RE: Rule 1.9 [3-310]
2/26&27/10 Commission Meeting
Open Session Agenda Item V.C.

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Wednesday, February 10, 2010 7:43 AM
To: Robert L. Kehr; Stan Lamport; Kurt Melchior
Cc: Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G; Raul L. Martinez
Subject: Re: RRC - 1.9 [3-310] - V.C. - Draft 7 (2/9/10)
Attachments: RRC - 3-310 [1-9] - Dashboard - ADOPT - DFT4 (02-09-10)KEM.doc; RRC - 3-310 [1-9] - Dash, Intro, Rule, Comment, Clean, Pub Com - COMBO - DFT4(02-09-10).pdf; RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - DFT3 (02-09-10)RLK-KEM.doc; RRC - 3-310 [1-9] - Rule - DFT7 (02-09-10) - CLEAN.doc; RRC - 3-310 [1-9] - Compare - Rule & Comment Explanation - DFT5 (02-09-10).doc; RRC - 3-310 [1-9] - Compare - Introduction - DFT4 (02-09-10).doc

Greetings:

I went ahead and created the other documents so we can make the agenda deadline today at noon. I've attached a scaled PDF file that includes the following documents:

1. Dashboard, Draft 4 (2/9/10)KEM;

2. Introduction, Draft 4 (2/9/10);

3. Rule & Comment Comparison Chart, Draft 5 (2/9/10);

4. Rule 1.9, Draft 7 (2/9/10), CLEAN. This is the draft I sent you all last night, with the proposed changes accepted.

5. Public Comment Chart, Draft 3 (2/9/10)RLK-KEM.

I have also attached each of the five files that comprise the PDF in their Word versions.

Finally, I've also copied Raul because he stated his intent to submit a dissent on this Rule.

Notes:

1. Changes that I made to the previous drafts that were considered at the 1/22-23/10 meeting are highlighted in gray.

2. However, changes in the middle column of the Rule/Comment Comparison Chart (i.e., changes to the Rule itself) are highlighted in yellow, except for the two issues I raised with you in the draft I circulated last night, which are in turquoise. They are:

a. Substitution of "information relating to a former client" for "information relating to the representation". In Rule 1.8.2, we changed “information relating to the representation of a client” to “information relating to a client.” Should we make the same change here? An argument in favor is that we no longer define what is meant by “relating to the representation of a client” and using

one phrase in 1.8.2 and another in 1.9 might cause confusion. An argument against is that 1.8.2 concerns current clients, where the duty of loyalty is a primary concern, thus warranting the broader, more inclusive “related to a client” standard, while a lawyer should only be required to protect information relating to a representation of a former client.

Alternative: Substitute “information protected by Business and Professions Code section 6068(e)” for “information relating to the representation” in both (c)(1) and (c)(2).

Alternative: Leave the Model Rule language alone.

b. Addition of sentence to Comment [11] re "public record" vs. "generally known". Again, the only reason I've suggested this is because the Commission voted down Rule 1.6, which did include a sentence on this issue. There is no other rule that uses the term "generally known," so if we are going to include this distinction, this is the appropriate rule for it.

3. Public Comment Chart. Depending upon what is done w/ the Rule, we might have to make some changes to the Public Comment Chart (i.e., the public record/generally known issue is addressed in several places there.

I think that's it. Please let me know if you have any questions. Thanks,

Kevin

Kevin Mohr wrote:
Greetings:

Before I proceed with the remaining documents (Dash, comparison charts, etc.), I wanted to run Draft 7 by the drafters on a couple of issues.

Please see footnotes 5, 7 and 19 of the attached draft and give me your thoughts on the changes I've proposed. I don't think the change at note 19 is necessary but I think we might have to make the change at notes 5 and 7 in light of the vote on 1.6 at the last meeting.

If you can get back to me tonight on this, it would be great. I'm off to class now but should be done about 8:30 tonight.

