

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, August 12, 2009 2:17 PM
To: McCurdy, Lauren; Difuntorum, Randall
Cc: Jerome Sapiro; Robert L. Kehr; Kurt Melchior; Kevin Mohr G; Harry Sondheim; Lee, Mimi
Subject: Re: RRC - 3-310 [1.11] - III.C. - 8/28-29/09 Meeting Materials
Attachments: RRC - 3-310 [1-11] - E-mails, etc. - REV (08-24-09)-EXC_081209.pdf; RRC - 3-310 [1-11] - Rule - DFT3.2 (08-10-09) - Cf. to MR - JS.pdf; RRC - 3-310 [1-11] - Rule - DFT3.2 (08-10-09) - Cf. to MR - JS.doc

Greetings all:

I'm re-sending as the previous message had the wrong message line. Sorry for any confusion.

Kevin

Kevin Mohr wrote:
Greetings Lauren & Randy:

I've attached the following.

1. Rule 1.11 [3-310], Draft 3.2 (8/10/09), redline, compared to Model Rule 1.11. In Word & PDF.
2. E-mail compilation excerpt, which includes recent exchanges among the drafters. In PDF.

I think the notes are self-explanatory. The e-mails will assist the Commission members in appreciating the issues the drafters have been discussing.

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

Kevin

--
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

--
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

DRAFT:08/10/09

1
2 PROPOSED NEW RULE 1.11 REDLINED TO SHOW CHANGES FROM MODEL RULE
3 AND SHOWING RESULTS OF VOTING ON PARAGRAPH (a) ON
4 MAY 9, 2009

5 Rule 1.11 Special Conflicts Of Interest For Former And Current Government
6 Officers And Employees

7 (a) Except as law may otherwise expressly permit, a lawyer who has formerly served
8 as a public officer or employee of the government:¹

9 (1) is subject to Rule [1.9(c)]; and²

10 (2) shall not otherwise³ represent a client in connection with a matter in which
11 the lawyer participated personally and substantially as a public officer or
12 employee, unless the appropriate government agency gives its informed
13 written consent⁴, ~~confirmed in writing~~, to the representation. This
14 paragraph shall not apply to matters governed by Rule [1.12(a)].⁵

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

² References to other rules are bracketed because we have not yet adopted them. On May 9, 2009, a proposed change from “is subject to” to “shall comply with” was defeated by a 8-2-1 vote. See 5/8-9/09 KEM Meeting Notes, III.D., at ¶. 2A. Under this configuration successive conflicts of former government lawyers will not be determined by Rule 1.9(a) and (b). If we do not adopt 1.9(a) and (b), this paragraph may be reworded. If we adopt a counterpart of Rule 1.9(c), a former government lawyer will be prohibited from using or disclosing confidential client information in successive employment. This will be in addition to a second category of disqualifying information, namely “confidential government information” as discussed in proposed Rule 1.11(c).

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

⁴ We recommend substituting “informed written consent” both because it uses fewer words and because this has become a defined term under our rules.

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

RRC – Rule 1.11 [3-310]
Rule – Draft 3.2 (8/10/09) – COMPARED TO MR 1.11 (2002)
August 28-29, 2009 Meeting, Agenda Item III.C.

- 15 (b) When a lawyer is ~~disqualified~~prohibited from representation under paragraph
16 (a),⁶ no lawyer in a firm with which that lawyer is associated may knowingly⁷
17 undertake or continue representation in such a matter unless:⁸
- 18 (1) the prohibited ~~disqualified~~ lawyer is timely screened from any participation
19 in the matter and is apportioned no part of the fee therefrom;⁹ and
- 20 (2)¹⁰ written notice is promptly given to the appropriate government agency to
21 enable it to ascertain compliance with the provisions of this ~~R~~Rule.¹¹

⁶ RRC Action: At the 7/24-25/09 meeting, beginning paragraph (b) to track the Model Rule, with the substitution of “prohibited” for “disqualified” was deemed approved. See 7/24-25/09 KEM Meeting Notes, III.C., at ¶. 4.d.

⁷ On July 24, 2009, the use of the word “knowingly” was approved 9:3:2. Bob Kehr and Jerry Sapiro dissent from that decision. They think this is a substantive error. Using “knowingly” immunizes from discipline a lawyer who does not even run a conflicts check. Bob and Jerry would substitute for “knowingly” the phrase “and who knows or reasonably should know of the lawyer’s prior participation” or words to that effect.

⁸ Paragraph (b) is substantially the same as the Model Rule. It and its subparagraphs were approved on July 24 and 25, 2009, as redlined in this draft. –The changes are to avoid using the word “disqualified,” which is used in the Model Rule. The proposed paragraph would permit a firm to use screening to avoid imputed disqualification. It does not include any standards for screening and does not require that the screening and written notice to the government agency be done either promptly or reasonably. Those are to be considered, if at all, in the Terminology rule. The specific votes:

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

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

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

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

KEM and Jerry raise the issue of whether screening should be permitted in the government lawyer context under Rule 1.11 if it is not to be permitted in the private practice context under Rule 1.10. See KEM email August 10, 2009, and JS email August 1, 2009.

⁹ RRC Action: At the 7/24-25/09 meeting, the RRC voted 13-1-0 to adopt MR 1.11(b)(1), except with “prohibited” substituted for “disqualified.” See 7/24-25/09 KEM Meeting Notes, III.C., at ¶. 6. This had been paragraph (b)(3) in proposed Draft 2 (7/7/09).

RRC – Rule 1.11 [3-310]
Rule – Draft 3.2 (8/10/09) – COMPARED TO MR 1.11 (2002)
August 28-29, 2009 Meeting, Agenda Item III.C.

