

**McCurdy, Lauren**

RE: Rule 1.11 [3-310]  
11/6&7/09 Commission Meeting  
Open Session Agenda IV.D.

**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Thursday, October 29, 2009 12:16 AM  
**To:** Jerome Sapiro Jr.  
**Cc:** 'Robert L. Kehr'; 'Kurt Melchior'; 'Lamport, Stanley W.'; pkramer@energy.state.ca.us; Harry Sondheim; Difuntorum, Randall; Kevin Mohr G; McCurdy, Lauren  
**Subject:** Re: RRC - 1.11 [3-310] - IV.D. - 10/16-17/09 meeting  
**Attachments:** RRC - 3-310 [1-11] - COMPARE - Rule & Comment Explanation - DFT2 (10-28-09)JS-KEM-MARKED.pdf; RRC - 3-310 [1-11] - Dashboard - PUBCOM - DFT1 (10-28-09).pdf

Greetings all:

It took me a bit longer to do as other events interceded but I've attached the following:

1. Dashboard, Draft 1 (10/28/09), in PDF.
2. Rule & Comment Comparison Chart, Draft 2 (10/28/09)JS-KEM, in scaled PDF.

**KEM Comments:**

1. The Dashboard is based on the comments Jerry made in his 10/27/09 e-mail (@10:40 a.m.). I've added some case citations in a couple of places, but they should probably only be in one place (assuming we want to keep them).
  - a. In addition, I've changed the reasoning for why the rule might be viewed as "moderately controversial".
2. I decided that it would be best in terms of presenting the issues to build on the Comparison Chart that Jerry had circulated earlier. By building on it, I mean I kept Jerry's third column entries but substituted Draft 5.2 (10/28/09) in the middle column, and included all the footnotes to Draft 5.2 so we have some idea how we got to where we are and what issues remain.
3. To make it a bit easier on everyone, I've highlighted in yellow those issues that I believe remain.
4. I added Stan's substituted three comments ([Alt-1] through [Alt-1B]). As with other rule or comment language for which there are alternatives (see #5), I've shaded the table cells in which the alternative appears.
5. Alternatives. There are several places where the drafters have provided alternative provisions. They are:
  - a. Paragraphs (e) and (Alt-e). Jerry and KEM have offered alternatives. See footnotes 22-30 & accompanying text.

- b. Comment [1] and Comments [Alt-1] through [Alt-1B]. See footnotes 31-39 & accompanying text.
  - c. Comments [2] and [Alt-2]. See footnotes 40-41 & accompanying text.
  - d. Comments [9A] and [Alt-9A]. See footnotes 55-57 & accompanying text.
  - e. Comments [9B] and [Alt-9B]. See footnote 58 & accompanying text.
  - f. Comments [9D] and [Alt-9D]. See footnotes 51-53 & accompanying text.
6. Jerry wants to move MR 1.11, cmt. [10] up in the Comments to after Comment [6]. I would leave it where it is, at the end of the Comment section, where we have typically included definitions that appear in a comment.
7. Re-vote. In footnote 16, I request a re-vote of the vote the Commission took at its August 2009 meeting not to require the former private client's informed written consent in paragraph (d)(2)(i). If someone would please explain why the former private client's informed written consent is not required, I'll withdraw my request. The explanation for the request is in footnote 16. (d)(2)(i) is not about imputation or screening. It is about permitting the lawyer w/ the personal prohibition to be personally involved on the government's side against his or her former private client in a matter in which the government lawyer was "personally and substantially involved" w/o requiring the former private client's informed consent. That strikes me as stunningly inappropriate. What am I missing? Please help me out here.
8. Finally, I didn't see Bob's comments from last night until a few minutes ago and I'm just too tired to try to put them in the attached. Please accept my apologies. I do want to mention, however, that I disagree with Bob's characterization that both versions of paragraph (e) are an attempt to codify the Cobra Solutions and Younger cases. The paragraphs are intended to do much more: to provide a screening alternative for private-to-government lawyers (which is California law under the Santa Barbara case) so the office can rebut the presumption of shared confidences. We need to include that alternative if the rule imputes the private-to-government lawyer's knowledge to the government office (something the Model Rule does not; see MR 1.11, cmt. [2]). The reference to those cases are an exception to the general rule that screening is available. If the Commission decides not to have imputation in government offices, then fine. There will be no need for a screening provision (and thus no need to refer to the facts of Cobra). But as I've mentioned before, that would create a very uneven playing field. If a lawyer goes from a private client to government, that lawyer need only obtain the government agency's consent to become personally involved in the very matter in which he or she represented the former private client and, even if the government agency does not consent, there is no requirement that the lawyer be screened. Compare that to the Commission's decisions on 1.10; the knowledge possessed by the private-to-private moving lawyer IS IMPUTED to every other lawyer in the firm,

and not even a limited screening provision is available.

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

Kevin

Kevin Mohr wrote:

Jerry:

Please see my e-mail from earlier today. I combined your 9/26 draft and my 9/15 draft and sent it out on 10/7 to the drafters and Paul Kramer. If we go back to your 9/26 draft, we're working at cross-purposes. I re-sent that 10/7 e-mail and have suggested we just go with the draft I previously circulated. I agree that we should not provide a comparison chart and have asked Harry for his input. It will just confuse things further.

Please review my draft 5.1 (10/5/09). We can clarify any disagreements we might have by e-mail before the e-mail deadline. For your convenience and the convenience of the recipients, I've attached both a redline and annotated version of draft 5.1, as well as my meeting notes from the September meeting.

**I've sent these to all the recipients twice already so if any recipient has already downloaded them, don't bother retrieving the attachments.**

Please, let's not make more work for ourselves. We have enough to do as it is. Thanks,

Kevin

Jerome Sapiro Jr. wrote:

Dear Kevin, Bob, Kurt, and Stan:

I see that our spreadsheet on Rule 1.11 is due by Wednesday. It seems to me silly to have to have a spreadsheet before the Commission has voted on the Comment. Nevertheless, I have drafted and attached a spreadsheet on the assumption that the comment that I distributed to you on September 26<sup>th</sup> will substantially be adopted by the full Commission.

A word of caution. On Monday, I asked Randy to send me by email a Word version of a spreadsheet for Rule 1.11. He did send it to me, but the comments in it did not conform with the draft comments that I sent you on September 26<sup>th</sup>. That is not surprising because we have not circulated the draft comments to the full Commission.

In the draft spreadsheet, I tried to insert in the middle column all of the comments as I distributed them to you on September 26<sup>th</sup>. I then drafted the explanations of changes in light of those.

I have not figured out how to add the subheadings in the comment.

Kevin, you will see that I have not tried to insert footnotes into the black letter rule in this spreadsheet. Are you able to do so without too much difficulty?

I do not have a blank form to use for the dashboard for this rule. It seems to me that we can show that the model rule has been substantially adopted and we are making some material additions to it; and the same for the comment, although for the comment we should add that there are some material deletions. We should check the boxes that show that we considered existing California law (Rule 3-310) and state rule variations including but not limited to New York and the District of Columbia. I would mark this as moderately controversial because we are allowing law firms and government agencies to insulate themselves from imputed disqualification. However, at this time we do not know the stakeholders will be other than participants in the revolving door.