Thanks,

Kevin

--
Kevin E. Mohr
Professor
Western State University College of Law

1111 N. State College Blvd.
Fullerton, CA 92831
714-459-1147
714-738-1000 x1147
714-525-2786 (FAX)
kevin_e_mohr@compuserve.com
kevinm@wsulaw.edu

--

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

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

(**Draft #7, 2/9/10**)

Summary: This Rule addresses conflicts of interest that arise when a lawyer's current representation is adverse to a client that the lawyer or the lawyer's firm (while the lawyer was still at the firm) formerly represented in the same or a substantially related matter. The black letter substantially follows the Model Rule but the Rule's comment is modified to address California case law. See Introduction & Explanation of Changes to the Comments.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☐ ABA Model Rule substantially rejected
☐ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☑ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rule	RPC 3-310(E)
Statute	Bus. & Prof. Code §6068(e)
Case law	*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; *In re Matter of Lane* (Rev.Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735

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

New Jersey Rule 1.9.

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __10___
Opposed Rule as Recommended for Adoption __1___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included on Model Rule Comparison Chart: ☑ Yes ☐ No
(See the introduction.)

☑ No Known Stakeholders

☐ The Following Stakeholders Are Known:

☐ Very Controversial – Explanation:

☑ Moderately Controversial – Explanation:

See the introduction and the Explanation of Changes for paragraph (b) of the proposed Rule and Comment [5] to the proposed Rule in the comparison chart.

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.9* Duties to Former Clients

February 2010
(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 1.9, which governs a lawyer's duty to former clients, is substantially the same as Model Rule 1.9. The minor changes to the language in the black letter of Model Rule 1.9 are for clarity and to include the same reference to the California State Bar Act that has been made in a number of other Rules. The Comments to proposed Rule 1.9 contain substantive additions and deletions to the Model Rule counterparts that, in part, explain relevant California case law and elaborate on the meaning of the phrase "substantially related" as used in the rule. Of particular note is Comment [5], in which the Commission recommends that the Supreme Court reject the position taken by the Review Department in *In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735, that the substantial relationship test, which provides an irrebuttable presumption in civil disqualification matters, is also applicable to disciplinary proceedings. See Explanation of Changes for Comment [5].

Minority. [To be submitted by Raul Martinez by 2/14/10]

* Proposed Rule 1.9, Draft 7 (2/9/10).

ABA Model Rule Rule 1.9 Duties to Former Clients	Commission's Proposed Rule* Rule 1.9 Duties to Former Clients	Explanation of Changes to the ABA Model Rule
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.	(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent~~, confirmed in writing~~.	The Commission proposes the adoption of Model Rule paragraph (a) except for the substitution of the more client-protective requirement that the lawyer obtain the client's *written* consent to the lawyer's adverse representation. This change affords more client protection and is consistent with California's requirement of *written* consent in other conflict situations.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.	(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a law firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer, while at the former law firm, had acquired information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent~~, confirmed in writing~~.	Proposed paragraph (b) is substantially the same as the corresponding Model Rule paragraph. The addition of "law" to modify "firm" conforms to the Rules style. The first change in (b)(2) is non-substantive; it clarifies that paragraph (b) applies when a lawyer learned information about a former client while in an earlier law firm association. The purpose of paragraph (b) is to describe the application of Rule 1.9 when the lawyer has departed that earlier law firm; the additional phrase in subparagraph (2) clarifies this connection. The addition of the reference to Bus. & Prof. Code § 6068(e) was made in response to public comment expressing concerns over the scope of protection afforded by proposed Rule 1.6. Although the Commission does not agree with the expressed concern, it has added the reference. Proposed paragraph (b) also substitutes the requirement of *written* consent in place of the MR's laxer "confirmed in writing" standard.

* Rule 1.9, Draft 7 (2/9/10). Redline/strikeout showing changes to the ABA Model Rule.

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

ABA Model Rule Rule 1.9 Duties to Former Clients	Commission's Proposed Rule* Rule 1.9 Duties to Former Clients	Explanation of Changes to the ABA Model Rule
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.	(2) reveal information relating to ~~the representation~~ a former client except as these Rules or the State Bar Act would permit ~~or require~~ with respect to a current client.	The proposed changes in (c)(2) track those proposed for (c)(1).