22 | (c)¹² Except as law may otherwise expressly permit,¹³ a lawyer having information that
23 | the lawyer knows is confidential government information about a person acquired
24 | when the lawyer was a public officer or employee, may not represent a private
25 | client whose interests are adverse to that person in a matter in which the
26 | information could be used to the material disadvantage of that person. As used in
27 | this Rule, the term "confidential government information" means information that
28 | has been obtained under governmental authority, that and which,¹⁴ at the time
29 | this Rule is applied, the government is prohibited by law from disclosing to the
30 | public or has a legal privilege not to disclose, and which-that¹⁵ is not otherwise
31 | available to the public. A firm with which that lawyer is associated may undertake

¹⁰ RRC Action: At the 7/24-25/09 meeting, the RRC voted 12-1-1 to adopt MR 1.11(b)(2). See 7/24-25/09 KEM Meeting Notes, III.C., at ¶. 7. This had been paragraph (b)(4) in proposed Draft 2 (7/7/09).

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

¹¹ "Rule" capitalized to be consistent with our style.

¹² Kurt disagrees with this paragraph. "I have real trouble here: We are saying that where a lawyer has confidential government information which s/he cannot disclose, and that information can be used adversely to the new private client, the lawyer may not represent the new client (but the firm can, provided the lawyer is fully screened). However, by definition the lawyer cannot use the information to the new client's disadvantage, and presumably would not do so under any circumstances. S/he might even be criminally liable if s/he disclosed the material. How, then, is it the Bar's business to say that lawyer cannot represent client, since lawyer knows (but cannot use) stuff which is bad for the client? Is this to pay obeisance to the rule that (otherwise) a lawyer must tell the client anything the lawyer knows which is useful to the client? Or to avoid the temptation to tell? Either, it seems to me, can be solved with a lesser prohibition: the lawyer can represent that client but cannot tell and is excused from telling. I do not agree that it is often or almost always better for client to get a lawyer not burdened with such secrets, and for lawyer not to be tempted to tell; but why do we have to go as far as this rule proposes? What is the public justification for that?"

¹³ New York changed "permit" to "provide." Jerry prefers the word "permit" from the Model Rule.

¹⁴ We changed "which" to "that" because the first word after "information" is the word "that" and is used to start a series of three clauses defining "information." The clauses thereby became parallel. New York made a similar change in its rule as adopted but did not include the commas that we have inserted. The commas make the sentence easier to parse.

¹⁵ See footnote 10.

32 | or continue representation in the matter only if the prohibited¹⁶ ~~disqualified~~ lawyer
33 | is timely and effectively¹⁷ screened from any participation in the matter and is
34 | apportioned no part of the fee therefrom.¹⁸

35 | (d) Except as law may otherwise expressly permit, a lawyer currently serving as a
36 | public officer or employee:¹⁹

37 | (1) is subject to Rules 1.7 and 1.9; and²⁰

38 | (2) shall not:²¹

39 | (i)²² participate in a matter in which the lawyer participated personally
40 | and substantially while in private practice or nongovernmental

¹⁶ We recommend deleting “disqualified” and substituting “prohibited” because disqualification is a decision for the tribunal. The commission has made the same change in paragraph (b) and its subparagraphs.

¹⁷ New York added the phrase “and effectively.” We think it is a good addition and recommend that we do the same.

¹⁸ In prior drafts, we recommended adding a clause, “in accordance with paragraph (b),” which was copied from the New York rule. Because of the wording of paragraph (b) as adopted on July 24 and 25, 2009, we no longer recommend that change. New York did not add the phrase “and is apportioned no part of the fee therefrom.” We think that phrase should be included so that there is no negative pregnant implying that the lawyer in this circumstance may be apportioned a part of the fee. The Model Rule does include that phrase.

¹⁹ Identical with Model Rule paragraph (d). This is the reciprocal of paragraph (a).

²⁰ New York deleted this requirement. We think it should be expressly stated. In a prior draft, we changed “is subject” to “shall comply with” to make the rule explicit. However, because that change was rejected by the Commission as to paragraph (a)(1) on May 9, 2009, we have deleted that change in this draft.

²¹ Identical with Model Rule 1.11(d)(2). Kurt correctly observes that this proposal is directly contrary to *City of Santa Barbara v. Superior Court*, 122 Cal. App. 4th 17 (2004). See also footnote 28.

²² Paragraph (d)(2) addresses a current, rather than former, government lawyer. It prohibits a current government lawyer from participating in a matter in which the lawyer participated personally and substantially while in private practice, unless consent of the appropriate government agency is obtained. It also prohibits a current government lawyer from negotiating for private employment with anyone involved in a matter in which the lawyer is participating personally and substantially. One question we

41 employment, unless the appropriate government agency gives its
42 informed written consent, ~~confirmed in writing~~,²³ or²⁴
43 (ii) negotiate for private employment with any person who is involved
44 as a party or as lawyer for a party in a matter in which the lawyer is
45 participating personally and substantially, except that a lawyer
46 serving as a law clerk to a judge, other adjudicative officer or
47 arbitrator may negotiate for private employment as permitted by
48 Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).²⁵

should discuss is whether “personally and substantially” should be included in the subparagraphs of this part of the Rule.

²³ We have changed “informed consent, confirmed in writing” to “informed written consent.” The latter is the phrase we have used and defined in our rules, and it makes the rule more succinct. Note that the rule does not permit screening to insulate the new government lawyer from causing imputed disqualification of his or her new office. We think that is appropriate. New York added what it calls a “rule of necessity.” It permits the new government lawyer to represent a government agency even without the agency giving its informed written consent, unless, under applicable law, no one is, or, by lawful delegation, may be authorized to act in place of the lawyer in the matter as to which there is a conflict. We do not recommend that we adopt that change from the Model Rule. Under paragraph (d)(1), the new government lawyer must comply with Rules 1.7 and 1.9(c). This requires the government lawyer to obtain the consent of the former client. The government agency should also give its informed, written consent, because otherwise it will have a lawyer whose loyalty may not be to the agency and will not have been forewarned about that risk and its consequences.