With best regards to all of you,

Jerry

(9930.16:533:vy)

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Kevin E. Mohr

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

(Draft #5.2, 10/28/09)

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

**Primary Factors Considered**

- Existing California Law

Rule	RPC 3-310.
Statute	
Case law	<i>City &amp; 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)

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

The proposed Rule departs from the Model Rule by requiring 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:

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></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:<sup>1</sup></p> <p>(1) is subject to<sup>2</sup> Rule 1.9(c); and</p>	<p>Paragraphs (a) and subparagraph (1) are identical with the Model Rule.</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<sup>3</sup> 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, <del>confirmed in writing</del>, to the representation. <u>This paragraph shall not apply to matters governed by Rule 1.12(a).</u><sup>4</sup></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 in a quandary about which rule applies in a given circumstance.</p>

\* Proposed Rule 1.11, Draft 5.2 (10/2/2008). Redline/strikeout showing changes to the ABA Model Rule

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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 <del>disqualified</del>prohibited from representation under paragraph (a),<sup>5</sup> no lawyer in a firm with which that lawyer is associated may knowingly<sup>6</sup> undertake or continue representation in such a matter unless:<sup>7</sup></p>	<p>Proposed paragraph (b) is substantially the same as Model Rule 1.11(b). However, the word “disqualified” has been changed to “prohibited” because 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 could use screening in order to avoid imputation of a conflict from one lawyer to the rest of the law firm.</p> <p>A minority of the Commission dissents from this paragraph because the use of the word “knowingly” will require actual</p>

<sup>5</sup> **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.

<sup>6</sup> On July 24, 2009, the use of the word “knowingly” was approved 9:3:2. See 7/24-25/09 KEM Meeting Notes, III.C., at ¶. 5A. 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.

<sup>7</sup> 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.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>knowledge before a lawyer who has a conflict of interest under this rule may be disciplined. That 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 <del>disqualified</del>prohibited lawyer is timely and effectively<sup>8</sup> screened from any participation in the matter and is apportioned no part of the fee therefrom;<sup>9</sup> and</p> <p>(2)<sup>10</sup> written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this <del>rule</del>Rule.</p>	<p>Subparagraphs (1) and (2) substantially track the language of the Model Rule. However, “prohibited” is substituted for “disqualified” for the same reasons stated in respect to paragraph (b), <i>supra</i>.</p> <p>The phrase “and effectively” has been added in order 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>

<sup>8</sup> **RRC Action:** See footnote 13, below.

<sup>9</sup> **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).

<sup>10</sup> **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.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></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)<sup>11</sup> 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 <del>and which, that</del>, 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 <del>which that</del> 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 <del>disqualified prohibited</del><sup>12</sup> lawyer is timely <del>and effectively</del><sup>13</sup> screened from any participation in the matter and is apportioned no part of the fee therefrom.</p>	<p>Proposed paragraph (c) substantially 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>

<sup>11</sup> **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to delete paragraph (c) by a 2-9-1 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 2A.

<sup>12</sup> See footnote 5.

<sup>13</sup> **RRC Action:** At the 8/28-29/09 meeting, the RRC voted 6-4-1 to retain the phrase "and effectively" in paragraph (c). See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 3A.

The Chair deemed approved the addition of "and effectively" to paragraph (b)(1). Id. at ¶. 3B.

Finally, the Consultant noted the necessity to change the phrase "promptly and reasonably" in proposed Rule 1.12(d)(1) to "timely and effectively." Id. at ¶. 3C.

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<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 substantially the same as Model Rule 1.11(d).</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<sup>14</sup></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<sup>15</sup> while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed <u>written</u> consent, <del>confirmed in writing;</del><sup>16</sup> or<sup>17</sup></p>	<p>In subparagraph (d)(2)(i), "informed written consent" has been substituted for "consent confirmed in writing" because the phrase "informed written consent" provides greater client protection than the Model Rule formulation.</p>

<sup>14</sup> **Possible Further Drafting:** At the 8/28-29/09 meeting, the Chair directed the drafters to attempt to resolve the discrepancy between paragraph (a)(1), which subjects lawyers only to MR 1.9(c) and paragraph (d)(1), which subjects lawyers to MR 1.7 and 1.9. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 5.f. See ¶. 5 for discussion.

<sup>15</sup> **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to delete the term "personally and substantially" from paragraph (d)(2) and both its subparagraphs by a 0-9-3 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 7A.

<sup>16</sup> **Consultant's Note/Request:** I realize a vote has been take on this issue, (see footnote 17, below), but if paragraph (d)(1) means what its says and the lawyer owes duties either to a former client under Rule 1.9 or a current client under Rule 1.7 (I presume that 1.7 applies only to a lawyer serving *part-time* as a "public officer or employee," i.e., one who still has clients in his or her private practice), then shouldn't the former and/or current clients have to give their consent to the lawyer's personal participation in the matter? We're not talking about screening in this paragraph; we're talking about a lawyer *personally* participating *on the government side* in a matter in which the lawyer "participated personally and substantially" while in private practice. To only require the consent of the government entity is a slap in the face to the former (and current) clients. Adding the requirement of private client consent would parallel paragraph (b), which requires the consent of the "appropriate government agency" for a *former* government lawyer to

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<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</p>	<p>(ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, <u>or with a law firm for a party,</u><sup>18</sup> in a matter in which the lawyer is participating personally and substantially, except<sup>19</sup> that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator<sup>20</sup> may</p>	

participate personally and substantially in the matter. I can accept non-consensual screening of the prohibited lawyer. I have a hard time accepting a lawyer actively participating in the same matter in which he or she participated personally and substantially – without the consent of the former, private-practice client.

There is the problem of a public office who statutorily cannot delegate his or her responsibilities (e.g., the Attorney General); such a government official should not have to obtain the consent of the his or her former clients. However, such situations are covered by the introductory clause of paragraph (d) (“Except as law may otherwise expressly permit ...”).

**Request:** Therefore, I ask that we revisit this question.

<sup>17</sup> **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to insert in the black letter of paragraph (d)(2)(i) the express requirement that the lawyer must obtain the consent of the former client by a 0-9-3 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 8A.

The lead drafter agreed to include a note to that effect in a comment. Id. at ¶. 8A.a.

<sup>18</sup> **Consultant's Note:** I've added this reference to “law firm for a party” to parallel the same prohibition as we drafted it for proposed Rule 1.12. The same kind of restrictions should be applicable here.

<sup>19</sup> **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to delete the language in paragraph (d)(2)(ii) from “except” to then end by a 2-9-0 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 9A.

<sup>20</sup> **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated by a 4-7-0 vote a motion to revise paragraph (d)(2)(ii) as follows:

“. . . judge, to another adjudicative officer or to an arbitrator . . . “

See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 9B.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).</p>	<p>negotiate for private employment as permitted by Rule 1.12(b)<sup>21</sup> and subject to the conditions stated in Rule 1.12(b).</p>	
	<p>(e)<sup>22</sup> <b>[JS] If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule and is the head of the government office, agency, or department or is supervisory lawyer therein, no lawyer serving in the same government office, agency, or department may knowingly undertake or continue representation in the matter. If the prohibited lawyer is not head of the office, agency or department and is not a supervisory lawyer therein, no other lawyer therein may knowingly undertake or continue representation in the matter unless:</b></p> <p>(1) <b>the personally conflicted lawyer reasonably believes that he or she will be able to provide competent and diligent representation; and</b></p>	<p>The Commission added paragraph (e) and its subparagraphs because, if a lawyer moves from private practice to government employ or from one government agency to another government agency, paragraph (d) of Rule 1.11 will impute the conflict of interest of that lawyer to the rest of the government office. Under some circumstances, the government agency should be permitted to avoid imputation of such conflicts by a timely and effective screen. However, if the affected lawyer is the head of the government office or is a supervisory lawyer, screening should not be available to avoid the imputation of the conflict of interest. <i>City &amp; County of San Francisco v. Cobra Solutions, Inc.</i>, 38 Cal. 4<sup>th</sup> 389, 852-54 (2006). <i>Younger v. Superior Court</i>, 77 Cal. App. 3d 892 (1978).</p> <p><b>NOTE: SEE (Alt-e), AN ALTERNATIVE TO PARAGRAPH (e), BELOW.</b></p>

<sup>21</sup> **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to delete the first reference to “1.12(b)” paragraph (d)(2)(ii) by a 3-6-0 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 9C.

<sup>22</sup> In the September 11, 2009 meeting, the RRC voted to restore paragraph (e) and its subparagraphs in order to permit screening in the private practice to government context or in the government to government context. At the August 28-29, 2009, meeting, the RRC voted to delete the paragraph. In the September 11, 2009, meeting, the drafting team was instructed to draft paragraph (e) and related comments. The first sentence is based on *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4<sup>th</sup> 389, 852-54 (2006); and *Younger v. Superior Court*, 77 Cal. App. 3d 892 (1978).