ABA Model Rule Rule 1.9 Duties to Former Clients Comment	Commission's Proposed Rule* Rule 1.9 Duties to Former Clients Comment	Explanation of Changes to the ABA Model Rule
[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.	[1] After termination of a lawyer-client relationship, the lawyer ~~has certain continuing~~ owes two duties to the former client. The lawyer may not (i) do anything that creates a substantial risk that it will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564**)** These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide information to the lawyer that will be protected as required by Business and Professions Code section 6068(e) and Rule 1.6 without fear that any such information later will be used against the client. [~~1~~2] Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would result in the lawyer doing work that would injuriously affect the former client with respect to ~~confidentiality and conflicts of interest and thus may not represent another client except~~a matter in ~~conformity with this Rule~~which the lawyer represented the former client. ~~Under this Rule, for~~	Proposed Comments [1] and [2] materially revise Model Rule Comment [1] in order to more fully explain how and why Rule 1.9 protects former clients, and to avoid any suggestion that proposed Rule 1.9 modifies long-standing California authority regarding a lawyer's duties to former clients. The Supreme Court's opinion in *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 (cited in proposed Comment [1]) and other authority such as *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 159, emphasize that a lawyer has two duties to former clients. Both of these duties are described and explained in these proposed Comment paragraphs. The Commission believes that it is essential to preserve this case law, and it further believes that Model Rule 1.9 is consistent with these California principles. However, adopting the Model Rule Comment risked obscuring these points and thus causing misunderstanding of the Rule's extremely important restrictions on lawyer conduct.

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

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

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

ABA Model Rule Rule 1.9 Duties to Former Clients Comment	Commission's Proposed Rule* Rule 1.9 Duties to Former Clients Comment	Explanation of Changes to the ABA Model Rule
determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.	~~lawyer~~paragraph (a) would not ~~be precluded, on~~apply if the ~~grounds of substantial relationship, from defending~~lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent~~. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client~~ if there is ~~not required to reveal the confidential information learned by the lawyer in order to establish a~~no substantial ~~risk that~~relationship between the ~~lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client~~land use and ~~information that would in ordinary practice be learned by a lawyer providing such services~~eviction matters.	

ABA Model Rule Rule 1.9 Duties to Former Clients Comment	Commission's Proposed Rule* Rule 1.9 Duties to Former Clients Comment	Explanation of Changes to the ABA Model Rule
	[4] Paragraph (a) applies when the lawyer's representation is in the same matter as, or in a matter substantially related to, the lawyer's representation of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation) and Rule 1.7, Comment [15].	Proposed Comment [4] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is. Also, it includes a reminder of the important concept that a lawyer sometimes can avoid the violation of duties owed to a former client, just as a lawyer sometimes can avoid the violation of duties owed to a current client, by limiting the scope of a new representation. This reminder includes cross-references to Rule 1.2(c) (limiting the scope of a representation) and to Rule 1.7, Comment [15] (discussing the same point in the context of a lawyer's duties to a current client).
	[5] The term "substantially related matter" as used in this Rule is not applied identically in all types of proceedings. In a disqualification proceeding, a court will presume conclusively that a lawyer has obtained confidential information material to the adverse engagement when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current	Proposed Comment [5] has no direct corollary in the Model Rule Comment. It also is part of the expanded explanation of what a "matter" is and includes citations to pertinent California appellate opinions. In addition, the Commission is recommending that Review Department's opinion in *In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735, be rejected. In that opinion, the Review Department suggested that the substantial relationship test,

