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

(**ALT1, YDraft #12.1, 6/29/10**)

Summary: Proposed Rule 1.11 largely tracks 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 case law that concerns this Rule's topic.

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
Statute	
Case law	*Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]; *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]; *Civil Service Comm. v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].

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

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

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

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

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

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption __8___
Opposed Rule as Recommended for Adoption __3___
Abstain __0___

Approved on Consent Calendar ☐

Approved by Consensus ☐

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): ☑ Yes ☐ No

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

Government lawyers

☑ Very Controversial – Explanation:

See Introduction.

☐ Moderately Controversial – Explanation:

☐ Not Controversial – Explanation:

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

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

July 2010
(Draft rule following July 22-24, 2010 Board of Governors Meeting.)

INTRODUCTION:

Proposed Rule 1.11 is based on Model Rule 1.11 and addresses conflicts arising from a lawyer moving to or from government service, or between different government agencies. Although there is no current rule counterpart in California, there is 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]. The Rule largely tracks the Model Rule, with some grammar and syntax changes made to clarify ambiguous Model Rule language. In addition, the Model Rule's standard of "consent, confirmed in writing" has been changed to California's heightened standard, "informed written consent," because the latter provides more client protection. As in other jurisdictions that have adopted imputation as a *disciplinary* standard, the Commission's position is that the Model Rule's "knowledge" standard should be adopted. Although a lawyer without actual knowledge of a conflict could be properly disqualified in a civil action, the lawyer would not be subject to discipline. California should not depart from this approach, which is taken in every jurisdiction. See Minority, ¶. 2, below. In adopting the Rule, the Board of Governors rejected the Commission's proposed paragraph (e), which implemented California case law that requires a government lawyer's conflict that arises from either: (i) representation of a former private client; or (ii) former employment by a different government entity be imputed to other lawyers in the governmental organization that currently employs the lawyer, unless (i) the former client consents, or (ii) the personally prohibited lawyer is timely screened. The Commission's proposed paragraph (e) is discussed more fully in the submission entitled, "Rules And Concepts That Were Considered, But Are Not Recommended For Adoption."

* Proposed Rule 1.11, ALT1, YDraft #12.1 (6/29/10).

Minority.

1. A minority of the Commission took the position that the Rule is unnecessary because the subject of the rule is already covered by statutory or regulatory limitations on the lateral movement government lawyers into or out of government, or between government agencies. See Dissent B, below.

2. A second minority of the Commission objected to the recommended adoption of the Model Rule's "knowingly" standard as applied to imputation in paragraph (b). This minority takes the position that it will immunize lawyers who fail to conduct an adequate conflicts check. See Explanation of Changes for paragraph (b).

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

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

TOTAL = 4 **Agree = 0**
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes	(e)	COPRAC supports the implementation of screening through the Rules of Professional Conduct and urges reconsideration and adoption of the prior version of the rule permitting screening including the prior version of subsection (e). COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be easily referenced, and easily applied. Accordingly, COPRAC urges the reconsideration, and adoption, of the prior language of the rule permitting screening. In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Absence of a rule	The Commission recommended screening in the situation covered by former paragraph (e). The Board of Governors deleted original paragraph (e), which dealt with conflicts and screening if a lawyer moved from other employment into government service. However, in light of further public comment, the Commission voted to request that the Board reconsider its rejection of proposed Rule 1.11 with paragraph (e) that provides for imputation within a government agency but affords the opportunity for screening.