**Consultant's Note:** Paragraph (e) and its subparagraphs are Jerry Sapiro's proposal. See (Alt-e), which is an alternative proposal by KEM.

<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>(2) the personally conflicted lawyer is timely screened from any participation in the matter;</p> <p>(3) if the conflict is based on the application of Rule [1.7] or [1.9], advise the personally conflicted lawyer's other or former client in writing of the circumstances that warranted implementation of the screening procedures required by this Rule and of the actions taken to comply with this Rule. However, if notice to the other or former client is prohibited by law or by Rule 1.6, screening is not available to avoid the effects of conflicts of interest.</p>	
	<p>(Alt-e)<sup>23</sup> [KEM] If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule and is the head of the government office, agency, or department or is supervisory lawyer therein, no lawyer serving in the same government office, agency, or department may</p>	

<sup>23</sup> **RRC Action:** At the 9/11/09 meeting, the Chair directed the drafters to reconsider deleted paragraph (e) and propose related comments. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 3B. See also discussion at ¶. 3.

<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><del>knowingly undertake or continue representation in the matter. If the prohibited lawyer is</del><sup>24</sup><del>not head of the office, agency or department and is not a supervisory lawyer therein, no other lawyer therein serving in the same government office, agency or department as the</del> prohibited<sup>25</sup> lawyer may knowingly undertake or continue representation in the matter unless:</p>	
	<p>(1) <del>the prohibited lawyer is neither (i) the head of the office, agency or department, or a lawyer with comparable managerial authority, nor (ii) a lawyer with direct</del></p>	

<sup>24</sup> **RRC Action:** At the 8/28-29/09 meeting, the RRC defeated a motion to retain the first sentence of proposed paragraph (e) by a 4-7-1 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 10A. That sentence provided:

If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule and is the head of the government office, agency, or department or is supervisory lawyer therein, no lawyer serving in the same government office, agency, or department may knowingly undertake or continue representation in the matter.

~~At the same meeting, the RRC defeated a motion to retain the second sentence of proposed paragraph (e) by a 3-7-1 vote. See 8/28-29/09 KEM Meeting Notes, III.C., at ¶. 10B. That sentence provided:~~

~~If the prohibited lawyer is not head of the office, agency or department and is not a supervisory lawyer therein, no other lawyer therein may knowingly undertake or continue representation in the matter unless:~~

~~With the deletion of introductory clause of paragraph (e), the remainder of the paragraph was deemed deleted. Id.~~

**Consultant's Note:** However, during the deliberations at the 9/11/09 meeting, several members and the Consultant suggested we should not try to codify *Cobra Solutions* in the Rule itself because of the questions left unanswered by the opinion. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 3. I have suggested a modification to the introductory paragraph of (e). See footnote 26.

<sup>25</sup> **Consultant's Note:** Jerry has suggested "personally conflicted" lawyer. I have suggested "prohibited" lawyer, which is the term we have used in proposed Rule 1.10 and also in paragraph (b).

<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>supervisory authority over any of the lawyers participating in the representation;<sup>26</sup></p>	
	<p><del>(2) the disqualified lawyer reasonably believes that he or she will be able to provide competent and diligent representation; and<sup>27</sup></del></p>	

<sup>26</sup> **Consultant's Note:** Rather than place the condition of not being the head of the office or supervisor in the introductory clause, I thought it would be cleaner to track the language of paragraph (b) in the introductory clause, and insert the requirement that the migrating lawyer not be the head of, or a supervisory lawyer in, the office as a subparagraph along with the other conditions to permitting screening.

I've added the phrase "or a lawyer with comparable managerial authority," which is taken from Model Rule 5.1(a) (and our proposed Rule 5.1) in an attempt to encompass other lawyers in senior management in the government office who might be able to influence lawyers handling the matter in a manner similar to that of the office head. The Court in *Cobra Solutions* did not reach that issue but suggested it might be a problem.

In addition, I tweaked the "supervisory" lawyer prohibition to require only those lawyers with "direct supervisory authority" over the other lawyers working on the matter. This language is taken from MR 5.1(b). I'm not sure that we should extend the holding of *Cobra Solutions* to mid-level supervisors who have no authority over the lawyers actually working on the matter.

Alternatively, we can keep the broadly prohibitory from the previous draft (i.e., "a supervisory lawyer therein") and include a comment to the effect that whether a particular supervisory lawyer can be screened will depend upon the particular facts and circumstances. For example, if the prohibited lawyer has direct supervisory authority over any of the lawyers involved in the matter, then no screen would be permitted. If, on the other hand, the prohibited lawyer has supervisory authority over a different unit of the office that is not involved in the representation, a screen would probably be permitted.

<sup>27</sup> **KEM Note:** Whether we characterize the migrated lawyer as the "disqualified" lawyer, the "prohibited" lawyer, or the "personally conflicted lawyer," this subparagraph does not make sense to me. Paragraph (e) is limited to whether other lawyers in the office will be permitted to represent the government. Whether the "infected" lawyer believes he or she will be able to provide competent representation in the matter is irrelevant. The "infected" lawyer is prohibited from participating by paragraph (d), the premise of the introductory clause ("If a lawyer is prohibited ... under paragraph (d)). I would delete this subparagraph.

**Alternative:** Having just read proposed Comment [9A], I think that if we keep this subparagraph, it should provide something along the following lines:

<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>(2) the prohibited lawyer is timely screened from any participation in the matter; <u>and</u></p>	
	<p>(3)<sup>28</sup> <u>if the prohibition is based on the application of Rule [1.7] or [1.9],<sup>29</sup> advise the personally disqualified prohibited lawyer's <del>other or</del> former client is notified<sup>30</sup> in writing of the circumstances that warranted implementation of the screening procedures required by this <del>Rule paragraph</del> and of the actions taken to comply with <del>this Rule</del> those requirements. However, if notice to the <del>other or</del> former client is prohibited by law or by Rule 1.6, the exception to <del>disqualification the imputation of the prohibited lawyer's conflict of interest to other lawyers in</del> the office, agency, or department under <del>this</del> paragraph (e) shall</u></p>	

~~the disqualified~~the lawyers in the government office, agency or department who are actually participating in the representation reasonably believes that ~~he or she~~they will be able to provide competent and diligent representation

<sup>28</sup> Consultant's Note: I prefer that we treat the notice requirements for a screen globally. In any event, I am still having trouble with the "present" or "current" client situation. If the prohibition arises because the lawyer is a part-time government employee and does have a current client that give rise to a conflict, then loyalty is at issue and a **non-consensual** screen should never be permitted. I would limit the availability of a screen to the former client situation.

<sup>29</sup> Consultant's Note: I would delete this first clause, i.e., "if the prohibition is based on the application of Rule 1.7 and 1.9." That is already covered by the express terms of (d)(1).

<sup>30</sup> Consultant's Note: I've substituted "notified" for "advised" to conform to the language used in Comment [9B], below.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p align="center">not be available.</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>(f) 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 with 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"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></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 <del>these Rules of Professional Conduct,</del><sup>31</sup> including the prohibition against concurrent conflicts of interest stated in Rule 1.7, and conflicts resulting from duties to former clients stated in Rule 1.9.<sup>32</sup> 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)<sup>33</sup> for the definition of informed <u>written</u><sup>34</sup> consent.</p>	<p>Proposed Comment [1] is substantially the same as Model Rule Comment [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>[Alt-1] <u>[ISWL]</u><sup>35</sup> A lawyer who has served or is currently serving as a public officer or employee is personally subject to <del>the these Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. Paragraph (a) applies when a lawyer has formerly served as an</del></p>	<p><b>NOTE:</b> Please refer to footnote 35 for guidance on reviewing Comments [Alt-1] through [Alt-1B]. The Commission needs to decide between Comment [1], above, and these three comments. <b>NOTE:</b> The redline strikeouts and underlines are to MR 1.11, cmt. [1].</p>

<sup>31</sup> Changed to "these Rules" to conform to our style standards.