²⁴ Kevin Mohr questions why the consent of the government agency allows a lawyer who participated personally and substantially while in private practice to participate in the same matter after he or she moves to government employment. He asks whether the informed consent should be from the former private client. Jerry responds that paragraph (d)(1) requires the informed written consent of the former client by imposing Rule 1.9. The requirement of dual consent should be made explicit in a comment. Jerry also points out that the same concern applies if a lawyer currently representing a client becomes a public officer or employee. Then, Rule 1.7 would apply in addition to 1.11.

²⁵ Subparagraph (d)(2)(ii) is identical with the Model Rule. New York deleted the exception for a lawyer serving as a law clerk to a judge or other adjudicative officer or arbitrator. New York’s COSAC had recommended the adoption of the law clerk exception. Hazard & Hodes, *The Law of Lawyering*, § 16.5 says that the rationale for the special rule for law clerks in Model Rule 1.12 is that the influence of clerks on judicial decision making is “secondary,” judicial clerks are always “on the market,” and notification to the judge allows the judge to “factor in the possibility of bias and to respond accordingly,” such as by reassigning clerks to other matters. Somewhere between COSAC and the New York House of Delegates, the law clerk exception got deleted from Rule 1.11, and New York’s Rule 1.12(b)(2) also prohibits a former law clerk from representing anyone in connection with the matter in which he or she participated personally and substantially as a law clerk. Thus, in New York both 1.11 and 1.12 apply to a

49 (e)²⁶ If a lawyer is prohibited from participating in a matter under paragraph (d) of this
50 Rule and is the head of the government office, agency, or department or is
51 supervisory lawyer therein,²⁷ no lawyer serving in the same government office,
52 agency, or department may knowingly undertake or continue representation in
53 the matter. If the prohibited lawyer is not head of the office, agency or

former law clerk. To Jerry, a judge's law clerk should not be able to negotiate for private employment with a party or lawyer in a matter in which the clerk is participating personally and substantially. Such negotiations smack of extortion and bring the judiciary into disrepute. However, Jerry thinks this is a substantive matter that should be discussed by the entire commission. We therefore left the law clerk exception in paragraph (d)(2)(ii) in this draft. Bob Kehr would not include law clerks in Rule 1.11 and points out that Florida and Mississippi end the paragraph at "substantial." Bob Kehr recommends that we consider the Arkansas change in paragraph (d)(2)(ii). After "substantial," Arkansas inserted: ". . . unless the lawyer has the consent, confirmed in writing, of the appropriate government supervisor or official." Arkansas then replaces the reference to Rule 1.12(b) with a separate sentence: "A lawyer serving as a law clerk to a judge or other adjudicative officer is subject to Rule 1.12(b)." Kurt recalls that the Ninth Circuit requires more than a law clerk merely getting the judge's consent, but at this writing Jerry has not found that authority.

²⁶ This is here for discussion only. New York COSAC proposed a screening rule unique for Rule 1.11 in place of screening under Rule 1.10. That part of New York's rule was not adopted in final. We present it here for discussion with the addition of a new first sentence. If we adopt such a rule, to be consistent with California decisional law, a supervisory lawyer in a government agency or a head of a government office who is personally disqualified should not be able to use a screen to absolve the entire office from imputed disqualification. Therefore, we have proposed a new subparagraph (1) that is not reflected in the New York proposal. We include this paragraph (e) for discussion by the entire Commission. Bob Kehr and Kurt Melchior would not include paragraph (e). They agree with Jerry's explanation in footnote 23 but consider the cases discussed in footnote 23 fact specific and rare. Bob would leave this disqualification for case development without placing it in the Rule, where it could become the basis for discipline. He is of the opinion that there are policy reasons to foster the exchange of lawyers between private and public practice. Kurt would not codify *Cobra Solutions*. In light of the changes made on July 24-25, 2009, Jerry now agrees with Bob and Kurt. Kevin says whether to add proposed paragraph (e) is a "close call." He thinks that the inclusion of the first sentence of the proposed paragraph would put lawyers on notice of *Cobra Solutions*, but he thinks that case left too many questions unanswered and that the nuances should be addressed by case law as situations arise. He therefore would not include that sentence in the rule but would add a sentence about it in the Comment. However, he would adopt the remainder of paragraph (e) to permit screening in the private lawyer moving to government employment context. See KEM email August 10, 2009.

²⁷ Under California decisions, if the personally disqualified lawyer is the head of the office, screening is not available. *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 852-54 (2006). If the disqualified lawyer is a supervisory lawyer, screening is not available. *Younger v. Superior Court*, 77 Cal. App. 3d 892 (1978).

54 department and is not a supervisory lawyer therein, no other lawyer therein may
55 knowingly undertake or continue representation in the matter unless:²⁸
56 (1) the disqualified lawyer reasonably believes that he or she will be able to
57 provide competent and diligent representation;²⁹ and
58 (2) the prohibited lawyer is timely screened from any participation in the
59 matter;³⁰
60 (3) if the disqualification is based on the application of Rule [1.7] or [1.9],
61 advise the personally disqualified lawyer's other or former client in writing
62 of the circumstances that warranted implementation of the screening
63 procedures required by this Rule and of the actions taken to comply with
64 this Rule. However, if notice to the former client is prohibited by law or by

²⁸ This sentence tracks (the New York Rule 1.11(f)) that COSAC proposed but that was not adopted.

²⁹ This exception was in the New York proposal. It is here for discussion only. Jerry would delete it because it is too subjective.

³⁰ The Model Rule does not impute the disqualification of a government lawyer to the government office, agency, or department. Former DR 5-105(D) did impute the conflicts of current government lawyers to the office, agency, or department on the same basis as lawyers in private law firms. Subparagraphs (e)(2) and (3) are adapted from their counterparts at subparagraph (b) and (2). The New York proposed rule required notice to all personnel about the disqualification of the personally disqualified lawyer and required effective screening procedures. Proposed subparagraph (e)(3) is adapted from the New York proposed rule. Jerry thinks that should be the rule. He disagrees with *City of Santa Barbara v. Superior Court*, 122 Cal. App. 4th 17 (2004). Government lawyers may who have financial incentives to try to override imputed disqualifications that would apply to anyone in private practice. To Jerry, the idea that disqualification will not be imputed makes no ethical sense, and it rejects the legitimate interests of the former client of the lawyer who changed sides and joined a government office.