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

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

TOTAL = 4 Agree = 0 Disagree = 0 Modify = 4 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					could subject a lawyer to discipline even if case law develops to permit screening as a method to avoid disqualification.	
2	Office of Chief Trial Counsel	M	Yes	(a)	OCTC thanks the Commission for adding B&P Code section 6131 to the Comments, but we still are concerned that subparagraph (a) is incomplete. OCTC believes it should state: Except as law may otherwise expressly permit *or prohibit*. The same is true of subparagraphs (c) and (d).	The Commission disagrees. Adding the phrase "or prohibit" to paragraphs (a), (c) and (d) would make the wording of those paragraphs illogical. Those paragraphs prohibit representation in defined circumstances. They contain an exception ["Except as law may otherwise expressly permit, ..."]. Adding the phrase "or prohibit" would mean, to paraphrase, that, "Except as law may otherwise expressly . . . prohibit . . . a lawyer shall not represent a client." That would be a double negative. Its effect would be the opposite of what is intended by the rule. The exception to the rule would negate the law. In plain English, it would mean, "If the law prohibits you from representing a client, you may represent that client."
				1.11(b)	Subparagraph (b) of the rule prohibits an attorney in a firm from knowingly undertaking or continuing representation in such a matter unless the conflicted attorney is timely and effectively screened and is apportioned no part of the fee and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of the Rule. OCTC agrees with the minority of the Commission who objected to	The Commission disagrees.

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

TOTAL = 4 Agree = 0, Disagree = 0, Modify = 4, NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					the use of the term "*knowingly*" because it would immunize attorneys who do not bother to check for conflicts of interest. Disciplinary law has long recognized that gross negligence can constitute misconduct. That would be appropriate here. Further, it would be consistent with Comment [4], of Proposed Rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule."	
				(c)	OCTC does not object to the concept contained in subparagraph (c), but did find it a little confusing as written. It would suggest that the Commission might want to tighten the language.	The Commission considered this objection when the proposed rule was first published for preliminary public comment. Paragraph (c) was modified in light of this comment. The comment is moot.
				(d)(2)(ii)	OCTC is concerned that subparagraph (d)(2)(ii) prohibiting government officers and employees from negotiating for private employment might be too broad. It would appear to prohibit any criminal prosecutor from negotiating with the public defender's office for a job.	The Commission disagrees. Paragraph (d)(2)(ii) prohibits government lawyers from negotiating for "private" employment with a party, lawyer, or law firm on the other side. That paragraph is limited to a government lawyer who seeks "private" employment. The Commission thinks that OCTC is misreading the paragraph.
					The Comments are too many and most appear more appropriate for treatises, law review articles, and ethics opinions.	The Commission disagrees. The comments provide useful guidance to lawyers and courts on the application of the Rule.

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

TOTAL = 4 **Agree = 0**
Disagree = 0
Modify = 4
NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	M	Yes	(e)	1. The commenter notes the minority objection to screening in the private to government context.	1. This comment is moot because the Board of Governors deleted original paragraph (e) which had been recommended by the Commission. That paragraph dealt with conflicts and screening if a lawyer moves from other employment into government service. However, if paragraph (e) is restored, this comment will become relevant.
				(e)(2)	2. Commenter agrees with the proposed wording of paragraph (e)(2) but expresses concern about how the client could monitor the screen and ensure it retains its effectiveness.	2. This comment is moot because the Board of Governors deleted original paragraph (e), which dealt with conflicts and screening if a lawyer moves from other employment into government service. However, if paragraph (e) is restored, this comment will become relevant.
				(e)	3. Commenter points out that paragraph (e) does not address the head of office and supervisory lawyer situation and thereby is *de facto* overruling *Cobra Solutions.*	3. This comment is moot because Board of Governors deleted original paragraph (e), which dealt with conflicts and screening if a lawyer moves from other employment into government service. In addition, *Cobra Solutions* and other cases are cited in Comment [9B]. Those cases are not impliedly overruled by doing so. Instead, that Comment calls them to the readers' attention so that they are aware of the potential applicability of such cases in the disqualification context. However, if paragraph (e) is restored, this comment will become relevant.
				(b) & (c)	4. San Diego County Bar Association agrees with the Commission minority that paragraphs (b) and (c) of Rule 1.11 should be modified to	4. The Commission disagrees with the commenter and has retained the "knowingly" standard in the rule and comment. As in the other jurisdictions that