<sup>32</sup> Adapted to make clear that both Rule 1.7 and Rule 1.9 apply in the government or former government context.

<sup>33</sup> Rule number inserted to conform with current proposed Rule 1.10, but the paragraph letter is blank pending adoption and organization of that Rule.

<sup>34</sup> "Written" added to the defined phrase because paragraphs (a)(2) and (d)(2)(ii) both use "informed written consent" and not "conformed consent."

<sup>35</sup> Drafters' Note: Comments [Alt-1] through [Alt-1B] have been proposed by Stan Lamport as an alternative to proposed Comment [1]. The drafters have not yet had an opportunity to consider Stan's submission.

<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>officer or employee of the government and addresses the lawyer's duties to government as a former client. Paragraph (a)(1) requires such a lawyer to adhere to the requirements of Rule 1.9(c), which limits the use and disclosure of information relating to the work the lawyer performed as a former public officer or employee. Paragraph (a)(2) imposes restrictions on the lawyer's representation of clients with respect to matters in which the lawyer personally and substantially participated as a public officer or employee. Paragraph (a)(2) differs from the restrictions on representations adverse to a former client found in Rule 1.9(a) and provides a standard that is unique to lawyers who formerly served as a public officer or employee.<sup>36</sup></p>	
	<p>[Alt-1A] [SWL] Paragraph (d) applies when a lawyer is currently serving as a public officer or employee. When a lawyer serves as a public officer or employee, the lawyer is required to comply with Rule 1.7 with respect to the lawyer's role as a public</p>	

<sup>36</sup> **Consultant's Note/Recommendation:** This last sentence should not be included. It adds nothing to the Rule. It provides no guidance in the Rule's application and is potentially misleading in that it appears to suggest that a government lawyer who has been personally and substantially involved in the same matter would be treated differently than a private lawyer who has been personally and substantially involved in the same matter. Under Rule 1.11(a)(2) and 1.9(a), both government and private lawyer will be personally disqualified. It is only under paragraph (b), and paragraph (e) if adopted, both of which permit non-consensual screening of lawyers, that government lawyers are be treated differently.

<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>officer or employee, in such cases when Rule 1.7 applies.<sup>37</sup> In addition, when a lawyer formerly represented clients in private or non-governmental practice, the lawyer is required to comply with Rule 1.9 with respect to those former clients when Rule 1.9 applies.<sup>38</sup> When a lawyer currently serving as a public officer or employee formerly served as a public officer or employee of another government entity, the lawyer is required to comply with paragraph (a) of this Rule instead of Rule 1.9.<sup>39</sup></p>	
	<p>[Alt-1B] [SWL] In addition, <del>such</del> a lawyer who has served or is currently serving as a public officer or employee 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>	

<sup>37</sup> **Consultant's Question/Recommendation:** Why is the qualification, "in such cases when Rule 1.7 applies" included here? The Model Rule makes not such distinction. I would delete the clause.

<sup>38</sup> **Consultant's Question/Recommendation:** Same question as in the previous footnote. Also, why is the structure here "when Rule 1.9 applies," but the clause concerning Rule 1.7 states: "*in such cases* when Rule 1.7 applies"? (emphasis added). As I suggested in the previous footnote, I recommend deleting the clause.

<sup>39</sup> **Consultant's Question:** If this statement is accurate, would the facts of *In re Charlissee C.* (2008) 45 Cal.4th 145, 84 Cal.Rptr.3d 597, have come within 1.11(a)? Was the previous representation the "same" matter?

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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] <b>[JS]</b> 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, paragraphs (b) and (e) sets forth a special imputation rules for former and current government lawyers. They also 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. Paragraphs (b) and (e) permit the conflicts of a lawyer formerly or currently serving as an officer or employee of the government to be imputed to other lawyers in the law firm or to other associated government officers or employees.<sup>40</sup></p>	<p>The first sentence of proposed Comment [2] is identical with its counterpart in the Model Rule.</p> <p>The Commission modified the second sentence to refer to both paragraphs (b) and (e), and to refer to both former and current government lawyers, because the rule applies to both former and current government lawyers and because those paragraphs establish imputation and screening rules for the two sets of lawyers.</p> <p>The third sentence has also been modified to reflect that change.</p> <p>The Commission deleted the fourth sentence because it is not consistent with California law. See <i>City &amp; County of San Francisco v. Cobra Solutions, Inc.</i> and <i>Younger v. Superior Court</i>, both <i>supra</i>.</p> <p>The new fourth sentence has been added in order to accurately reflect what this rule will provide.</p> <p><b>NOTE: SEE [Alt-2], BELOW, FOR AN ALTERNATIVE PROPOSAL FOR THIS COMMENT.</b></p>

<sup>40</sup> Original sentence deleted and new sentence added in order to make explicit the difference between this proposed rule and Model Rule 1.11(d).

<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>[Alt-2] <del>[KEM]</del> 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. <del>Because of the special problems raised by imputation within a government agency, paragraph</del> Paragraph (d) <del>does not impute</del> 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 although ordinarily it will be prudent to screen such lawyers.<sup>41</sup></p>	<p><b>NOTE:</b> The redline strikeouts and underlines are to Jerry's proposed revision of Comment [2], above.</p>

<sup>41</sup> **Consultant's Note/Recommendation:** I've suggested a slightly different version of Jerry's proposed Comment [2]. Rather than address paragraphs (b) (former government lawyer) and (e) (current government lawyer) together, I have addressed them separately.

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Commission's Proposed Rule</b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
	<p>[2A]<sup>42</sup> Under paragraphs (a)(2) and (d)(2), the informed written consent of the government is required. In addition, the informed written consent of the lawyer's current client or former client is required by, respectively, Rule 1.7 and Rule 1.9. These consents are in addition to the consent of the government agency required under paragraph (d)(2)(i) of this Rule. To illustrate, if a former government lawyer now in private practice will represent a private client in a matter substantially related to a matter on which he or she works for a government agency, then the informed written consent of the private client will be required under Rule [1.7 ],<sup>43</sup> and the informed written consent of the government agency will be required under paragraph (a)(2) of this Rule. Similarly, if the government permits a lawyer to represent private clients while serving as an officer or employee of the government, the lawyer may not represent the</p>	

<sup>42</sup> **Consultant's Note:** At the 9/11/09 meeting, the RRC did not take any action on proposed Comment [2A], See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 6. Bob Kehr opposes its adoption: "I have suggested no alternative to your [2A], but I would not include it. I don't believe that this kind of serialization of the permutations does anything to help explain the Rule. The Rule seems to me to be reasonably straightforward. In any event, the long third sentence (beginning at line 37 of the attachment) is not right. It speaks of a former government lawyer although paragraph (d) addresses current government lawyers." See 9/5/09 Kehr E-mail. Jerry stated he would attempt to redraft it. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 6.a.(1). This is Jerry's redraft.

**Consultant's Recommendation:** I would delete the comment as drafted because it appears to conflate the obligations of former as opposed to current government lawyers. I think Jerry is trying to address the part-time government lawyer situation here but I'm not sure it is amenable to a tidy resolution in a Rule of Professional Conduct. Better to let the Rule develop through case law.