ABA Model Rule Rule 1.9 Duties to Former Clients Comment	Commission's Proposed Rule* Rule 1.9 Duties to Former Clients Comment	Explanation of Changes to the ABA Model Rule
	dispute normally would have been imparted to the attorney. (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454) This disqualification application exists, at least in part, to protect the former client by avoiding an inquiry into the substance of the information that the former client is entitled to keep from being imparted to the lawyer's current client. (See *In re Complex Asbestos Litigation*, (1991) 232 Cal.App.3d at p. 592; *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes does not apply and the lawyer can provide evidence concerning the information actually received in the prior representation.	which provides an irrebuttable presumption in civil disqualification matters, was also applicable to disciplinary proceedings. The Commission determined that the Review Department's conclusion is ill-advised in those situations where the lawyer's new client is not present and the lawyer will be afforded an opportunity to provide direct evidence of what information the lawyer actually obtained in the prior representation.
	[6] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code section 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent	Proposed Comment [6] has no direct corollary in the Model Rule Comment. It is part of the expanded explanation of what a "matter" is and is intended to underline that the concept of a "matter" should be understood within the context of the purposes of Rule 1.9 as they are explained in Comment [1].

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

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

ABA Model Rule Rule 1.9 Duties to Former Clients Comment	Commission's Proposed Rule* Rule 1.9 Duties to Former Clients Comment	Explanation of Changes to the ABA Model Rule
	matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.	
[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.	[~~6~~9] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm ~~whose disqualification is sought~~~~t~~to which this Rule applies.	Proposed Comment [9] is nearly identical to Model Rule Comment [6], but removes the reference to disqualification in the last sentence.
[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).	[~~7~~10] ~~Independent of the question of disqualification of a firm, a~~A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c).	Proposed Comment [10] is substantially the same as Model Rule Comment [7]. However, the proposed Comment removes the reference to lawyer disqualification. Although the Commission understands that Rule 1.9 will be cited when disqualification issues are raised, it has written the Rule primarily for disciplinary purposes and does not want to suggest that it presumes to

ABA Model Rule Rule 1.9 Duties to Former Clients Comment	Commission's Proposed Rule* Rule 1.9 Duties to Former Clients Comment	Explanation of Changes to the ABA Model Rule
		dictate to courts how to exercise their authority, for example, under C.C.P. § 128(a)(5). In addition, a reference to Bus. & Prof. Code § 6068(e) has been added. See Explanation of Changes for paragraph (b)(2), above.
[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.	[~~8~~11] Paragraph (c) provides that confidential information acquired by ~~the~~a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. ~~However,~~See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)	Proposed Comment [11] is based on Model Rule Comment [8]. The first set of changes clarify that it (and Rule 1.9) speak only of confidential information that is protected by Rule 1.6, not to non-confidential information that a lawyer might have learned in the course of representing a former client. The addition of the last sentence was made in response to public comment received on this Rule and proposed Rule 1.6 expressing concerns that information in the public record is not generally known.
[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With	**Client Consent** [~~9~~12] The provisions of this Rule are for the protection of former clients and can be waived if the former client gives informed written consent~~, which consent must be confirmed in writing under paragraphs (a) and (b)~~. See Rule 1.0(e). With regard to the effectiveness of an advance	Proposed Comment [12] is much the same as Model Rule Comment [9]. There are two substantive changes. First, the proposed Comment substitutes California's more client-protective requirement of "informed written consent" in place of the Model Rule's requirement of "consent confirmed in writing" (this change can be seen in paragraphs (a) and (b) of the proposed Rule, and

ABA Model Rule Rule 1.9 Duties to Former Clients Comment	Commission's Proposed Rule* Rule 1.9 Duties to Former Clients Comment	Explanation of Changes to the ABA Model Rule
regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.	~~waiver~~consent, see Comment [22] to Rule 1.7. With regard to ~~disqualification~~the application of a lawyer's conflict to a firm with which a lawyer is or was formerly associated, see Rule 1.10.	is consistent with the same change made in other proposed conflicts Rules). Second, as explained with respect to Comment [10], this removes the reference to disqualification.

Rule 1.9 Duties To Former Clients

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

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

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

(2) about whom the lawyer, while at the former law firm, had acquired information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.

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

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

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

Comment

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

[2] Paragraph (a) addresses both of these duties. It first addresses the situation in which there is a substantial risk that a lawyer's representation of another client would

result in the lawyer doing work that would injuriously affect the former client with respect to a matter in which the lawyer represented the former client. For example, a lawyer could not properly seek to rescind on behalf of a new client a contract the lawyer drafted on behalf of the former client. A lawyer who has prosecuted an accused person could not represent the accused in a subsequent civil action against the government concerning the same matter.