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

TOTAL = 4 Agree = 0 Disagree = 0 Modify = 4 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					prohibit lawyers in a firm who "know or reasonably should know" that a lawyer in his or her firm is prohibited from representation, from undertaking or continuing representation in such a matter unless the screening is conducted and notice given as set forth in 1.11(b)(1) and (2).	have adopted imputation as a disciplinary standard, the Commission concluded that the Model Rule's standard should be adopted. Although a lawyer without actual knowledge could properly be disqualified in a civil action, the lawyer would not be subject to discipline. The Commission concluded that California should not depart from this approach.
4	U.S. Attorney's Offices for the Central, Eastern, Northern and Southern Districts of California	M	Yes	Comment [2] & [9C]	We are concerned that the last sentence of Proposed Comment [2] and new Proposed Comments [9B] and [9C], intermingle two distinct concepts, imputation and disqualification, and as a result create the impression that disqualification as the result of imputed conflicts is not unusual, when in fact it is only in extraordinary cases that imputation is appropriate, and only in even more unusual circumstances that disqualification as the result of such imputation is found appropriate. Accordingly, we suggest that the Proposed Comments be modified as follows	The Commission disagrees. The comments do not confuse imputation and disqualification. They have been drafted to keep the two concepts distinct. Comments [9B] and [9C] are physically located separately from Comment [2] in order to avoid confusion. Disqualification of prosecutors' offices because of imputed conflicts may be unusual in criminal cases, but that is not the limit of Rule 1.11, which also applies to civil and to non-litigation matters. Whether disqualification of prosecutors' offices is or is not unusual should not be the subject of the Comments. Although the Legislature has made disqualification unusual in situations in which *Younger* and other precedents apply, and although court decisions express reluctance to disqualify entire offices of prosecutors, the former client of a side-shifting prosecutor is still aggrieved, and the Comments should not sanctify the conflicts of interest in such cases.
					First, we suggest that the text of Proposed Comment [9C], which addresses only	The Commission disagrees. The effect of these changes would be to change the neutral wording of

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

TOTAL = 4 Agree = 0 Disagree = 0 Modify = 4 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					imputation and screening for purposes of this Rule, and not disqualification, be modified to make more clear that the Rule does not itself impute conflicts within government agencies, and moved to replace the last sentence in Proposed Comment [2]. This would avoid an unnecessary cross-reference, and bring the Proposed Comment closer to the ABA Model Rule Comments, which include in their Comment [2] the discussion of imputation and screening for current government lawyers. The resulting Comment [2] would read: "Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or non-governmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. 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. The Rule does not impute a current government	Comment [9C] ("This Rule leaves open the issues of . . . .") to wording that would be used by the commenters to argue that Rule 1.11 prohibits imputation of conflicts within government offices. The Rules of Professional Conduct should not be reworded to change the analyses and results of disqualification motions. This rule should not define when conflicts will be imputed within government offices for disqualification purposes and should not be written to change the decisional law regarding disqualification motions. California decisions have not accepted Model Rule Comment [2]. In addition, moving Comment [9C] to Comment [2] and merging them would change the significance of both comments. Now, they clearly distinguish conflicts for discipline purposes from conflicts for disqualification purposes. The Commission recommends that the rule not become a revision of decisional law regarding disqualification and that the distinctions between discipline and disqualification be kept clear.

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

TOTAL = 4	Agree = 0 Disagree = 0 Modify = 4 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					lawyer's conflict under paragraph (d) to other lawyers serving in the same governmental agency; whether such imputation will occur and whether the use of a timely screen will avoid that imputation are matters of case law."	
				Comment [9B]	Second, we would suggest that Proposed Comment [9B], which makes clear that this Rule does not govern disqualification, be modified to make more clear the distinction between criminal and civil cases, remove the citation to Younger (which applied to a criminal case a disqualification standard that has since been displaced by statute), and cite additional case law that has limited the circumstances in which disqualification on the basis of imputed conflicts may be appropriate. The resulting Proposed Comment [9B] would read: "This Rule Not Determinative of Disqualification [9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. The policies underlying discipline and disqualification are different. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721. Whether a lawyer or law firm will or will not be disqualified is a matter to be	The Commission disagrees with the deletion of *Younger*. *Younger* still states valid analyses of disqualification standards. In *Cobra Solutions*, 38 Cal. 4th 839, 850 (2006), the Court stated that the principles discussed in *Younger* "have not lost their relevance." Not calling *Younger* to the attention of a reader would be misleading. The Commission does not recommend that additional cases be cited in Comment [9B]. The list of cases that wold have to be added to the comment would make the comment far too long. The Commission also disagrees with the proposal to reword the last sentence of Comment [9B]. It now states, "Regarding prosecutors in criminal matters, see Penal Code section 1424." That is the code section the Legislature added to offset *Younger* and its sequellae. Instead of the neutral wording of the last sentence of Comment [9B], the commenters would change the sentence from alerting a reader to the need to consult the code section to a sentence that would make the code section the limit of disqualification motions. The Comment should not become a basis for changing the premises of