65 Rule 1.6, the exception to disqualification of the office, agency, or
66 department under paragraph (e) shall not be available.³¹

67 (f) As used in this Rule, the term "matter" includes:^{32 33}

68 (1) any judicial or other proceeding, application, request for a ruling or other
69 determination, contract, claim, controversy, investigation, charge,
70 accusation, arrest or other particular matter involving a specific party or
71 parties, and

72 (2) any other matter covered by the conflict of interest rules of the appropriate
73 government agency.

74 ³⁴

³¹ From New York proposed rule. The exception for Rule 1.6 is included because it and Business and Professions Code section 6068(e) may require that the lawyer who has changed sides not disclose that the lawyer's former representation, or facts related to it, in a writing that originates from the government office, agency, or department. The lawyer who has changed sides would thereby be disclosing to the government the very things that the rule is intended to protect and mandate nondisclosure. In that circumstance, in this draft, an ethical screen will not suffice and not be available to prevent imputed disqualification. Instead, the conflicts of a personally disqualified government lawyer will be imputed to the other lawyers employed by that office, agency, or department.

³² This is the same as Model Rule 1.11(e), but re-lettered because of the addition of new proposed paragraph (e). As adopted by New York, paragraph (e) defines "matter" as adopted in its Rule 1.10(l) and added that "matter" does not include or apply to agency rule making functions. We disagree with the New York exception and do not include it here. However, whether we should define "matter" universally in a "terminology" rule should be discussed.

³³ New York's final rule (which was not recommended by COSAC), also contains prohibitions against a lawyer who holds public office using the public position to obtain special advantage in legislative matters for the lawyer or for a client when the lawyer knows or it is obvious that such action is not in the public interest; using the public position to influence or attempting to influence a tribunal to act in favor of the lawyer or of a client; or accepting 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. Jerry likes that addition. Lawyers who are influence peddlers while in government office bring the profession into disrepute. However, we leave up to the full Commission whether to add it.

³⁴ Bob Kehr suggests that we discuss the following:

75 | **Comment**³⁵

76 [1] A lawyer who has served or is currently serving as a public officer or employee is
77 personally subject to the Rules of Professional Conduct, including the prohibition
78 against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may
79 be subject to statutes and government regulations regarding conflict of interest. Such
80 statutes and regulations may circumscribe the extent to which the government agency
81 may give consent under this Rule. See Rule 1.0(e) for the definition of informed
82 consent.

83 [2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer
84 who has served or is currently serving as an officer or employee of the government
85 toward a former government or private client. Rule 1.10 is not applicable to the conflicts
86 of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation
87 rule for former government lawyers that provides for screening and notice. Because of
88 the special problems raised by imputation within a government agency, paragraph (d)
89 does not impute the conflicts of a lawyer currently serving as an officer or employee of

The District of Columbia version is materially different from Model Rule 1.11. One difference is in what is our proposed paragraph (a)(2) which adds that the rule applies to acting on the merits in a judicial or other adjudicative capacity.

The District of Columbia version contains unique requirements regarding verifications to the government that screening is being followed.

The District of Columbia version has an additional paragraph that states that certain temporary government service is covered by the Rule. Bob would handle this in a comment.

New Jersey limits application of its rule to the representation of a private client. This means, for example, that a government lawyer could move to another government position and not be subject to Rule 1.11.

Wisconsin adds a paragraph (f) that eliminates imputation for lawyers currently serving as government officers or employees as long as there is timely screening.

³⁵ We have not attempted to revise the Comment pending our deliberations about the contents of the black letter rule.

90 the government to other associated government officers or employees, although
91 ordinarily it will be prudent to screen such lawyers.

92 [3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a
93 former client and are thus designed not only to protect the former client, but also to
94 prevent a lawyer from exploiting public office for the advantage of another client. For
95 example, a lawyer who has pursued a claim on behalf of the government may not
96 pursue the same claim on behalf of a later private client after the lawyer has left
97 government service, except when authorized to do so by the government agency under
98 paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client
99 may not pursue the claim on behalf of the government, except when authorized to do so
100 by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the
101 conflicts of interest addressed by these paragraphs.

102 [4] This Rule represents a balancing of interests. On the one hand, where the
103 successive clients are a government agency and another client, public or private, the
104 risk exists that power or discretion vested in that agency might be used for the special
105 benefit of the other client. A lawyer should not be in a position where benefit to the other
106 client might affect performance of the lawyer's professional functions on behalf of the
107 government. Also, unfair advantage could accrue to the other client by reason of access
108 to confidential government information about the client's adversary obtainable only
109 through the lawyer's government service. On the other hand, the rules governing
110 lawyers presently or formerly employed by a government agency should not be so
111 restrictive as to inhibit transfer of employment to and from the government. The

112 government has a legitimate need to attract qualified lawyers as well as to maintain high
113 ethical standards. Thus a former government lawyer is disqualified only from particular
114 matters in which the lawyer participated personally and substantially. The provisions for
115 screening and waiver in paragraph (b) are necessary to prevent the disqualification rule
116 from imposing too severe a deterrent against entering public service. The limitation of
117 disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or
118 parties, rather than extending disqualification to all substantive issues on which the
119 lawyer worked, serves a similar function.