<sup>43</sup> Blank left for insertion of paragraph when Rule 1.7 is adopted.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p>government in a matter in which his or her present client is an adverse party without complying with Rule 1.7. Thus, the informed written consent of both the private client and the government agency is required by Rule 1.7, in addition to the informed written consent of the government agency under paragraph (d)(2)(i) of this Rule. If a lawyer who is serving as an officer or employee of the government will be working on a matter in which his or her former client will be an adverse party, and the matters are substantially related, Rule 1.9 requires the informed written consent of the former client in addition to the informed written consent of the government agency required under paragraph (d)(2)(i) of this Rule.</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</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</p>	<p>This proposed Comment is substantially the same as Model Rule Comment [3]. The references to "this Rule" and to specific paragraphs of Rule 1.11 have been added for clarity.</p>

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.</p>	<p>paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by <del>these</del> paragraphs <u>(a)(2) and (d)(2)</u>.<sup>44</sup></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 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</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 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</p>	<p>Proposed Comment [4] is substantially the same as Model Rule Comment [4]. The reference to paragraph (e) has been added because that paragraph has been added to the black letter rule.</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>The last sentence has been revised because this rule does not dictate whether a lawyer or law firm will be disqualified. Instead, this rule is a disciplinary rule, and the subject of disqualification will be decided by tribunals on a case by case basis.</p>

<sup>44</sup> **RRC Action:** At the 9/11/09 meeting, adoption of what was denominated Comment [Alt-3] in the meeting draft, which included the foregoing changes to MR 1.11, cmt. [3], was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 7.b.

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>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>to prevent <del>the disqualification rule</del> <u>this Rule</u> from imposing too severe a deterrent against entering public service. <del>The limitations of disqualification representation</del> in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than <del>extending disqualification</del> <u>imputing conflicts</u> to all substantive issues on which the lawyer worked, serves a similar function.<sup>45</sup></p>	
	<p><u>[4A]<sup>46</sup> 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 <del>or require</del><sup>47</sup> 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</u></p>	<p>The Model Rule does not have a counterpart of proposed Comment [4A]. The Commission added it to make clear the purposes of Rule 1.11(a)(1) and (c). This comment has been copied from proposed New York Rule 1.11 Comment [4A].</p>

<sup>45</sup> **RRC Action:** At the 9/11/09 meeting, a motion to strike the Comment except for the last two sentences was defeated by a 4-4-2 vote. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 8A.

<sup>46</sup> **RRC Action:** At the 9/11/09 meeting, proposed Comment [4A], derived from NY Rule 1.11, was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 9.b. The words "or require" that appear in the New York comment were deleted as has been done throughout the Rules.

<sup>47</sup> **Drafters' Note:** Consistent with the Commission's policy on drafting re confidentiality, the reference to "or require" has been deleted.

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><u>Commission's Proposed Rule</u></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><a href="#">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.</a></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</p>	<p>[5]<sup>48</sup> 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. <del>However, because the conflict of interest is governed</del></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 deleted because conflicts of interest may be imputed to an entire government agency under California law. See <i>City and County of San Francisco v. Cobra Solutions, Inc.</i> and <i>Younger v. Superior Court</i>, both <i>supra</i>.</p>

<sup>48</sup> **RRC Action:** [At the 9/11/09 meeting, adoption of MR 1.11, cmt. \[5\] was deemed approved, but with the deletion of the Model Rule comment's second sentence and substitution of the correct number of the comment to proposed Rule 1.13. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 10.b.](#)

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b></p> <p align="center"><b>Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>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><del>by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. Because the conflict of interest is governed by paragraphs (d) and (e), the latter agency is required to screen the lawyer.</del><sup>49</sup> 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].<sup>50</sup></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>[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"><b>Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)</b></p> <p>[6]<sup>51</sup> Paragraphs (b) and (c) contemplate a screening arrangement <b>for former government lawyers</b>. 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.]</p>	<p>This Comment is identical to Model Rule Comment [6].</p> <p>The second sentence is in brackets because the Commission will need to revisit it, depending on what the definition of "screening" will be in proposed Rule 1.0.1.</p>

<sup>49</sup> **Consultant's Note:** I've suggested a substitute sentence in the event the Commission adopts paragraph (e).

<sup>50</sup> **Drafters' Note:** The counterpart to MR 1.13, cmt. [9] in proposed Rule 1.13 is Comment [14].

<sup>51</sup> **RRC Action:** At the 9/11/09 meeting, the RRC voted 6-2-0 to retain MR 1.11, cmt. [6]. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 11A.

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 1.11 Special Conflicts Of Interest  For Former And Current Government  Officers And Employees  Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule</u></b>  <b>Rule 1.11 Special Conflicts Of Interest  For Former And Current Government  Officers And Employees  Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></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]<sup>52</sup> 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>This Comment is substantially the same as Model Rule Comment [7]. The phrase "to the appropriate government agency" is added in order to make clear to whom the notice must be given.</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]<sup>53</sup> Paragraph (c) operates only when the lawyer in question has <u>actual</u> knowledge of the information, <del>which means actual knowledge</del>; it does not operate with respect to information that merely could be imputed to the lawyer.</p>	<p>This Comment is substantially the same as Model Rule Comment [8]. It has been reworded for brevity. In its proposed comments, New York made the same change.</p> <p>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]<sup>54</sup> 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>This proposed Comment is identical with Model Rule Comment [9].</p>

<sup>52</sup> **RRC Action:** At the 9/11/09 meeting, adoption of MR 1.11, cmt. [7], as revised to add "to the appropriate government agency," was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 14.a.

<sup>53</sup> **RRC Action:** At the 9/11/09 meeting, adoption of MR 1.11, cmt. [8], as revised to substitute "actual" for the clause, "which means actual knowledge," was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 15.b.

<sup>54</sup> **RRC Action:** At the 9/11/09 meeting, adoption of MR 1.11, cmt. [9] was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 16.a.

<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><b>Screening of Current Government Lawyers Pursuant to Paragraph (e)</b></p> <p>[9A]<sup>55</sup> [JS] Paragraph (e) of this Rule permits a current government lawyer to undertake or continue a representation notwithstanding the conflicts of interest of another lawyer in the same office, agency or department if (i) the lawyer reasonably believes that the lawyer can provide competent and diligent representation in the matter and (ii) the office acts promptly and reasonably to comply with the notice and screening requirements of subparagraph (2).</p>	<p>Subheadings have been added to ease of reference when reading the Comment.</p> <p>Proposed Comment [9A] has no counterpart in the Model Rule. Because proposed Rule 1.11(d) would permit imputation of conflicts of interest to an entire government law office, the Commission has added paragraph (e) which, under certain circumstances, would allow the government law office to use an ethical screen to prevent imputation of the conflicts of interest. Proposed Comments [9A] and [9B] explain how this rule operates and make clear that the government law office is still subject to rules of confidentiality.</p>
	<p>[Alt-9A]<sup>56</sup> [KEM] Paragraph (e) of this Rule permits a current government lawyer to undertake or continue a representation notwithstanding <del>the that a</del> conflicts of interest <del>of-prohibits</del> another lawyer in the same office, agency or department <del>from participating in the matter</del> if: (i) <del>the prohibited lawyer is neither the</del></p>	<p><b>NOTE: The redline strikeouts and underlines are to Jerry's proposed Comment [9A], above.</b></p>

<sup>55</sup> Proposed Comments [9A] and [9B] are adapted from the comments proposed by New York.

<sup>56</sup> **Consultant's Note:** This is my proposed alternative to Comment [9A]. There is a problem with Comments [9A] and [9B] that has arisen before in the context of other rules: NY is one of two states that has law firm discipline, so the NY comment can be written in the active voice. However, we have avoided doing that with Rule 1.12 and in the black letter of this rule ("... unless: ... the prohibited lawyer is timely screened," etc.) I have revised the Comments accordingly and also suggest other revisions.

<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>head of the office, agency or department, or a lawyer with comparable managerial authority, nor a lawyer with direct supervisory authority over any of the lawyers involved in the representation; (ii) the lawyer reasonably believes that the lawyer can provide competent and diligent representation in the matter and (iii) <del>the office acts promptly and reasonably to comply with</del> there is timely compliance with the notice and screening requirements of subparagraph [(2) and (3)].<sup>57</sup></p>	
	<p>[9B] [JS] If the conflict arises from the government lawyer's prior representation of a client, the office, agency or department is required to notify the former client of the circumstances warranting the use of screens and the actions that have been taken to comply with the requirements of this Rule, unless providing notice would be in violation of law, such as Business &amp; Professions Code section 6068(e), or Rule 1.6. The requirement that the government lawyer's former client be notified cannot be fulfilled if notice would make public information that the government office, agency, or department is required to keep secret. For example, a prosecutor's office could not notify a personally disqualified lawyer's former client who is the subject of a pending grand jury investigation. In such circumstances, screening</p>	<p>See Explanation of Changes for Comment [9A]</p>

<sup>57</sup> **Consultant's Note:** I've placed "(2) and (3)" in brackets because, if we keep deleted subparagraph (2), (see footnote 27, above), then the correct reference is to "subparagraphs (3) and (4)."