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

[4] Paragraph (a) applies when the lawyer's representation is in the same matter as, or in a matter substantially related to, the lawyer's representation of the former client. The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. An underlying question is whether the lawyer was so involved in the earlier matter that the subsequent representation justly can be regarded as changing of sides in the matter in question. A lawyer might avoid the application of this Rule by limiting the scope of a representation so as to exclude matters on which the lawyer has a conflict of interest. See Rule 1.2(c) (limiting the scope of representation) and Rule 1.7, Comment [15].

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

149 Cal.App.3d 931, 934) In disciplinary proceedings, and in civil litigation between a lawyer and a former client, where the lawyer's new client is not present, the evidentiary presumption created for disqualification purposes does not apply and the lawyer can provide evidence concerning the information actually received in the prior representation.

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

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

Lawyers Moving Between Firms

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

[9] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence

of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm to which this Rule applies.

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

[11] Paragraph (c) provides that confidential information acquired by a lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the former client. See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

Client Consent

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

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

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

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

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					applied more flexibly in criminal cases. In addition, since Comment [5] to Proposed Rule 1.10 incorporates Rule 1.9, and applies the same disqualification rules where the former client was represented by a lawyer who is no longer employed by the firm, Rule 1.10, subdivision (b)(1), and Comment [5] must likewise be modified.	
2	COPRAC	M			We agree with the minority as to the issue involving Business and Professions Code section 6068(e) and proposed Rule 1.6, in that it appears to COPRAC that the definition of confidential information set forth in proposed rule 1.6 is narrower than the scope of Section 6068(e). The proposed rule references the State Bar Act; Comment [3] references Rule 1.6; Comment [7] then refers to both section 6068(e) and Rule 1.6; and finally Comment [10] then references yet a further iteration, a duty to preserve confidential information "about a client." COPRAC suggests that uniformity of reference would assist practitioners in applying the rule. Reference to section 6068(e) and Rule 1.6 (assuming that rule is re-crafted to address the concerns of the minority) would be appropriate.	The Commission does not agree with the commernter's concerns because both proposed Rule 1.6(a) and current rule 3-100(A) expressly prohibit disclosure of information protected under Bus. & Prof. Code § 6068(e). Nevertheless, there is no important reason for not including dual references to Rule 1.6 and Section 6068(e), and the Commission has edited Rule 1.9 accordingly.
				Comment [3]	Comment [3] appears to have an incorrect reference to the type of work being performed by the lawyer who is the subject of the second	The Commission agrees and has made the suggested change.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					example in this Comment. The lawyer's previous representation in a land use matter is compared, first, with a zoning matter (considered to be substantially related) and, second, with an eviction matter (considered to not be substantially related). The example incorrectly concludes by stating "there is no substantial relationship between the *zoning* and the eviction matters." The word "zoning" in this phrase should be replaced with the words "land use" in order for the proper comparison to be made.	
				Comment [5]	Comment [5] should be revised to state "The evidentiary presumption created for disqualification purposes should not apply in a disciplinary context."	See the reply to OCTC re Comment [5], below.
					We note the Rule uses the terms "firm" and "law firm." We recommend that a uniform term be used throughout.	The Commission agrees and generally has used "law firm" except that it generally has dropped the modifier where there is a second reference to a firm soon after an earlier one so that confusion is unlikely.
				paragraph (b)	We believe that the language of sub-section (b) is unclear as to what is required to be known. COPRAC proposes that section (b) be rewritten as follows: "(b) A lawyer shall not represent a person in a matter which the lawyer knows to be the same or substantially related to a	The Commission disagrees and has not made the requested change. Paragraph (b) is essentially identical to the corresponding Model Rule provision, and the Commission is not aware that its drafting has lead to confusion in the many jurisdictions in which it has been adopted.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					matter in which a law firm with which the lawyer formerly was associated had represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer, while at the former law firm, had acquired information that is protected by Business and Professions Code section 6068(e) and Rule 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent."	
6	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	M			PREC is generally supportive of the proposed Rule and its Comments. However, there is some concern that the Comments are too long, give practice pointers, and are suggestive of means to avoid disqualification in a way that may be viewed as attempting to create substantive law for civil proceedings. Comments [8] and [9] in particular seem directed to provide guidance not just to lawyers but also to Courts on the subject of disqualification. Comments that refer to disqualification are not just for disciplinary purposes – they seem calculated to specifically address how Courts will handle	The Commission's response regarding Comment [8] is given immediately below. On Comment [9], the Commission disagrees that its discussion of burdens is not appropriate. The court in *Adams v. Aerojet-General*, 86 Cal. App. 4th 1324 (2001) relied on this particular comment in reaching its well-settled decision. Although the allocation of the burden might depend on the situation in which the issue arises, such as in a damage claim by a former client, a disciplinary proceeding or a disqualification motion, the statement is accurate.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					disqualification.	
				Comment [8]	With respect to Comment [8], the disqualification reference could be avoided by saying that such representation is not a violation of this rule.	The Commission agrees and has removed the reference to disqualification in Comment [8].
				Comment [9]	If Comment [9] is to be retained, the last sentence should be modified to make it clear that the burden of proof should rest upon the firm *and the lawyer* whose disqualification is being sought. Paragraph (b) of the Proposed Rule is about a lawyer, not just a firm. We note, however, that the disciplinary rules are no place to set civil burdens of proof or regulate disqualification.	The Commission has also revised Comment [9] to remove the reference to disqualification. The Commission does not believe it is necessary to add the phrase "and the lawyer". Because the lawyer is in the firm that is the subject of the Rule, the burden will necessarily also fall on the individual lawyer.
				1.9(c)(1) and (2)	PREC also has some concern about the repeated references to the State Bar Act, in subsections (c)(1) and (2). We note that the reference to the State Bar Act in a disciplinary rule is too broad, and carries with it the same lack of clarity that would come with language such as "except otherwise as provided by law." If the primary concern by reference to the State Bar Act is Section 6068(e), and if that is the intent, the rule should simply refer to that section.	The Commission agrees that the broad reference to the State Bar Act could lead to confusion. However, the legislature presumably has the authority to create exceptions to the general rule of client confidentiality by revising other sections of the statute, and narrowing the Rule as suggested might interfere with any such action by the legislature.
				Comment [11]	Regarding Comment [11], we are concerned about the last sentence that seems to convey	The Commission believes that the concept of what information is "generally known" is well understood,

