

Rule 1.9 Duties to Former Clients
(Proposed Rule Adopted by the Board on March 9, 2017)

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

- (b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and rules 1.6 and 1.9(c) that is material to the matter;unless the former client gives informed written consent.*

- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:
 - (1) use information protected by Business and Professions Code § 6068(e) and rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;*
 - (2) reveal information protected by Business and Professions Code § 6068(e) and rule 1.6 acquired by virtue of the representation of the former client except as these rules or the State Bar Act permit with respect to a current client.

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a

client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this rule, see rule 1.7, Comment [2].

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

[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm* would violate this rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm* with which a lawyer is or was formerly associated, see rule 1.10. Current and former government lawyers must comply with this rule to the extent required by rule 1.11.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.9
(Current Rule 3-310(E))
Duties to Former Clients**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations: Model Rules 1.7 (Current Client Conflicts); 1.8(f) (third-party payments); 1.8(g) (aggregate settlements); and 1.9 (Duties To Former Clients).

Rule As Issued For 90-day Public Comment

The result of the Commission’s evaluation is a two-fold recommendation for implementing:

- (1) the Model Rules’ framework of having separate rules that regulate different conflicts interest situations: proposed Rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and
- (2) proposed Rule 1.9 (duties to former clients), which regulates conflicts situations that are currently regulated under rule 3-310(E). Proposed Rule 1.9 largely adheres to the internal framework of Model Rule 1.9, which addresses duties to former client in three separate provisions, MR 1.9(a) through (c), rather than the current rule’s approach to address those duties in a single provision, 3-310(E).

Proposed Rule 1.9 has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

1. **Recommendation of the ABA Model Rule Conflicts Framework.** The Model Rule Framework has (i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed Rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and (ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed Rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers), and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).¹

¹ Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., Model Rule 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse to a Client] and Model Rule 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By or For a Client]).

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees).

2. **Recommendation of addressing duties to former clients in three separate provisions that track the organization of Model Rule 1.9.** There are three separate provisions, each of which addresses a different aspect of duties owed a former client or recognizes the different ways in which a lawyer can incur duties to a client that survive the lawyer-client relationship. The Commission determined that implementing Rule 1.9 will help make a lawyer's duties to a former client more apparent, thus promoting compliance with the rule. This is particularly important in the context of former clients. Although the principal value at issue in conflicts of interest involving former clients is confidentiality, there is a residual duty of loyalty that the Supreme Court has recognized. (See, e.g., *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811.) The proposed rule affirms that duty. (See paragraph (c)(3) and Comment [1].)

There are a number of reasons for the Commission's recommendation. *First*, adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law and statutes, should protect client interests by better demarcating the ways in which the lawyer might acquire confidential client information "material to the matter," (paragraphs (a) and (b)), and delimit the lawyer's precise duties in protecting that information once acquired, (paragraph (c)). *Second*, incorporating the concept of matters that are "substantially related" into the blackletter of the rule reflects how current rule 3-310(E) has been interpreted and applied in both civil (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445) and disciplinary contexts (*In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735.)

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's more client-protective requirement that a lawyer obtain the client's "informed written consent," which requires written disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a less-strict requirement of requiring only "informed consent, confirmed in writing." That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict.

Paragraph (a) of proposed Rule 1.9 recognizes that a lawyer who has participated in the same or a substantially related matter in which the lawyer's new client has interests adverse to the former client, the lawyer will have acquired confidential information material to the new matter and will be prohibited from representing the new client unless the former client gives informed written consent.

Paragraph (b) incorporates Model Rule 1.9(b), which was adopted as the law of California by the court in *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324. In effect, Rule 1.9(b) will codify the *Adams v. Aerojet* case. The concept recognized by *Adams* and MR 1.9(b) is that a lawyer in a law firm may become privy to the confidential information of a firm client even if the lawyer did not personally represent the client in the same or a substantially related matter. This is sometimes referred to as the "water cooler" phenomenon, the lawyer having acquired the information by consulting with another firm lawyer who actually worked on the case. Incorporating this concept into a rule of professional conduct would afford greater client protection regarding adverse use of confidential information by alerting lawyers to how confidential information might be acquired even without having actually represented a client.

The Commission is also recommending rule counterparts to those rules, each of which is the subject of a separate memorandum.