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

TOTAL = 4 Agree = 0 Disagree = 0 Modify = 4 NI = 0

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					determined by an appropriate tribunal. See, e.g., *In re Charlisse C*., 45 Cal.4th 145 (2008); *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal.4th 839 (2006). Standards for disqualification of criminal prosecutors are set forth in Penal Code section 1424."	disqualification decisions. Other standards may also apply. Moreover, federal courts are not bound by the California Penal Code in deciding disqualification motions. The change the commenters recommend is an attempt to bring the Californa statute into federal practice by changing the Rules of Professional conduct.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	**ALT1 [NO PARA (e)] – Board's Proposed Rule*** **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	**Explanation of Changes to the ABA Model Rule**
(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c); and	(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government: (1) is subject to Rule 1.9(c); and	Paragraph (a) and subparagraph (a)(1) are identical to Model Rule 1.11(a) and (a)(1).
(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.	(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent~~, confirmed in writing,~~ to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).	Subparagraph (a)(2) tracks the approach of Model Rule paragraph (a)(2). However, the Commission has changed "consent, confirmed in writing" to California's heightened standard, "informed written consent" because the latter provides more client protection. 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), concerning former judicial officers and employees, are governed by that rule and not by Rule 1.11. Lawyers should not be confused about which rule applies in a given circumstance.
(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:	(b) When a lawyer is ~~disqualified~~prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:	Paragraph (b) is substantially the same as Model Rule 1.11(b). However, the word "disqualified" has been changed to "prohibited." Whether a lawyer is potentially subject to discipline will be determined by this Rule, but whether a lawyer will be disqualified from representation will be a matter for decision by the tribunal before whom the lawyer appears. Under paragraph (b), a law firm is permitted to use screening in

* Proposed Rule 1.11, YDraft 12.1 (6/29/10); Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	ALT1 [NO PARA (e)] – Board's Proposed Rule* Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees	Explanation of Changes to the ABA Model Rule
		order to avoid imputation of a conflict from one lawyer to the rest of the law firm. *Minority*. A minority of the Commission dissents from this paragraph because the use of the word "knowingly" will require actual knowledge before a lawyer who has a conflict of interest under this Rule may be disciplined. The minority believes this will immunize from discipline a lawyer who does not bother to check for conflicts of interest. The lawyer who knows or reasonably should know that he or she is prohibited from representation under this Rule ought to be subject to discipline, and not merely the lawyer that OCTC can prove had actual knowledge.
(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.	(1) the ~~disqualified~~personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this ~~rule~~Rule.	Subparagraphs (a)(1) and (a)(2) track the language of the Model Rule. However, "personally prohibited" is substituted for "disqualified" for the same reasons stated in the Explanation for paragraph (b), above, and to focus attention on the individual lawyer whose conflict creates the necessity for the screen. In subparagraph (2), "rule" has been capitalized in accordance with the convention followed by the Commission in referring to these Rules.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	ALT1 [NO PARA (e)] – Board's Proposed Rule* **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	Explanation of Changes to the ABA Model Rule
(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority 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.	(c) Except as law may otherwise expressly permit, a lawyer ~~having~~who was a public officer or employee and, during that employment, acquired information that the lawyer knows is confidential government information about a person ~~acquired when the lawyer was a public officer or employee~~, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority ~~and which~~, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and ~~which~~that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the ~~disqualified~~personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.	Paragraph (c) largely tracks the wording of Model Rule 1.11(c). However, the first sentence has been reordered to clarify its meaning in response to a comment received from the Office of Trial Counsel. Also, the subordinate clauses in the second sentence have been broken up by commas , and the word "that" is used for clarity and for correct parallel construction. 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.
(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:	(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:	Paragraph (d) and its subparagraphs are nearly identical to Model Rule 1.11(d).