<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>is not available.</p>	
	<p>[<del>Alt 9B</del>]<sup>58</sup> [KEM] If the conflict arises from <del>the a</del> government lawyer's prior representation of a client, <del>the office, agency or department is</del> paragraph (e) <del>required requires to notify</del> that the former client be notified<sup>59</sup> of the circumstances warranting the use of screens and the actions that have been taken to comply with the requirements of this Rule, unless providing notice would be in violation of law, such as Business &amp; Professions Code section 6068(e)(1), or Rule 1.6. The requirement that the government lawyer's former client be notified cannot be fulfilled if notice would make public information that the government office, agency, or department is required to keep secret. For example, a prosecutor's office could not notify a <del>personally disqualified</del> prohibited lawyer's former client who is the subject of a pending grand jury investigation. In such circumstances, screening is not available.</p>	<p><b>NOTE:</b> The redline strikeouts and underlines are to Jerry's proposed Comment [9B], above.</p>

<sup>58</sup> **Consultant's Note:** This is my proposed revision of Comment [9B].

<sup>59</sup> See footnote 56, Consultant's Note.

<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><b>This Rule Not Determinative of Disqualification</b></p> <p>[9C] This Rule does not address whether a law firm will be disqualified from <u>a representation</u> <del>in certain circumstances</del>. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal <del>in light of the relevant facts</del>.<sup>60</sup></p>	<p><b>NOTE: The redline strikeouts and underlines are to previous draft of the Rule considered at the 9/11/09 meeting.</b></p> <p>Proposed Comment [9C] is added in order to make clear that, although this rule affects discipline, whether a lawyer or law firm will or will not be disqualified as a matter to be determined by the appropriate tribunal and is not necessarily dictated by this rule. There is no model rule counterpart.</p>
	<p><b>[9D]<sup>61</sup> If the personally conflicted lawyer is the head of an office, or a supervisory lawyer who has responsibility for overseeing the matter that gives rise to the conflict, screening may not avoid disqualification. See, e.g., <i>City &amp; County of San Francisco v. Cobra Solutions, Inc.</i>, 38 Cal. 4<sup>th</sup> 389, 852-54 (2006); and <i>Younger v. Superior Court</i>, 77 Cal. App. 3d 892 (1978).</b></p>	<p>Proposed Comment [9D] has been added to make clear why paragraph (e) of the black letter rule does not apply if the personally conflicted lawyer is the head of a government office or a supervisory lawyer who has responsibility for overseeing the matter that gives rise to the conflict. There is no model rule counterpart. This Comment accurately reflects California decisional law.</p>

<sup>60</sup> **RRC Action:** At the 9/11/09 meeting, the RRC voted 8-2-0 to adopt Comment [9C] (then numbered [9A]), as revised during the meeting. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 17A.

<sup>61</sup> See footnote 62, 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 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>[9DAlt-9D]<sup>62</sup> This Rule does not address whether screening may be utilized by a government office to avoid disqualification. If the personally conflicted prohibited lawyer is the head of a government office, agency or department, or a supervisory lawyer who has responsibility for overseeing the matter that gives rise to the conflict direct supervisory authority over any of the lawyers participating in the representation,<sup>63</sup> screening may not avoid disqualification. See, e.g., <i>City &amp; County of San Francisco v. Cobra Solutions, Inc.</i>, 38 Cal. 4th 389, 852-54 (2006); and <i>Younger v. Superior Court</i>, 77 Cal. App. 3d 892 (1978).</p>	<p><b>NOTE:</b> The redline strikeouts and underlines are to Jerry's proposed Comment [9D], above.</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</p>	<p><u>Matter</u></p> <p>[10]<sup>64</sup> For purposes of paragraph (ef) 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</p>	

<sup>62</sup> **Consultant's Note:** At the 9/11/09 meeting, consideration of Comment [9D] (then numbered [9B]) was deferred pending the Commission's decision re proposed paragraph (e). See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 18.a. This comment, [Alt-9D] represents my proposed revision of the Comment that was under consideration at that meeting.

<sup>63</sup> See footnote 26, above. Language taken from Rule 5.1.

<sup>64</sup> **RRC Action:** At the 9/11/09 meeting, adoption of MR 1.11, cmt. [10] was deemed approved. See 9/11/09 KEM Meeting Notes, Supp. A., at ¶. 19.a.

**Consultant's Note:** Jerry suggested moving this Comment. I'd leave it here in the same order that "matter" appears in the Rule.

<u>ABA Model Rule</u> <b>Rule 1.11 Special Conflicts Of Interest  For Former And Current Government  Officers And Employees  Comment</b>	<u>Commission's Proposed Rule</u> <b>Rule 1.11 Special Conflicts Of Interest  For Former And Current Government  Officers And Employees  Comment</b>	<u>Explanation of Changes to the ABA Model Rule</u>
or related parties, and the time elapsed.	or related parties, and the time elapsed.	

**RRC – Rule 1.11 [3-310]  
E-mails, etc. – Revised (11/03/2009)**

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**September 26, 2009 Sapiro E-mail to Drafters (Kehr, Melchior & KEM), cc Paul Kramer (BOG):**

1. It is my recollection that Bob is now on vacation, but I send a copy of this email to him anyway. Bob, if you are not on vacation, please give attention to this email. If you are on vacation and receive this email anyway, ignore this email. It is better that you enjoy your vacation.
2. Attached is a new version of Rule 1.11. It is redlined to show differences from the Model Rule.
3. The biggest change is the addition of paragraph (e) and its subparagraphs. I used and edited the version that had previously been rejected by the Commission. The addition of that paragraph required me to make some changes in the Comment. In addition, I adapted into the Comment some paragraphs from the New York COSAC proposed comments that affect screening in the private to government context.
4. I added two subheadings in the Comment to break it up because it is long. Do you agree with adding them, and do you think there should be others?
5. Please give me the benefit of your comments, questions, and criticisms. My understanding is that this is due by September 30<sup>th</sup>.
6. Kevin, last week I sent you an email requesting your notes from the discussion on September 11<sup>th</sup> regarding this rule. You probably did not see it in the blizzard of emails about other matters. If you have composed your notes, or even a draft of them, I would appreciate a copy. At the last meeting, I was at the wrong end of the table from where most of the debate took place, and I am not sure that my notes accurately reflect what was discussed or decided. The attached rewrite reflects my best recollection of the results of the discussions.
7. I am sending a copy of this email to Mr. Kramer at his request.

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

hope you're doing well. Thanks for the draft. I had also done a revised draft of 1.11 but I didn't circulate it because it's not on the agenda again until the November meeting, with a due date of 10/28. See attached Supplemental Agenda that shows 1.11 is not due until 10/28 (last item on the agenda). I thought I had sent you an e-mail last week in reply to an inquiry you sent me about my notes explaining when the deadline for 1.11 was, but I'm mistaken.

Given the amount of work we all have for the October agenda, Harry didn't want 1.11 to get the in way of our focus for the October meeting. Rule 1.11 is a Batch 6 rule and Harry told us to give priority to the Batch 1, 2 and 3 rules.

We already have something like 26 rules on the agenda -- not counting the eight that are circulating on a 10-day ballot. Let's put this Rule off at least until after the agenda materials for the October meeting are circulated (the agenda submission deadline is next Wednesday, 9/30/09). I have some input on the Rule but, given my obligations on the October agenda, I

**RRC – Rule 1.11 [3-310]  
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can't look at this until at least next weekend. I suspect we're all in the same boat (I'm pretty sure Bob is). I will attempt to reconcile your draft w/ mine and circulate that to the recipients of this e-mail.

