disqualification, even if the head of the office or a supervisory lawyer is the conflicted attorney, by transferring supervisory responsibility over the case away from the head of the office, removing the head of the office from all involvement in the case, and creating an ethical wall. Conversely, if the Department does not want to use such a plan, it can avoid imputed disqualification by recusing the entire local office and transferring responsibility for the case to a different office. If the head of the office was personally involved in representation of a former client that is substantially related to the case at hand, in most cases the former client is going to know that the government office is acting on the matter. For example, in *United States v. Nosal, supra*, Mr. Russoniello represented the defendant in the investigatory stages of the case. Both he and his former client knew about the investigation before Mr. Russoniello was appointed United States Attorney.

29. As a result of the foregoing, it is my conclusion that proposed paragraph (e) accurately states the standards that should apply in California. It includes use of screening to eliminate potential disciplinary exposure of an entire governmental office. It is limited to discipline. If the conflicted lawyer is timely and effectively screened from any participation in the matter, paragraph (e)(2) is satisfied. All the office has to do is give the notice required by paragraph (e)(3).

30. In the disqualification context, if, in rare circumstances, the governmental office cannot tell the former client of the conflicted new employee about the matter and about the conflict, then the former client has no knowledge of or ability to protect himself or herself under Rule 1.9, under Rule 1.11, or under the Fifth and Sixth Amendments. Even in those instances, the burdens are not insuperable. The conflicted office, at state level, can ask the Attorney General to take over the matter. At the federal level, as discussed above, there are other practical solutions. Recusal is a minor price to pay for protecting these important rights of the subject of the investigation.