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	**ALT1 [NO PARA (e)] – Board's Proposed Rule*** **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	**Explanation of Changes to the ABA Model Rule**
(1) is subject to Rules 1.7 and 1.9; and	(1) is subject to Rules 1.7 and 1.9; and	
(2) shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or	(2) shall not: (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent~~, confirmed in writing~~; or	In subparagraph (d)(2)(i), California's heightened standard, "informed written consent," has been substituted for "consent confirmed in writing" because the phrase "informed written consent," which is used throughout the proposed Rules, provides greater client protection than the Model Rule formulation.
(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).	(ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).	The phrase "or with a law firm for a party" has been added to broaden the scope of the prohibition on negotiation to encompass not only negotiating with the particular lawyer who is representing the party, but also that lawyer's law firm.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	**ALT1 [NO PARA (e)] – Board's Proposed Rule*** **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees**	**Explanation of Changes to the ABA Model Rule**
(e) As used in this Rule, the term "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.	(e) As used in this Rule, the term "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and (2) any other matter covered by the conflict of interest rules of the appropriate government agency.	Proposed paragraph (e) and its subparagraphs are identical to Model Rule 1.11(e) and its subparagraphs.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	ALT1 [NO PARA (e)] – Board's Proposed Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Explanation of Changes to the ABA Model Rule
[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.	[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to ~~the~~these Rules ~~of Professional Conduct~~, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See, e.g., Business and Professions Code section 6131. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule ~~1.0~~1.0.1(e-1) for the definition of "informed written consent."	Proposed Comment [1] is substantially the same as Model Rule 1.11, cmt. [1]. However, the reference to the Rules of Professional Conduct has been changed to "these Rules" to conform with the drafting convention the Commission is following. The reference to Rule 1.9 has been added because a lawyer who served or who is currently serving as a public officer or employee is subject to both Rule 1.7 and Rule 1.9. "Informed consent" has been changed to "informed written consent" in the last sentence because it affords greater protection to the government agency. Following public comment, a reference to Bus. & Prof. Code § 6131 was added as an example of a statute governing the subject matter of this Rule.
[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	[2] Paragraphs (a)(1)~~,~~ and (a)(2~~) and (d)(1~~) restate the obligations of an individual lawyer ~~who has served~~toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who 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	Although generally based on Model Rule 1.11, cmt. [2], Comment [2] has been substantially revised to clarify when the various provisions are applicable. The first sentence clarifies that paragraph (a) applies not only to lawyers who move from government employment to private practice or other nongovernmental employment, but also to lawyers who move from employment by one government agency to another. The second sentence clarifies that paragraph (d)(1) applies when a lawyer has moved from private practice or nongovernmental employment to governmental employment. The third and fourth sentences are identical to the second and third sentences of Model Rule 1.11, cmt. [2].

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to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.	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~~ Concerning imputation and screening 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~~ see Comments [9B] and [9C], below.	The last sentence of the Model Rule comment has largely been replaced by a cross-reference to Comments [9A] and [9C], which provide better guidance on the duties of a government lawyer who has previously been in private or other non-government employment.
[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.	[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 government or private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). [As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by ~~these~~ paragraphs (a)(2) and (d)(2).]	Comment [3] is nearly identical to Model Rule 1.11, cmt. [3]. The phrase, "government or" has been added to the second sentence to reflect the fact that paragraph (a) applies whether a lawyer has left government employment for private practice or to work for a different government agency. The last sentence has been placed in brackets pending resolution of the Commission's request for reconsideration of the Board's decision to reject proposed Rule 1.10. The references to specific paragraphs of Rule 1.11 in that sentence have been added for clarity.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	ALT1 [NO PARA (e)] – Board's Proposed Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Explanation of Changes to the ABA Model Rule
[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent 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.	[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus, a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent ~~the disqualification rule~~this Rule from imposing too severe ~~a deterrent~~an obstacle against entering public service. The ~~limitation~~limitations of ~~disqualification~~representation in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than ~~extending~~	Comment [4] is substantially the same as Model Rule 1.11, cmt. [4]. 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. The word "obstacle" has been substituted for "deterrent" in the next to last sentence because paragraph (a), by addressing a lawyer's obligations and limitations on employment *after* leaving government service, acts as a deterrent to going into public service in the first instance, while paragraph (d)'s provisions more directly pose an obstacle to a lawyer being hired by the government. The last sentence has been revised because this Rule does not dictate whether a lawyer or law firm will be disqualified. Instead, the subject of disqualification will be decided by tribunals on a case by case basis. See also Comment [9C].