Finally, I've also included Stan on this e-mail. He has volunteered to assist the drafting team.

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

Thanks, Kevin. I thought I was instructed by Harry that this would be carried over to October. Oh well, I guess this just relieves some pressure for me for November. I apologize to all for sending this too early.

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

I've attached the following:

1. Rule 1.11, Draft 5.1 (10/3/09), redline, compared to Draft 4.1 (8/28/09), the draft the Commission considered at the September 11, 2009 meeting.
2. Rule 1.11, Draft 5.1 (10/3/09), annotated. This might be a bit easier to follow than the redline, but if you decided to comment by referencing line numbers, please refer to the line numbers in the redline version.
3. My 9/11/09 meeting notes for Rule 1.11.

**KEM Comments:**

1. I'm sending this now, although it is not due until 10/28. The priority, of course, is on the matters (34) set on the October 16-17, 2009 meeting agenda. However, I wanted to get this out to you because I will have very limited time to address this Rule after the October meeting.
  - a. I've also copied Stan (who has volunteered to try to redraft Comment [1]) and Paul Kramer from the BOG (who has requested that we keep him in the loop on this rule).
2. The attached draft is an attempt by me to merge Jerry's proposed draft (9/25/09), which he circulated to us on 9/26/09 and the draft I had prepared after the September meeting but had set aside when I saw that it was put on the schedule for the November 6-7, 2009 meeting. The main issue involves new paragraph (e), which is intended to address the discussion at the September meeting whether there should be imputation within government agencies and, if yes, whether screening should be permitted to rebut the presumption of shared confidences. That is what (e) attempts to do.
  - a. I've inserted Jerry's proposed paragraph (e), which is I believe is substantially the same the paragraph the Commission rejected at its August 2009 meeting, with some revisions.
  - b. Rather than mark up Jerry's proposed paragraph (e), I've inserted "(Alt-e)," which is the paragraph (e) from the earlier draft, marked up to address what I thought were some problems with that earlier proposal. I've tried to explain my changes in the footnotes to (Alt-e). Rather than repeating the discussion there, I ask you to please refer to those footnotes (23-30). I'll mention only that the biggest difference between the proposals is the introductory paragraph; I recommend moving much of what was in the previous introductory clause into subparagraph (1). See footnote 26.
3. Concerning (d)(2)(i), I request that we revisit that issue. See footnote 16 for the reasons for my request, but also don't forget footnote 17, which notes that the Commission already voted on this issue. I would like the Commission to vote again but if the drafters disagree, so be it. The Model Rule does not make much sense to me.
4. Concerning (d)(2)(ii), I conformed the MR language to the changes we made to our proposed Rule 1.12.

5. I've suggested a slightly different Comment [2] from what Jerry has suggested. See Comment [Alt-2] & note 36.
6. I recommend not adopting Comment [2A].
7. I've suggested a slightly different Comment [9A] from what Jerry has suggested. See Comment [Alt-9A] & notes 53 & 54.
8. Ditto for Comment [9B]. See Comment [Alt-9B] & notes 55 & 56.
9. Ditto for Comment [9D]. See Comment [Alt-9D] & notes 59 & 60.
10. Finally, I recommend keeping Comment [10] at the end of the Comment to the Rule.

Please let me know if you have any questions.

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

Given Harry's new rules, I want to confirm that you will get the Rule 1.11 materials done before the deadline.

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

I circulated a proposed revised rule, draft 5.1 (10/5/09) on 10/7/09 @ 7:27 a.m. I haven't heard anything back from any of the drafters or Stan. If I don't hear from the drafters by 5 tonight, that's what I will submit. I'll resend that e-mail presently in case you might have misplaced it in the recent blizzard.

I'll put it in comparison chart format if Harry insists but I argue against that because the comparison is to Draft 4 and it will be more helpful for the Commission members, given where we left off at the 9/11/09 meeting, to review the changes to Draft 4. Harry: Are you OK w/ that?

I teach all morning tomorrow and then have office hours, a faculty meeting, and then a faculty committee meeting until about 5 so I plan on sending in what I have by early morning tomorrow.

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

As promised, here is the e-mail sent earlier this month. As w/ the earlier e-mail, I've copied Paul Kramer from BOG as he has asked to be kept in the loop. Please include him in any responses.

As I noted in the e-mail I just sent the drafters, I need to hear from you by 5 p.m. tonight to meet the 12 noon deadline tomorrow.

See **October 7, 2009 KEM E-mail to Drafters, cc Lamport, Chair, Paul Kramer (BOG) and Staff:**, for information re attachments, etc.

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

1. I see that our spreadsheet on Rule 1.11 is due by Wednesday. It seems to me silly to have to have a spreadsheet before the Commission has voted on the Comment. Nevertheless, I have drafted and attached a spreadsheet on the assumption that the comment that I distributed to you on September 26th will substantially be adopted by the full Commission.
2. A word of caution. On Monday, I asked Randy to send me by email a Word version of a spreadsheet for Rule 1.11. He did send it to me, but the comments in it did not conform with the draft comments that I sent you on September 26th. That is not surprising because we have not circulated the draft comments to the full Commission.
3. In the draft spreadsheet, I tried to insert in the middle column all of the comments as I distributed them to you on September 26th. I then drafted the explanations of changes in light of those.
4. I have not figured out how to add the subheadings in the comment.
5. Kevin, you will see that I have not tried to insert footnotes into the black letter rule in this spreadsheet. Are you able to do so without too much difficulty?
6. I do not have a blank form to use for the dashboard for this rule. It seems to me that we can show that the model rule has been substantially adopted and we are making some material additions to it; and the same for the comment, although for the comment we should add that there are some material deletions. We should check the boxes that show that we considered existing California law (Rule 3-310) and state rule variations including but not limited to New York and the District of Columbia. I would mark this as moderately controversial because we are allowing law firms and government agencies to insulate themselves from imputed disqualification. However, at this time we do not know the stakeholders will be other than participants in the revolving door.

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

I am in a Board of Supervisors hearing in Santa Maria at the moment. I will be back in LA this evening and plan to work on my piece of this tonight. I am not sure this meets Kevin's 5 pm deadline, but I can't overcome the law of physics. I will look at Jerry's chart tonight as well.

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

Please see my e-mail from earlier today. I combined your 9/26 draft and my 9/15 draft and sent it out on 10/7 to the drafters and Paul Kramer. If we go back to your 9/26 draft, we're working at cross-purposes. I re-sent that 10/7 e-mail and have suggested we just go with the draft I previously circulated. I agree that we should not provide a comparison chart and have asked Harry for his input. It will just confuse things further.

Please review my draft 5.1 (10/5/09). We can clarify any disagreements we might have by e-mail before the e-mail deadline. For your convenience and the convenience of the recipients, I've attached both a redline and annotated version of draft 5.1, as well as my meeting notes from the September meeting.

**I've sent these to all the recipients twice already so if any recipient has already downloaded them, don't bother retrieving the attachments.**

Please, let's not make more work for ourselves. We have enough to do as it is.

See **October 7, 2009 KEM E-mail to Drafters, cc Lamport, Chair, Paul Kramer (BOG) and Staff:**, for information re attachments, etc.

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

Jerry's chart is based on a draft that has been superseded, so I don't advise looking at the chart. What I sent out this morning combines his and my drafts. That is the draft you should work on. It might be easier that you simply draft an insert that I can put into the rule to be sure we don't have several different drafts circulating.

By when can you get me your part of this tonight? If you have until 9 p.m. tonight, will that be enough time (barring Sig Alerts, etc.)?

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

Thanks, Kevin. I wish I had seen this before I composed the spreadsheet last night. Sigh. I suspect most of the explanations can just be copied from my draft after we see what the commission does to the comments.

I won't try doing that tonight in light of your remarks.