120 [5] When a lawyer has been employed by one government agency and then moves to a
121 second government agency, it may be appropriate to treat that second agency as
122 another client for purposes of this Rule, as when a lawyer is employed by a city and
123 subsequently is employed by a federal agency. However, because the conflict of
124 interest is governed by paragraph (d), the latter agency is not required to screen the
125 lawyer as paragraph (b) requires a law firm to do. The question of whether two
126 government agencies should be regarded as the same or different clients for conflict of
127 interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

128 [6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k)
129 (requirements for screening procedures). These paragraphs do not prohibit a lawyer
130 from receiving a salary or partnership share established by prior independent
131 agreement, but that lawyer may not receive compensation directly relating the lawyer's
132 compensation to the fee in the matter in which the lawyer is disqualified.

133 [7] Notice, including a description of the screened lawyer's prior representation and of
134 the screening procedures employed, generally should be given as soon as practicable
135 after the need for screening becomes apparent.

136 [8] Paragraph (c) operates only when the lawyer in question has knowledge of the
137 information, which means actual knowledge; it does not operate with respect to
138 information that merely could be imputed to the lawyer.

139 [9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private
140 party and a government agency when doing so is permitted by Rule 1.7 and is not
141 otherwise prohibited by law.

142 [10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another
143 form. In determining whether two particular matters are the same, the lawyer should
144 consider the extent to which the matters involve the same basic facts, the same or
145 related parties, and the time elapsed.

146
147 (9930.16:317)
148

Table of Contents

February 18, 2008 Sapiro E-mail to RRC: 1

February 18, 2008 Kehr E-mail to Sapiro, cc RRC:..... 1

February 18, 2008 Kehr E-mail to Sapiro, cc RRC:..... 1

August 21, 2008 KEM E-mail to Chair & RRC (re Rule 4.2 [2-100]): 1

RLK Notes re Benefits & Problems with Ethical Screens: 2

February 25, 2008 Sondheim E-mail #1 to RRC re Agenda:..... 4

February 26, 2008 Sapiro E-mail to RRC List:..... 4

August 12, 2008 Sapiro E-mail to Staff:..... 4

August 19, 2008 Sondheim E-mail to RRC:..... 5

August 23, 2008 KEM E-mail to RRC (w/ Chart on ABA Screening Proposals): 5

Chart Showing Screening Proposals at ABA Annual Meeting (August 2008)..... 6

August 24, 2008 Sapiro E-mail to RRC List re Screening: 8

August 26, 2008 Lampton E-mail on Screening: 10

August 27, 2008 George Cardona E-mail to KEM & Difuntorum (forwarded to RRC by Lauren McCurdy on 8/27/08): 13

September 19, 2008 KEM E-mail to RRC, cc Staff (w/ attachments):..... 14

9/16/2008 ABA Standing Committee on Ethics & Professional Responsibility Notice to ABA entities re revised proposal to amend MR 1.10(e):..... 15

September 16, 2008 Revised Proposal to Amend MR 1.10(e):..... 17

September 23, 2008 KEM E-mail to RRC (w/ E-mail Compilations, etc.): 18

September 23, 2008 Sondheim E-mail to RRC: 19

October 17, 2008 Tuft E-mail to Drafters, cc Vapnek & Staff: 20

October 18, 2008 Kehr E-mail to Drafters, cc Vapnek & Staff:..... 21

October 18, 2008 Ruvolo E-mail to Drafters, cc Vapnek & Staff: 21

October 18, 2008 Julien E-mail to Drafters, cc Vapnek & Staff: 21

October 21, 2008 KEM E-mail to Difuntorum & McCurdy:..... 21

February 16, 2009 Melchior E-mail to RRC List: 22

March 21, 2009 Sondheim E-mail to RRC:..... 23

March 22, 2009 Tuft E-mail to RRC List: 23

March 24, 2009 KEM E-mail to RRC: 23

March 31, 2009 Sheryl Bratton E-mail to KEM: 25

March 31, 2009 KEM E-mail to Sheryl Bratton: 25

April 1, 2009 KEM E-mail #1 to Sheryl Bratton:..... 25

April 1, 2009 KEM E-mail #2 to Sheryl Bratton: 26

April 14, 2009 Sapiro E-mail to Drafters (Kehr, Melchior & Mohr): 26

April 15, 2009 KEM E-mail to Sapiro, cc Drafters:..... 26

April 16, 2009 Sapiro E-mail to KEM, cc Drafters: 27

April 20, 2009 Kehr E-mail to Drafters, cc Chair & Staff: 27

April 22, 2009 Melchior E-mail to Drafters, cc Chair & Staff: 28

April 24, 2009 Sapiro E-mail to McCurdy & KEM, cc Drafters, Chair & Difuntorum: 30

April 24, 2009 McCurdy E-mail to Sapiro, cc Drafters, Chair & Staff:..... 30

**RRC – Rule 1.11 [3-310]
E-mails, etc. – Revised (8/24/2009)**

April 29, 2009 Sondheim E-mail #1 to RRC:..... 30
April 29, 2009 Sondheim E-mail #2 [CORRECTION] to RRC: 30
April 29, 2009 Sapiro E-mail to Sondheim, cc RRC: 31
April 29, 2009 Sondheim E-mail #3 to RRC:..... 31
April 29, 2009 Sondheim E-mail to Sapiro & KEM, cc Difuntorum: 31
April 29, 2009 Sapiro E-mail to Sondheim, cc KEM & Difuntorum: 31
April 29, 2009 KEM E-mail to Sondheim, cc Sapiro & Difuntorum: 31
April 29, 2009 Sondheim E-mail to KEM, cc Sapiro & Difuntorum: 31
April 30, 2009 KEM E-mail to RRC: 31
May 4, 2009 KEM E-mail to RRC: 32
May 20, 2009 KEM E-mail to Drafters (Sapiro, Kehr, Melchior), cc Chair, Vapnek, Tuft & Staff: 34
May 28, 2009 KEM E-mail to Drafters (Sapiro, Kehr, Melchior, KEM), Tuft, Julien, Vapnek, Lampport,
Ruvolo, Peck, cc Chair & Staff: 34
June 13, 2009 Kehr E-mail to KEM, cc Chair & Difuntorum: 35
June 20, 2009 KEM E-mail to Kehr re “Current” Client, cc Chair & Difuntorum: 35
July 3, 2009 Sapiro E-mail to Drafters (Kehr, Melchior & KEM): 36
July 4, 2009 Kehr E-mail to Sapiro, cc Drafters: 36
July 4, 2009 KEM E-mail to Drafters: 36
July , 2009 Melchior E-mail to Drafters: 37
July 7, 2009 Sapiro E-mail to McCurdy & Difuntorum, cc Drafters & Chair. 37
August 1, 2009 Sapiro E-mail to KEM: 38
August 1, 2009 KEM E-mail to Sapiro: 38
August 2, 2009 Sapiro E-mail to Drafters (Kehr, Melchior & Mohr) 39
August 3, 2009 Kehr E-mail to Sapiro, cc Melchior & KEM: 40
August 9, 2009 Kehr E-mail to Drafters, cc Chair & Staff: 40
August 10, 2009 KEM E-mail to Drafters, cc Chair & Staff: 41