Paragraph (c) has three subparagraphs. Subparagraph (c)(1) prohibits a lawyer from “using” a former client’s information to the client’s disadvantage except as permitted under the Rules or the State Bar Act, or if the information has become generally known. This is the former client counterpart to proposed Rule 1.8.2, which prohibits a lawyer from “using” a current client’s confidential information to the client’s disadvantage. Subparagraph (c)(2) prohibits a lawyer from “revealing” a former client’s confidential information except to the extent such disclosure is permitted by the Rules or the State Bar Act. Subparagraph (c)(3) has no counterpart in Model Rule 1.9. It carries forward current rule 3-310(E), modified to conform to the Commission’s format and style requirements. The intent of including this subparagraph is to ensure that the concept of residual loyalty recognized in the *Wutchumna* and *Oasis West* cases cited above is incorporated into the Rule. This provision is somewhat controversial as a minority of the Commission takes the position that the concept addressed in subparagraph (c)(3) is already adequately addressed in paragraph (a) and subparagraphs (c)(1) and (c)(2), and the inclusion of (c)(3) might cause confusion without adding any public protection.

There are four comments to proposed Rule 1.9, all of which provide interpretative guidance or clarify how the proposed rule, which is intended to govern a broad array of complex conflicts situations, should be applied. Comment [1] clarifies that there is a residual duty of loyalty owed former clients so that a lawyer is prohibited from attacking the very legal services that the lawyer has provided the former client, and provides two examples of prohibited representations. Comment [2] explains how paragraph (b), which codifies *Adams v. Aerojet-General*, should be applied, and provides additional clarification on how the rule should be applied when a lawyer moves laterally from one firm to another. Comment [3] draws an important distinction between information that is in the public record (e.g., a former client’s criminal record) and information that is “generally known,” and cites to *In the Matter of Johnson*, a Review Department case that imposed discipline on a lawyer for revealing public record information of a former client’s criminal history. Comment [4] provides cross-references to related rules that govern other situations involving former clients, for example, when the former client is a governmental agency.

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission deleted paragraph (c)(3). The determined that the concept contained in (c)(3) would be adequately addressed in paragraphs (a) and (b), coupled with the prohibitions on use and disclosure of confidential information as contained in (c)(1) and (c)(2). The Commission also added two new comments. A new Comment [2] provided a cross reference to Rule 1.7, Comment [2] for the definition of the term “matter.” A new Comment [3] explained when two matters should be regarded as “the same or substantially related.”

With these changes, the proposed rule was submitted to the Board of Trustees (Board) for authorization for an additional 45-day public comment period.

Proposed Rule as Amended by the Board of Trustees on November 17, 2016

The proposed rule was considered by the Board at its meeting on November 17, 2016. The Board revised the rule to address two potential ambiguities.

First, in Comment [4], the Board revised the third and fourth sentences to add the phrase “lawyers in” before the references to a law firm. This was done to make clear that it is the lawyers in a firm and not a firm itself as an entity that are subject to the rule.

Second, in Comment [6], the Board revised the second sentence to delete a reference to the “disqualification of a firm” and substitute the phrase “imputation of conflicts to lawyers in a firm.” This was done to clarify that the attorney conduct standards set by the rules are not intended to be standards of law firm disqualification in non-disciplinary proceedings.

The redline strikeout text below shows the changes made by the Board:

* * * * *

[4] Paragraph (b) addresses a lawyer’s duties to a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor [lawyers in](#) the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on [lawyers in](#) a firm once a lawyer has terminated association with the firm.

* * * * *

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to [imputation of conflicts to lawyers in](#) ~~disqualification of~~ a firm with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

Final Modifications to the Proposed Rule

After consideration of comments received in response to the additional 45-day public comment period, the Commission made one non-substantive change to the proposed rule. At the start of the second sentence of Comment [3], the Commission substituted the phrase “For example, this” for the word “This” to read: “For example, this will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer”

With these changes, the rule Commission voted to recommend that the Board adopt the proposed rule.

Board's Consideration of the Commission's Proposed Rule on March 9, 2017

At its meeting on March 9, 2017, the Board considered but did not adopt revisions to the Commission's final version of the proposed rule. The Board considered revising Comment [3] as follows by substituting the first sentence of ABA Model Rule 1.9, Comment [3] for the Commission's proposed Comment [3]:

~~[3]—Two matters are “the same or substantially related” for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. For example, this will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code § 6068(e) and Rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.~~ [3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

In discussing this revision, it was observed that Model Rule Comment [3] describes only matters that are “substantially related,” while the Commission's Comment describes what is meant by the phrase “same or substantially related.” Matters that are the same primarily implicate the duty of loyalty, although confidentiality is relevant. The substantial relationship test, on the other hand, pertains to a lawyer's duty of confidentiality; it is an analytical concept employed in litigated matters to ascertain whether a court should presume that a lawyer sought to be disqualified possesses confidential information of a former client. Given that the concept of “same” should not require clarification, it was suggested that the comment should mirror the Model Rule comment and address only the term “substantially related.” Moreover, it was observed that the Commission's final version of proposed Comment [3] might lead to confusion because the comment language refers to the duty of loyalty by referring to Comment [1] and the loyalty concepts and cases found in that comment. The objective of the proposed change was to eliminate this potential confusion by limiting the scope of the comment to the “substantially related” prong of the proposed rule. It was also observed that a more concise comment that eschews examples would more closely track the Commission's Charter which provides that comments be used sparingly.