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	ALT1 [NO PARA (e)] – Board's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	~~disqualification~~imputing conflicts to all substantive issues on which the lawyer worked, serves a similar function.	
	[4A] By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. Accordingly, unless the information acquired during government service is "generally known" or these Rules would otherwise permit its use or disclosure, the information may not be used or revealed to the government's disadvantage. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by Rule 1.11(a)(1). Paragraph (c) of this Rule adds further protections against exploitation of confidential information. Paragraph (c) prohibits a lawyer who has information about a person acquired when the lawyer was a public officer or employee, that the lawyer knows is confidential government information, from representing a private client whose interests are adverse to that person in a matter in which the information could be used to that person's material disadvantage. A firm with which the lawyer is associated may undertake or	Comment [4A] has no counterpart in the Model Rule. It has been added to clarify the purposes of Rule 1.11(a)(1) and (c). This comment is nearly identical to New York Rule 1.11, cmt. [4A].

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	ALT1 [NO PARA (e)] – Board's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	continue representation in the matter only if the lawyer who possesses the confidential government information is timely screened. Thus, a purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the lawyer's subsequent private client from obtaining an unfair advantage because the lawyer has confidential government information about the client's adversary.	
[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].	[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~~ Because the conflict of interest is governed by ~~paragraph~~paragraphs (~~d~~a) and (b), 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~~14]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70 [209 Cal.Rptr. 159].	The first sentence of proposed Comment [5] is identical with that in Comment [5] of the Model Rule. The second sentence has been amended to conform to California law. The reference in the Model Rule Comment to "paragraph (d)" has been changed to "paragraphs (a) and (b)" because the latter paragraphs govern the situation that is described. See also Explanation of Changes for Comment [2], above. 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. A reference to *Civil Service Commission v. Superior Court* has been added to direct readers to that important case on the issue of when a government entity is the same or a different client.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	ALT1 [NO PARA (e)] – Board's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	Screening of Former Government Lawyers Pursuant to Paragraphs (b) and (c)	
[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.	[6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule ~~1.0~~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.	Comment [6] is nearly identical to Model Rule 1.11, cmt. [6]. The phrase, "for former government lawyers" has been added to distinguish the screening arrangement permitted by these provisions from the screening arrangement provided in paragraph (e) that may be utilized by former private lawyers who are now in government service.
[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.	[7] Notice to the appropriate government agency, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.	Comment [7] is nearly identical to Model Rule 1.11, cmt. [7]. The phrase "to the appropriate government agency" is added in order to clarify the appropriate recipient of the notice.
[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.	[8] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information~~, which means actual knowledge~~; it does not operate with respect to information that merely could be imputed to the lawyer.	Comment [7] is based on Model Rule 1.11, cmt. [8]. It has been reworded for brevity. *Minority*. 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.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	ALT1 [NO PARA (e)] – Board's Proposed Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Explanation of Changes to the ABA Model Rule
[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.	[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.	Comment [9] is identical to Model Rule 1.11, cmt. [9].
	Consent required to permit government lawyer to represent the government in a matter in which the lawyer participated personally and substantially. [9A] A government officer or employee may participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent as required by subparagraph (d)(2)(i); and (ii) the former client gives its informed written consent as required by Rule 1.9, to which the lawyer is subject by subparagraph (d)(1).	Comment [9A] has no counterpart in the Model Rule. It has been added to make clear precisely what consents a former government lawyer must obtain to *personally* participate in a matter. Although subparagraph (d)(2)(ii) appears on its face to require only the consent of the government agency, the consent of the private lawyer's former client is also required because (d)(1) makes that lawyer subject to Rule 1.9, under which a former client's consent is required for an otherwise prohibited lawyer's personal participation in a matter. The Commission is concerned that without this clarifying comment, the requirement of the former client's consent will not be apparent.