August 1, 2009 Sapiro E-mail to KEM:

I'm working on 1.11.

Earlier, you questioned why the informed consent is only from the government in (d)(2)(i). Isn't the consent of the former client required by (d)(1) under 1.9? Or did we delete the requirement of informed written consent of the former client under 1.9? If my analysis is correct, we should point out the requirement in a comment.

This resurrects my criticism of 1.9 that the consents should be from both the former and the current clients, but I lost that vote.

I am not sure what your concern is about (d)(2)(i) in the side-shifting petroleum industry executive. I think it does apply, but I don't think it is limited to that kind of situation. For example, I think it applies in the Santa Barbara case, and we should say we are overturning it.

But I would like to know what you would change before I redraft that paragraph or the comments. Are you available to speak by phone? If so, at which number should I call you?

August 1, 2009 KEM E-mail to Sapiro:

I've had family visiting from the east coast so I've been away from the computer today. They will leave tomorrow late morning. I'm afraid I can't speak with you today.

I'll be happy to talk w/ you tomorrow if you're available, perhaps in the afternoon between 1:30 and 5:00 p.m. You name the time. * * *

I've also answered some of your questions below in your e-mail. I don't think it fully answers your questions. I would like to talk with you and if you have the time tomorrow, I promise to keep it short.

Thanks and take care.

Kevin

Jerome Sapiro Jr. wrote:

I'm working on 1.11.

Earlier, you questioned why the informed consent is only from the government in (d)(2)(i). Isn't the consent of the former client required by (d)(1) under 1.9? Or did we delete the requirement of informed written consent of the former client under 1.9? If my analysis is correct, we should point out the requirement in a comment.

1. As I noted in my earlier e-mail from 7/4/09 (originally sent on 5/4/09), I think that (d)(1) is supposed to cover the consent from the former client. Our proposed Rule 1.9 still requires that the former private client give its informed consent.

a. I have a problem with that, however. First, it is unclear to the reader what he or she should do under the circumstances. Sure, (d)(1) incorporates by reference 1.9 and its requirements,

but why can't we just spell it out. However, we should probably do that in a comment and keep the Model Rule blackletter (more about this on the phone). Second, and more important, if 1.9 applies to the current government lawyer, then non-consensual screening of lawyers in government offices would not be permitted unless we adopt non-consensual screening in 1.10. That's why (d)(2) doesn't make sense to me. There is no express provision that provides for screening in a government office as permitted by the Court of Appeal under the Santa Barbara case and impliedly permitted by the S.Ct. in Cobra Solutions for government lawyers, so long as they are not the head of the office or otherwise in some position to make employment decisions about the lawyers actually participating in the matter.

b. The only screening provision in the Model Rule is 1.11(b), and that applies only to FORMER government employees or public officers.

This resurrects my criticism of 1.9 that the consents should be from both the former and the current clients, but I lost that vote.

2. I'm OK w/ not requiring consent of both clients. The real concern for me is that the former client be given full disclosure. If the former client is OK with it, I'm so not concerned with the present client. That client should be notified under 1.4 because the contemplated conduct is a significant development.

I am not sure what your concern is about (d)(2)(i) in the side-shifting petroleum industry executive. I think it does apply, but I don't think it is limited to that kind of situation. For example, I think it applies in the Santa Barbara case, and we should say we are overturning it.

3. I wasn't trying to argue that (d)(2)(i) should be limited to the side-shifting industry executive. It just seemed confusing to me why (d)(2)(i) is written to require only the consent of the government agency. I was using a petroleum executive as an example where the government would want to be satisfied the new government employee was not selling out the government interests, while the petroleum industry might be very happy to have someone "on the inside" (eight years of Bush has jaded my outlook). However, regardless of how advantageous it might appear, I think the former client (petro client) has to be given the opportunity to consent -- or reject. I'm just not satisfied that (d)(1) provides sufficient guidance to a lawyer or that it would permit screening of a government employee to enable the government office to continue the representation. See my #1, above.

But I would like to know what you would change before I redraft that paragraph or the comments. Are you available to speak by phone? If so, at which number should I call you?

August 2, 2009 Sapiro E-mail to Drafters (Kehr, Melchior & Mohr)

1. Attached is a redraft of proposed Rule 1.11. In this draft, I have inserted the version of paragraph (b) as adopted in our last meeting. I have changed the style of subsequent paragraphs to match the style of paragraphs (a) and (b) as adopted.
2. Please let me have the benefit of your comments and criticisms. You will see that I still have not tried to rewrite the comment.