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					that a lawyer is free to disclose any information about a former client that is "generally known information." This is not well defined and leaves open the possibility of being construed by lawyers as *carte blanche* to reveal information from the public record. If the sentence is retained, we believe the meaning of "generally known information" should be clarified, and distinguished from public record information.	i.e., it describes that category of information, learned by a lawyer as a result of representing a client, that the lawyer is permitted to use or repeat. Nevertheless, the Commission has added a sentence to the Comment that draws a distinction between "public record" and "generally known," without absolutely prohibiting use of generally-known client information in the public record.
7	Office of Chief Trial Counsel ("OCTC"), State Bar of California			1.9(a) & 1.9(b)	1. OCTC is concerned that paragraphs (a) and (b) have added an undefined term, "materially adverse," rather than "adverse" in the current rule. This is a significant change in the law. This will create uncertainty for lawyers and make prosecution more difficult.	The Commission disagrees as this language is found in other jurisdictions without causing confusion so far as the Commission is aware.
				1.9(b)	In addition, paragraph (b) should reference § 6068(e), as well as Rules 1.6 and 1.9(c).	The Commission agrees and has made the requested change. See the Commission response to the COPRAC letter.
				1.9(c)(1)	2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit ... or when the information has become generally known" in paragraph (c)(1). First, OCTC repeats the concern it raised in relation to proposed Rule 1.6 that lawyers are required to disclose confidential information under some circumstances. Second, OCTC	The Commission disagrees and has not made the requested change. OCTC misunderstands the *Johnson* decision. It does not say that a lawyer never can disclose pubic information but rather that a lawyer is not free to disclose information simply because it can be found among public records; information might be in a public record but not generally known. See also Comment [11], the last sentence of which draws a distinction between