ABA Model Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	ALT1 [NO PARA (e)] – Board's Proposed Rule Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees Comment	Explanation of Changes to the ABA Model Rule
	This Rule Not Determinative of Disqualification [9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34]. Regarding prosecutors in criminal matters, see Penal Code section 1424.	Comment [9B] has no counterpart in the Model Rule. It has been added to clarify that, although this Rule affects discipline, whether a lawyer or law firm will or will not be disqualified is a matter to be determined by the appropriate tribunal and is not necessarily dictated by this Rule. The reference to *Hollywood v. Superior Court* has been added because that case explains the different policies concerning discipline and disqualification. The Comment also calls the reader's attention to important California decisional law, including *Cobra Solutions* and *Younger*, that reject screening when the personally-prohibited lawyer is the head of the office or has direct supervisory responsibility over the lawyers actually handling the matter. The Commission determined that rather than codify these cases in the Rule itself and subject lawyers to discipline in an area of the law that is still developing, these cases should be referenced in a comment to provide notice to lawyers of the potential applicability of this case in the civil disqualification context. The last sentence of the Comment clarifies that Penal Code section 1424 governs motions to disqualify prosecutors.
	[9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.	Comment [9C] has no counterpart in the Model Rule. It has been added to effectuate the Board's intent that the law of screening of lawyers who move from the private sector to government employment be developed through court decisions. The Comment is intended to assuage concerns that the implementation of an ethical screen would necessarily subject a lawyer or group of lawyers to discipline because this Rule does not expressly provide for screening.

ABA Model Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	ALT1 [NO PARA (e)] – Board's Proposed Rule **Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees** **Comment**	Explanation of Changes to the ABA Model Rule
	Matter	
[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.	[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.	Comment [10] is identical to Model Rule 1.11, cmt. [10].

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

(Redline Comparison of the Proposed Rule to the Public Comment Draft)

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

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer who was a public officer or employee and, during that employment, acquired information that the lawyer knows is confidential government information about a person, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

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

(ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is

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

~~(e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government agency as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless:~~

~~(1) the personally prohibited lawyer is timely screened from any participation in the matter; and~~

~~(2) as soon as practicable after the need for screening arises, and unless prohibited by law or a court order, the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements.~~

(~~f~~e) As used in this Rule, the term "matter" includes:

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

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

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to these Rules, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See, e.g., Business and Professions Code section 6131. 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-1) for the definition of "informed written consent."

[2] Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. ~~[~~Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.~~]~~ Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. ~~Similarly, paragraph (e) provides that the conflicts of a lawyer currently serving as an officer or employee of the government shall be imputed to other associated government officers or employees, but also provides for screening~~Concerning imputation and ~~notice in certain situations~~screening within a government agency, see Comments [9B] and [9C], below.

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

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

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

because the lawyer has confidential government information about the client's adversary.

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

~~*[5A] 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.*~~

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

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

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

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

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

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

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

~~*Screening of Current Government Lawyers Pursuant to Paragraph (e)*~~

~~[9B] Under paragraph (e), lawyers in a government agency are not prohibited from participating in a matter because another lawyer in the agency has participated personally and substantially in the matter, so long as the personally prohibited lawyer is timely screened and notice is given as soon as practicable to the former client to enable it to ensure the government's compliance with the screen. But see Comment [9D]~~

~~[9C] Paragraph (e)(2) recognizes that in some circumstances, it may not be practicable for the government agency to provide prompt notice to the former private client. The government agency may not be able to locate the former client. An investigation by the government may be compromised if the fact of the investigation is not kept confidential. For example, if notice that the former lawyer of the target of the investigation is being screened would pose a significant risk that the investigation would be compromised, the government agency may delay providing notice of the screen. However, not providing notice promptly under paragraph (e)(2) should be the exception.~~

This Rule Not Determinative of Disqualification

[9~~D~~B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34]. Regarding prosecutors in criminal matters, see Penal Code section 1424.