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

Jerry: Here are my comments on Draft 5.1 ---

1. Regarding footnote 14 and the possible discrepancy between paragraph (a)(1), which subjects lawyers only to MR 1.9(c), and paragraph (d)(1), which subjects lawyers to MR 1.7 and 1.9 – I don't think there is any discrepancy. The MR has it right. The reason is that 1.11(a)(1) deals with a lawyer who *formerly* served in government, and this calls into question only the lawyer's duties to a former client stated in Rule 1.9(c). Rule 1.11(d)(1) deals with a lawyer who *currently* serves in government, and this calls into question all of Rule 1.9 plus Rule 1.7. So far so good. My only concern is that a lawyer governed by paragraph (d)(1) is subject to requirements found outside of Rules 1.7 and 1.9, for example, in 1.8.7 and 1.8.11. My current thinking is that I would skip these other possible rule applications under the theory that they are strictly internal to the governmental client, as opposed to 1.7 and 1.9, both of which affect others, and the internal issues will be covered by Government Code, muni code, and other requirements.
2. Regarding fn. 16, it might be that I'm simply becoming punchy, but I don't follow Kevin's point, and I therefore ask that it be discussed at the meeting.

3. Regarding fn. 18, I support Kevin's addition of the law firm, which I think is an improvement on the MR language.
4. Paragraphs (e) and (alt-e) both attempt to codify the Cobra Solutions and Younger cases, an effort to which I am opposed. My view is that these cases are fact specific, and that the responsibilities of the head of an office should be left to case development in disqualification contests. Although I understand that the disqualification discussion in the related Comments might be an attempt to distinguish between disciplinary and civil consequences, I don't believe that the head of the office in these marginal situations should be threatened with possible discipline. Because I intend to vote against any version that refers to the head of the office, I will limit my comment here to the "reasonably believes" language in paragraph (e) (1), which I oppose for much the same reason as the similar language in MR 1.7.
5. I'm ok with Comment [1] as drafted. Despite fn. 34, I don't think anything more is needed for this vanilla statement.
6. I have no strong feeling about Comments [2] and [Alt-2].
7. I appreciate your effort to restate Comment [2A], but my feeling is the same. It is quite dense and I think more likely to cause confusion than to cure it. I would omit it entirely.

This brings me to the [9] comments, and this is where I will stop for the night.

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

1. Attached is a revised draft of Comment [1] along the lines I discussed at the September meeting. It worked out to three paragraphs, with the third retaining the reference to other laws and rules that was in Comment [1]. In light of this draft, the first sentence of whatever version of Comment [2] we adopt should be deleted.
2. I will address Kevin's comments separately before our next meeting as well as some additional comments I will have.
3. However, at this point, I must add that the more I work on this rule the more troubling I find it. This rule is not limited to a lawyer acting as a lawyer for a government entity. It applies to any lawyer who is a public officer or employee, even if not acting in the capacity as a lawyer. A lawyer who is a city councilmember or the director of an agency is subject to this rule. However, we are not clear about this in the Comments, and, in fact, we tend to use the phrase government lawyer in the Comments, which is going to lead the vast majority of lawyers who are not ethics insiders to think this rule is limited to that context, when it is not.
4. Having said that this rule is not limited to lawyers acting as such for the government, I am concerned that this rule would impose restrictions on lawyers who leave government service that would not apply to a non-lawyer in the same capacity for the government. I thought the point of this Rule was to facilitate government service by allowing lawyers who leave government service to do things that otherwise would be prohibited (hence the reason for screening in this rule and not elsewhere). But this rule goes further and imposes other limitations on a lawyer in a non-lawyer capacity that do not facilitate government service and may well impede it.

5. I do not understand why the Bar needs to take up matters that go beyond the role of a lawyer for the government in these rules. Lawyers working in a non-legal capacity for an agency should be subject to the restrictions that apply to anyone else in or leaving government service, particularly if the policy is to facilitate government service.
6. In saying this I realize that there are the fiduciary duty cases which may impose additional duties on lawyers who occupied a fiduciary, non-lawyer role for a government agency; but I think this rule goes way beyond what those courts have held. Plus those cases do not account for the general rules for the permissible use of information by a former government employee that should be the same for a lawyer who is not acting as a lawyer for the government.

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

It took me a bit longer to do as other events interceded but I've attached the following:

1. Dashboard, Draft 1 (10/28/09), in PDF.
2. Rule & Comment Comparison Chart, Draft 2 (10/28/09)JS-KEM, in scaled PDF.

**KEM Comments:**

1. The Dashboard is based on the comments Jerry made in his 10/27/09 e-mail (@10:40 a.m.). I've added some case citations in a couple of places, but they should probably only be in one place (assuming we want to keep them).

a. In addition, I've changed the reasoning for why the rule might be viewed as "moderately controversial".

2. I decided that it would be best in terms of presenting the issues to build on the Comparison Chart that Jerry had circulated earlier. By building on it, I mean I kept Jerry's third column entries but substituted Draft 5.2 (10/28/09) in the middle column, and included all the footnotes to Draft 5.2 so we have some idea how we got to where we are and what issues remain.

3. To make it a bit easier on everyone, I've highlighted in yellow those issues that I believe remain.

4. I added Stan's substituted three comments ([Alt-1] through [Alt-1B]). As with other rule or comment language for which there are alternatives (see #5), I've shaded the table cells in which the alternative appears.

5. Alternatives. There are several places where the drafters have provided alternative provisions. They are:

a. Paragraphs (e) and (Alt-e). Jerry and KEM have offered alternatives. See footnotes 22-30 & accompanying text.

b. Comment [1] and Comments [Alt-1] through [Alt-1B]. See footnotes 31-39 & accompanying text.

- c. Comments [2] and [Alt-2]. See footnotes 40-41 & accompanying text.
- d. Comments [9A] and [Alt-9A]. See footnotes 55-57 & accompanying text.
- e. Comments [9B] and [Alt-9B]. See footnote 58 & accompanying text.
- f. Comments [9D] and [Alt-9D]. See footnotes 51-53 & accompanying text.

6. Jerry wants to move MR 1.11, cmt. [10] up in the Comments to after Comment [6]. I would leave it where it is, at the end of the Comment section, where we have typically included definitions that appear in a comment.

7. Re-vote. In footnote 16, I request a re-vote of the vote the Commission took at its August 2009 meeting not to require the former private client's informed written consent in paragraph (d)(2)(i). If someone would please explain why the former private client's informed written consent is not required, I'll withdraw my request. The explanation for the request is in footnote 16. (d)(2)(i) is not about imputation or screening. It is about permitting the lawyer w/ the personal prohibition to be personally involved on the government's side against his or her former private client in a matter in which the government lawyer was "personally and substantially involved" w/o requiring the former private client's informed consent. That strikes me as stunningly inappropriate. What am I missing? Please help me out here.

8. Finally, I didn't see Bob's comments from last night until a few minutes ago and I'm just too tired to try to put them in the attached. Please accept my apologies. I do want to mention, however, that I disagree with Bob's characterization that both versions of paragraph (e) are an attempt to codify the Cobra Solutions and Younger cases. The paragraphs are intended to do much more: to provide a screening alternative for private-to-government lawyers (which is California law under the Santa Barbara case) so the office can rebut the presumption of shared confidences. We need to include that alternative if the rule imputes the private-to-government lawyer's knowledge to the government office (something the Model Rule does not; see MR 1.11, cmt. [2]). The reference to those cases are an exception to the general rule that screening is available. If the Commission decides not to have imputation in government offices, then fine. There will be no need for a screening provision (and thus no need to refer to the facts of Cobra). But as I've mentioned before, that would create a very uneven playing field. If a lawyer goes from a private client to government, that lawyer need only obtain the government agency's consent to become personally involved in the very matter in which he or she represented the former private client and, even if the government agency does not consent, there is no requirement that the lawyer be screened. Compare that to the Commission's decisions on 1.10; the knowledge possessed by the private-to-private moving lawyer IS IMPUTED to every other lawyer in the firm, and not even a limited screening provision is available.

Please let me know if you have any questions.