

McCurdy, Lauren

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

Greetings Lauren & Randy:

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

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

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

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

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

Kevin

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

--
Kevin E. Mohr
Professor
Western State University College of Law
1111 N. State College Blvd.
Fullerton, CA 92831
714-459-1147
714-738-1000 x1147
714-525-2786 (FAX)
kevin_e_mohr@compuserve.com
kevinm@wsulaw.edu

RRC – Rule 1.9 [3-310(E)]
Rule – Draft 4 (8/6/09) – COMPARED TO DFT 3.3 (7/8/09)
August 28-29, 2009 Meeting; Agenda Item III.A.

1
2 **Rule 1.9 Duties To Former Clients¹**
3

4 (a) A lawyer who has formerly represented a client in a matter shall not thereafter
5 represent² another person in the same or a substantially related matter in which
6 that person's interests are materially adverse³ to the interests of the former client
7 unless the former client gives informed written consent.⁴
8

9 (b)⁵ A lawyer shall not knowingly represent a person in the same or a substantially
10 related matter in which a firm with which the lawyer formerly was associated had
11 previously represented a client

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

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

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

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

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

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

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

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

RRC – Rule 1.9 [3-310(E)]
Rule – Draft 4 (8/6/09) – COMPARED TO DFT 3.3 (7/8/09)
August 28-29, 2009 Meeting; Agenda Item III.A.

14
15
16 |
17
18
19
20
21
22
23
24
25 |
26
27
28
29
30
31

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

unless the former client gives⁹ informed written consent.

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

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

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

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

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

⁹ See footnote 4, above.

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

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

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

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

RRC – Rule 1.9 [3-310(E)]
Rule – Draft 4 (8/6/09) – COMPARED TO DFT 3.3 (7/8/09)
August 28-29, 2009 Meeting; Agenda Item III.A.

32 **Comment**¹⁴
33

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

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

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

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

¹⁶ See fn. 19, below.

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

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

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

RRC – Rule 1.9 [3-310(E)]
Rule – Draft 4 (8/6/09) – COMPARED TO DFT 3.3 (7/8/09)
August 28-29, 2009 Meeting; Agenda Item III.A.

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

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

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

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

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

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

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

RRC – Rule 1.9 [3-310(E)]
Rule – Draft 4 (8/6/09) – COMPARED TO DFT 3.3 (7/8/09)
August 28-29, 2009 Meeting; Agenda Item III.A.

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

79 |
80 | [5]²⁴ Matters are the same or substantially related for purposes of this Rule: ~~if~~ (i) if they
81 | involve the same transaction or legal dispute or other work performed by the lawyer for
82 | the former client, or (ii) if the lawyer normally would have obtained received information
83 | in the prior representation that is protected by ~~Business and Professions Code section~~
84 | 6068(e) Rule 1.6, and that the lawyer would be expected to use or disclose that
85 | information in the subsequent representation because it is material, ~~such as when the~~
86 | lawyer’s duty to represent the new client competently in the subsequent representation
87 | would require the lawyer to use or reveal the former client’s confidential information.
88 |

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

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

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

RRC – Rule 1.9 [3-310(E)]
Rule – Draft 4 (8/6/09) – COMPARED TO DFT 3.3 (7/8/09)
August 28-29, 2009 Meeting; Agenda Item III.A.

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

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

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

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

131 |
132 | ~~[59]~~ Paragraph (b) ~~describes the potential for a conflict of interest when a client is a~~
133 | ~~former client because the lawyer no longer is associated with the law firm that~~
134 | ~~represents or represented the client. In that situation, operates to disqualify~~ the lawyer
135 | ~~has a conflict of interest~~ only when the lawyer ~~involved~~ has actual knowledge of
136 | information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm
137 | acquired no knowledge or information relating to a particular client of the firm, and that
138 | lawyer later joined another firm, neither the lawyer individually nor the second firm is
139 | disqualified from representing another client in the same or a related matter even though
140 | the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm
141 | once a lawyer has terminated association with the firm.²⁷

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

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

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

RRC – Rule 1.9 [3-310(E)]
Rule – Draft 4 (8/6/09) – COMPARED TO DFT 3.3 (7/8/09)
August 28-29, 2009 Meeting; Agenda Item III.A.

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

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

157 |
158 | **Confidential Information**³⁰

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

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

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

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

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

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

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

RRC – Rule 1.9 [3-310(E)]
Rule – Draft 4 (8/6/09) – COMPARED TO DFT 3.3 (7/8/09)
August 28-29, 2009 Meeting; Agenda Item III.A.

168 | [Client Consent](#)³²

169

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

176

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

³² See footnote 30, above.

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

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

McCurdy, Lauren

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

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

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

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

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

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

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

From: Lamport, Stanley W.

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

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

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

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

The following are my comments to the revised draft:

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

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

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

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

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

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

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

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

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

To: Lauren McCurdy; Randall Difuntorum

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

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

Greetings Lauren & Randy:

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

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

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

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

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

Kevin

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

--

Kevin E. Mohr

Professor

Western State University College of Law

1111 N. State College Blvd.

Fullerton, CA 92831