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					notes that currently, a lawyer may not reveal information in the public record if the lawyer learned of that information during or because of the representation. See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.	"generally known" information and "information in the public record," but does not absolutely prohibit the disclosure of public record information.
				1.9(c)(2)	3. Paragraph (c)(2) references the exception to current clients. First, like paragraph (c)(1), (c)(2) raises issue of whether the confidentiality rules should require some disclosures. Second, unlike (c)(1), paragraph (c)(2) does not include the language "or when the information is generally known." This requires clarification.	The Commission disagrees and has not made the requested change. OCTC is correct that paragraph (c)(2) does not express an exception for information that is generally known. However, that paragraph prohibits the disclosure of confidential information, and the Commission does not see how a lawyer could be considered to have "disclosed" information that already is generally known.
				Cmt. [5]	4. The statement in Comment 5 that the substantial relationship test presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: "Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.) " (Id at 747.) If there is to	Comment [5] describes a distinction between the application of the substantial relationship test in disqualification and in other contexts. After lengthy deliberations, the Commission has concluded that the *Lane* case's reliance on the substantial relationship test in the disciplinary context is misplaced, and has revised Comment [5] to reflect that position.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with Comment [5]'s analysis, which states the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; the new client can learn of them even if not present by reading the pleadings or a transcript. The new client may also be a witness. The Commission's Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney's mind. It would create numerous disputes as to what the client really told the lawyer. Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions. Moreover, the presumption springs from the fact that all attorney-client communications	

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrtcy S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) Most importantly, without the conclusive presumption, OCTC would be forced to	

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While Woods addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.	
				Cmt. [6]	5. Comment [6] presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related."	The Commission believes Comment [6] is correct and cannot tell from the OCTC letter how it might be edited.
				Cmt. [7]	Comment [6] also does not reference Business & Professions Code section 6068(e). Yet, Comment [7] does reference section 6068(e). The difference in these Comments could create some confusion and uncertainty.	The Commission agrees and has added the 6068(e) reference to Comment [6].
				Cmt. [11]	As to Comment [11], OCTC is concerned that, like paragraph (c) itself, what is meant by "generally known information" and this Comment appears not consistent with the established law that section 6068(e) is broader than the attorney-client privilege. Section 6068(e) has generally been	The Commission disagrees with OCTC's position that "section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that is in the public record." See reply to the OCTC comment on paragraph (c)(2), above. Nevertheless, the Commission has added a sentence to the Comment that draws a distinction between "public record" and

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

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					understood to preclude attorneys from disclosing information they obtained from the client that is in the public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the current law.	"generally known," without absolutely prohibiting use of generally-known client information in the public record.
1	Orange County Bar Association	M		1.9(c)(1) & (2)	The OCBA is concerned that the change from the Model Rule in paragraphs (c)(1) and (2), to substitute "current client" for "client," potentially introduces ambiguity. As former clients continue to enjoy various protections against use and disclosure of their confidential information, it is not clear whether the modified reference to "current client" is intended to narrow the exception to apply only to rules applicable to current clients, to the exclusion of rules permitting disclosures as to former clients. The OCBA accordingly asks the Commission to clarify the meaning and intent behind the reference to "a current client" in the exception.	The Model Rules usually refer to current clients without the modifier "current", which sometimes causes a lack of clarity as to whether the reference includes former clients. The Commission has adopted the style of including "current" whenever a misreading otherwise might be possible. In paragraph (c) the reference to "current" client is correct and emphasizes that the duty of confidentiality to former clients is no less than is owed to current clients. The Commission has not made the requested change. Subparagraph (c)(1) provides a good example because, without "current" it confusingly would read: "... use information relating to the representation to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a client,".
				Comment [1]	Comment [1] should be amended to substitute "with respect to" for "in" on line five (with the phrase to read ". . . will injuriously affect his or her former client with respect to any matter. . .") so that the Comment is not read as restricted only to the very matter in which the	The Commission has not made the requested change. The questioned phrase is taken directly from the Supreme Court's opinion in *Wutchumna Water Co. v. Bailey*, 216 Cal. 564 (1932), where it appears multiple times.