[9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.

Matter

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

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

(**Commission's Proposed Rule – CLEAN VERSION**)

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

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed written consent to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer who was a public officer or employee and, during that employment, acquired information that the lawyer knows is confidential government information about a person, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

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

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

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

(ii) negotiate for private employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is

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

(e) As used in this Rule, the term "matter" includes:

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

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

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to these Rules, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and conflicts resulting from duties to former clients as stated in Rule 1.9. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See, e.g., Business and Professions Code section 6131. 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-1) for the definition of "informed written consent."

[2] Paragraphs (a)(1) and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. 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. Concerning imputation and screening within a government agency, see Comments [9B] and [9C], below.

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

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional

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

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

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

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

[6] Paragraphs (b) and (c) contemplate a screening arrangement for former government lawyers. See Rule 1.0.1(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer

from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

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

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

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

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

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

This Rule Not Determinative of Disqualification

[9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34]. Regarding prosecutors in criminal matters, see Penal Code section 1424.

[9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.

Matter

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

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

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: *Statutes and Standards* (2010 Ed.) by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

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

California has no provision comparable to ABA Model Rule 1.11.

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

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

Georgia has adopted a Rule 9.5 that provides as follows:

Rule 9.5 Lawyer as a Public Official

> (a) A lawyer who is a public official and represents the State, a municipal corporation in the State, the United States government, their agencies or officials, is bound by the provisions of these Rules.
>
> (b) No provision of these Rules shall be construed to prohibit such a lawyer from taking a legal position adverse to the State, a municipal corporation in the State, the United States government, their agencies or officials,

> when such action is authorized or required by the U.S. Constitution, the Georgia Constitution or statutes of the United States or Georgia.

Illinois: In the rules effective January 1, 2010, Rule 1.11(a) does not require consent to be confirmed in writing.

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

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

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

Missouri: Rule 1.11(e) provides as follows:

> (1) A lawyer who also holds public office, whether full or part-time, shall not engage in activities in which his or her personal or professional interests are or foreseeably could be in conflict with his or her official duties or responsibilities. . . .
>
> (2) No lawyer in a firm in which a lawyer holding a public office is associated may undertake or continue representation in a matter in which the lawyer who holds public office would be disqualified, unless the lawyer holding public office is screened in the manner set forth in Rule 4-1.11(a).

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

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

> (a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or

employee of the government shall not represent a private client in connection with a matter:

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

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

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

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

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

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

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

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

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

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

New York: In the rules effective April 1, 2009, Rule 1.11(b) amplifies the procedures necessary to avoid the imputation of a conflict, including that a law firm must ''notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client,'' and that ''there are no other circumstances in the particular representation that create an appearance of impropriety.'' Several new comments offer further guidance regarding these procedures. Rule 1.11(e) specifies that the term ''matter'' does ''not include or apply to agency rulemaking functions.'' Rule 1.11(f) is a nearly verbatim adoption of DR 8-101 of the old Model Code.

Oregon expands the ''law clerk'' exception to include a lawyer who is a ''staff lawyer to or otherwise assisting in the official duties of'' a judge, other adjudicative officer or arbitrator. Oregon Rule 1.11(d) adds language drawn partly from DR 8-101 of the ABA Model Code of Professional Responsibility providing that, except as law otherwise expressly permits, a lawyer shall not:

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

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

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

(iv) either while in office or after leaving office use information the lawyer knows is confidential government information obtained while a public official to represent a private client.

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

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

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

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

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

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

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

Virginia adheres mostly to the original 1983 version of ABA Model Rule 1.11, except that Virginia adds the following language drawn from DR 8-101 of the ABA Model Code of Professional Responsibility as Rule 1.11(a):

> (a) A lawyer who holds public office shall not:
>
> > (1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;
> >
> > (2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or
> >
> > (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.