3. Some time ago, Kevin raised an issue that we should discuss. In my words, not Kevin's, he says that, if 1.10 does not permit screening, we will have to work hard to sell screening for this rule. Having thought about it, I now believe that we should not have screening for this rule if we do not in 1.10. To me, politicians and others who play the revolving door game should not be a privileged class. We could delete screening from this rule. Adhering to the concept that this is a disciplinary rule, in disqualification motions courts could continue to decide whether screening will absolve a conflict on a case by case basis. That would leave up in the air whether screening in the government context is a defense in a disciplinary case. What are your thoughts?
4. Kurt, please look at your comments in footnote 8. Are there specific changes you think we should make to address your concerns?
5. Regarding paragraph (e), my sense is that we all do not recommend it be adopted. If that is the case, we can delete it from this draft and say why in a footnote, or we can leave it in this draft and add to the footnote that we do not recommend it be adopted. Again, I request your thoughts.
6. If we leave it in, what are your thoughts regarding footnote 25?
7. In any event, my recommendation is that, for the next meeting, we ask the Commission to consider the remaining parts of the Black Letter Rule. Once those parts have been adopted, then I would turn to the comments.
8. I tried to reach Bob on Saturday to discuss a couple of issues. If I have not spoken with you before you receive this email, please call me so we can speak.

August 3, 2009 Kehr E-mail to Sapiro, cc Melchior & KEM:

I just picked up your Saturday message. I'm afraid that my own schedule (knee surgery on Wednesday) will make it impossible for me to look at this until next weekend at the earliest. I'll do the best I can.

August 9, 2009 Kehr E-mail to Drafters, cc Chair & Staff:

I finally have been able to get to this and have the following comments on Jerry's draft dated 8/1/09:

1. There are some differences between your draft of paragraph (b) and the meeting notes. I won't try to list them here, but I think you should compare the current draft to Kevin's notes in order to put an accurate re-draft before the Commission.
2. According to Kevin's notes and to mine, the word "knowingly" in paragraph (b) was approved by a vote of 9-3-2, but I believe this is a substantive error and ask that my dissent be noted when the three-column chart is prepared. This bars a lawyer in from "knowingly" undertaking or continuing a representation when there is another lawyer in the firm who is prohibited from doing so under paragraph (a). The term "knowingly" means actual knowledge, which seems to me to leave a gap for conflicts that a firm reasonably should be able to locate through a competent conflicts checking system. Hawaii, Kansas, Massachusetts, and any other jurisdictions that have retained the 1983 version have avoided this with the following sentence: "A firm with which that lawyer is associated

may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.” As I read the reorganized and restated N.J. version, where this appears as paragraph (c), it also imposes an absolute requirement. I think this is closer to the mark but would prefer “reasonably should know” b/c it encompasses an appropriate conflicts check but nothing more than that. According to Kevin’s chart, this is exactly what Illinois has done: “No lawyer in a firm with which that lawyer is associated and who knows or reasonably should know of the lawyer’s prior participation may **knowingly** undertake or continue representation in such a matter unless:”

3. I do not agree that screening for this Rule must track what is done for Rule 1.10. Certain reasons have been given and traditionally accepted for treating former governmental lawyers differently. I would consider the two Rule separately.
4. With respect to paragraph (e), I agree that it should not be included. My recommendation would be to leave it to the development in civil disqualification arena. The head of the office problem is unusual, and the courts’ treatment seems to me to be fact specific. Under the facts of *Cobra Solutions* I wouldn’t want the lawyer to be under any risk of discipline. If there is any consideration of paragraph (e), I agree with your fn. 25 comment on (e)(1). That concept is a free pass for the lawyer’s self-conviction of his or her own rectitude, and I see it as the main problem with MR 1.7.
5. I’ve lost track of your pre-general anesthetic phone message to me last weekend, but I think you asked for my views on the Tennessee variation. There is one thing in its version that is materially different and worth discussing, which is its (b)(2): “determine that no lawyer representing the client has acquired any material confidential government information relating to the matter”. The implementation of screening procedures might lock to barn door too late, but my preference would be to consider this as part of a global definition of screening in Rule 1.0.1.

August 10, 2009 KEM E-mail to Drafters, cc Chair & Staff:

I've attached a revised draft 3.1 (8/9/09), compared to the Model Rule. The only change I made was to the introductory paragraph of (b) -- to change "if" back to the Model Rule's "when". In addition, I've added cross-references to my meeting notes. I've found this essential if I am to be able to track changes in the Rules. Finally, I've also changed the font to Arial 12-point. Until I get my new glasses prescription following my cataract surgery (probably not for another month), it is much easier for me to read Arial 12-point both on the computer screen and on hard copy during meetings than it is to read Times New Roman or Courier. Even smaller Arial fonts are easier for me to read than a serif typeface.

Responding to Bob's points:

1. See the revised draft I've attached for revisions.
2. I've addressed Bob's point earlier this morning in relation to Rule 1.10. Here is what I wrote:

I think I agree that the standard should be "knows or reasonably should know" to get at the "bad" lawyer who chooses not to run a conflicts check to run afoul of the rule. I say "I think," because I'm not sure the intent of the rule is to get at the "bad" lawyer so much as to provide a safe harbor for a "good" lawyer who does make the conflicts check but for some reason the information had not been inputted or if a "bad" lawyer in the firm decided not to input the information. Please see my May 2009 meeting notes for Rule 1.10, attached, at paragraph 1, where we had that discussion and Mark explained his

understanding of the purpose of the Rule. The Commission agreed w/ Mark by a 7-3-1 vote. I had suggested that "knowingly" should reach the lawyer that intentionally chose not to use the firm's conflict checking procedure and received looks that implied I had just flopped down from Pluto. I agree after that episode that "knowingly" means "actual" knowledge and that if you want to reach the "bad," "head in the sand" lawyer, you need to use the objective "know or reasonably should know." The question is whether we should expand the scope of the rule. I thought the previous vote indicated the Commission's intent not to do so. Perhaps others of the drafters can enlighten or some other members of the Commission might request that we revisit the issue.