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					attorney represented the former client.	
				Comment [4]	Comment [4] should be amended to add "in" after "is" in the second line (simply to correct what appears to be a typographical error).	The Commission agrees and has made the suggested addition.
				Comment [7]	Comment [7] should be amended to substitute ". . . with respect to any matter in which the lawyer represented the former client" for "in any manner in which the lawyer represented the former client" (in the third sentence, subpart (i)), to clarify the meaning of the Comment, consistent with our suggestions for Comment [1].	This repeats the suggestion made with respect to Comment [1], and for the same reason the Commission has not made this change.
					Comment [7] also should be amended by substituting "of" for "to" in the last line (simply to correct what appears to be a typographical error).	The Commission agrees and has made the suggested change.
				Comment [11]	The OCBA believes that Comment [11] should be deleted entirely, as not useful and as inherently contradictory, or it should be amended to eliminate any ambiguity.	The Commission disagrees and has not made the requested change. The first and third sentences of Comment [11] are taken directly from the Model Rule and are correct. The second sentence merely provides cross references to other Rules.
4	San Diego County Bar Association, Legal Ethics Committee	A			We approve of the new rule in its entirety.	No response required.
5	Santa Clara County Bar Association	A			No comment.	No response required.

McCurdy, Lauren

From: Robert L. Kehr [rlkehr@kscllp.com]
Sent: Wednesday, February 10, 2010 7:25 PM
To: Kevin Mohr; Stan Lamport; Kurt Melchior
Cc: Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G; Raul L. Martinez
Subject: RE: RRC - 1.9 [3-310] - V.C. - Draft 7 (2/9/10)

Kevin and all: Here are my comments on these redrafts ---

1. The last line on p. 1 of the public commenter chart says: "...that he vicarious disqualification rule must be ....". The word "he" should be "the".

2. According to my meeting notes, in the last full paragraph of the RRC reply on p. 5 of 12, "might interfere with any such action by the legislature" was to be changed to: "might conflict with ...."

3. I suggest replacing the reply to the LACBA comment on Comment [11] by referring to the Commission's reply to the OCTC comments on Rule paragraph (c) and on Comment [11]. (and by the way, I support Kevin's edit to Comment [11])

4. At the bottom of p.6 and at p. 10, in the reply to the OCTC comment on Comment [11], I do not understand "without absolutely prohibiting". As I read Comment [11], and as I believe is correct, a lawyer is not restricted at all in using generally known information. Neither the former client nor the legal system has any legitimate interest in preventing a former Microsoft lawyer from using or disclosing the fact that it is in the software business, and there is nothing that I can see in the Rule to the contrary. One possible fix at the bottom of p. 6 would be to end the sentence with "... public record."

5. In the Rule comparison chart explanation of our proposed change to paragraph (c)(1), I'm not certain that the MR isn't intended to be as broad as what the Commission has in mind. To clarify my point, I suggest replacing the highlighted paragraph with the following: "The use of 'relating to a former client' in place of the Model Rule's 'relating to the representation of a former client' is intended to eliminate the possibility of a narrow reading that the duty applies only to information that relates to the subject matter of a former representation. A lawyer's continuing duty of confidentiality under section 6068(e) and Rule 1.6 applies to all information obtained by a lawyer as a result of a lawyer-client relationship if the use or disclosure of the information likely would be harmful or embarrassing to the client or if the client has directed the lawyer to not use or disclose the information."

6. I don't think that the highlighted addition to the Comment [11] explanation is accurate. I suggest: "The addition ... expressing the incorrect view that *Matter of Johnson* prohibits a lawyer from using to the disadvantage of a former client or disclosing information that is generally known. That opinion (correctly) holds that a lawyer has obligations with respect to information that is in a public record, and therefore potentially available to others, but that is not generally known."

rlk