3. As I've noted before, I don't buy the rationale that traditionally has been given for permitting screening in government lawyer situations but not in private lawyer cases. Although its opinion was superseded by the Supreme Court, I think the Court of Appeal in the Cobra Solutions case correctly questioned the traditional rationales, although ultimately it chose not to reject the concept of government lawyer screening (see 14 Cal.Rptr.3d 400, 406-407):

ABA Formal Opinion 342 and Chambers highlighted three reasons for allowing more limited prophylactic measures against the breach of confidences for attorneys coming from the public sector. First, vicarious disqualification impinges on a client's ability to retain the counsel of her choice (a consideration which, we note, is equally present in private sector cases). Second, vicarious disqualification might unduly limit a former government lawyer's employment prospects because she carries the taint of her prior work. Third, vicarious disqualification might hamper government recruiting efforts, as able lawyers elect not to do work that would later limit their employment prospects. (Chambers v. Superior Court, supra, 121 Cal.App.3d at p. 899, 175 Cal.Rptr. 575.) [FN7]

FN7. The extent to which these latter considerations enumerated in Chambers are any more manifest in public-to-private cases than they are in private-to-private cases is unclear. Attorneys leaving private firms like attorneys leaving public offices carry with them a taint for all substantially related matters in which they participated. It may well be that vicarious disqualification is an overbroad response to the problem of protecting client confidences and that it needs to be reconsidered. If so, it is not readily apparent why the disqualification is broader in private-to-private migration than in public-to-private migration or why the reasons identified in Chambers are sufficient by themselves to support different rules.

[15] Subsequent cases have confirmed that where migration from public service to private service is involved, vicarious disqualification is not automatically required. In Higdon v. Superior Court (1991) 227 Cal.App.3d 1667, 278 Cal.Rptr. 588, a court commissioner held hearings in two divorce cases, then left public service to join a firm representing one of the parties. The trial court ordered vicarious disqualification of the firm, but the court of appeal reversed the order as an abuse of discretion. It concluded that so long as an ethical screen was observed, no vicarious disqualification was needed. (Id. at p. 1680, 278 Cal.Rptr. 588.)

Cases involving migration from one public office to another public office similarly have countenanced more limited measures to protect client confidences. In Chadwick v. Superior Court (1980) 106 Cal.App.3d 108, 164 Cal.Rptr. 864, a public defender joined the district attorney's office, and his former clients moved to disqualify the entire district

attorney's office, notwithstanding the institution of an ethical screen. The court refused, exercising "particular caution" in declining to extend disqualification from the attorney to the office as a whole. (Id. at p. 115, 164 Cal.Rptr. 864.) In particular, the court noted that the migrating attorney had no policy or personnel evaluation authority in the district attorney's office. (Id. at pp. 112-113, 121, 164 Cal.Rptr. 864.) Like the court in Chambers, it relied on ABA Formal Opinion 342 for the proposition that vicarious disqualification does not apply to government lawyers. (Id. at p. 117, 164 Cal.Rptr. 864.) It emphasized that the financial interests of government lawyers are different: because they are not dependent on each other for their compensation, there may be less incentive to disclose confidential information. It accepted the possibility that in some cases, the structure of government offices might dispel the presumption that information would flow freely. It also emphasized that prosecutors must seek justice, not just convictions. (Ibid.)

The court did, however, point to two other reasons, either of which would appear to apply equally in the private lawyer context (14 Cal.Rptr.3d at 407-408):

The City Attorney's Office points to two other reasons for applying a different rule in public sector cases: cost and specialization. First, disqualification raises the cost of a given civil or criminal prosecution, and this higher cost may warrant proceeding with caution before disqualifying public sector attorneys and accepting ethical screens as sufficient in a broader category of cases. (See *People v. Christian* (1996) 41 Cal.App.4th 986, 998, 48 Cal.Rptr.2d 867.) "Disqualifications of public counsel can result in increased public expenditures for legal representation, and 'there is the potential for a substantially increased call upon an already severely strained tax base.' " (In re Lee G. (1991) 1 Cal.App.4th 17, 28, 1 Cal.Rptr.2d 375, quoting *People v. Municipal Court (Byars)* (1978) 77 Cal.App.3d 294, 301, 143 Cal.Rptr. 491.) This first concern goes beyond protection of the public fisc. Because disqualification can significantly raise the cost of prosecution, it changes the cost-benefit analysis of the decision whether to proceed with a given civil prosecution, and raises the possibility that defendants who threaten or obtain vicarious disqualification may avoid prosecution entirely. A broad disqualification rule for public sector attorneys is thus particularly susceptible to tactical abuse.

Second, disqualification of public sector attorneys has the potential to deprive the client of an attorney highly skilled in a particular area of the law, especially when the public law office has a unit with extensive experience in handling a particular sort of public law case. (In re Lee, supra, 1 Cal.App.4th at p. 28, 1 Cal.Rptr.2d 375.)

We can probably continue government lawyer screening without having to address the policies underlying why it has been permitted for so many years. After, we're not proposing to change current law. More difficult will be our rationale for rejecting screening in the private sector in light of our recommending its continuation for government lawyers.

4. Concerning paragraph (e), I agree that the first sentence of the introductory paragraph should not be included, but it could be flagged in a comment. However, I think the remainder of the comment is necessary to permit screening for the private lawyer moving to government employment. I think the Model Rule is woefully inadequate in protecting the interests of the moving lawyer's former, private citizen clients. California addresses the situation in the City of Santa Barbara case and we should flag that here.

5. I have no comments on this point.

Please let me know if you have any questions.

August 10, 2009 Sapiro E-mail to Drafters, cc Chair & Staff:

Thanks for doing this Kevin. It saved me a lot of time. I added to Kevin's draft and changed the date of the draft to today.

My additions were a new footnote 7, showing Bob and me as dissenters on "knowingly"; and

Bob, what I was trying to elicit in my telephone call a week ago Saturday was whether you want to try to add anything from Tennessee to this draft. If all you want is what is in your August 9th email, I suggest we take it up now. I do not see that as a "terminology" issue. If the confidential government information has already been given to the rest of the firm, screening would not be appropriate. This would not make that issue appropriate for the terminology rule. In addition, I thought there were additional issues you wanted to glean from the Tennessee rule.