COMMISSION REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

Commission Drafting Team Information

Lead Drafter: Raul Martinez

Co-Drafters: George Cardona, Daniel Eaton, Lee Harris, Hon. Dean Stout

I. CURRENT CALIFORNIA RULE

Rule 3-310(E) Avoiding the Representation of Adverse Interests

(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

Discussion

* * * * *

Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.

While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complimentary provisions.

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II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 1.9 [3-310(E)]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 1.9 [3-310(E)]

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

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

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.*
- (b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client
- (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;
- unless the former client gives informed written consent.*
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:
- (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;*
 - (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client.

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a

client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

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

[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 3-310(E))

Rule 1.9 [3-310(E)] - ~~Avoiding the Representation of Adverse Interests~~ Duties to Former Clients

(Ea) A ~~member shall not, without the~~ lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent ~~of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former~~

~~client, the member has obtained confidential information material to the employment.*~~

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

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

(2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.*

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

(1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;*

(2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client.

DiscussionComment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

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

[4] Paragraph (b) addresses a lawyer’s duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member’s present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

V. COMMISSION’S PROPOSED RULE (REDLINE TO ABA MODEL RULE 1.9)

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

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that ~~person’s~~person's interests are materially adverse to the interests of the

former client unless the former client gives informed written consent, ~~confirmed in writing.~~*

- (b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client
- (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent, ~~confirmed in writing.~~*

- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:
- (1) use information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit ~~or require~~ with respect to a current client, or when the information has become generally known; ~~or~~*
 - (2) reveal information ~~relating to~~protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules ~~would~~or the State Bar Act permit ~~or require~~ with respect to a current client.

Comment

[1] After termination of a ~~client-lawyer~~lawyer-client relationship, ~~athe~~ lawyer ~~has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, fo~~owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchurna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. ~~So also and (ii) a lawyer who has prosecuted an accused person* could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.~~matter. See also

Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

~~[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.~~

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

~~[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior~~

~~representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.~~

Lawyers Moving Between Firms

~~[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.~~

[54] Paragraph (b) ~~operates to disqualify the lawyer~~addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm ~~is disqualified from~~* would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[6] With regard to the effectiveness of an advance consent, see Rule 1.7, Comment [10]. With regard to imputation of conflicts to lawyers in a firm* with which a lawyer is or was formerly associated, see Rule 1.10. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

VI. RULE HISTORY

The predecessor to current rule 3-310, former 5-102, originally approved and made operative on January 1, 1975, was entitled “Avoiding the Representation of Adverse Interests.” Rule 5-102 was adopted following the 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility. Prior to the enactment of rule 5-102, Rule 7 was the rule that governed conflicts. The text of rule 5-102 was identical to the text of the previous rule 7.

A. Summary of 1989 Amendments

As part of the comprehensive revision of the Rules of Professional Conduct during the period from 1989 to 1992, the Supreme Court approved current rule 3-310, which became operative on May 27, 1989.¹

Paragraph (E) was new and adopted from ABA Model Rule 1.8(f). It was intended to regulate those situations in which an attorney is paid by someone other than the client.

(E) A member shall not accept compensation for representing a client from one other than the client unless:

- (1) There is no interference with the member’s independence of professional judgment or with the client-lawyer relationship; and
- (2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and
- (3) The client consents after disclosure, provided that no disclosure is required if:
 - (a) such nondisclosure is otherwise authorized by law, or
 - (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or members of the public.

B. Summary of 1992 Proposed Amendments

Proposed amendments to rule 3-310 were substantive and substantial. Structurally, former paragraph (F) became new paragraph (A), former paragraph (A) became new paragraph (B), former paragraph (B) became new paragraph (C), and so on throughout the rule.

¹ See page 34 of Bar Misc. No. 5626, Request That The Supreme Court Of California Approve Amendments To The Rules Of Professional Conduct Of The State Bar Of California, And Memorandum And Supporting Documents In Explanation, December 1987.

Proposed amendment to subparagraph (F)(3) created a stricter standard than the one found in current subparagraph (E)(3) by requiring the member to obtain the client's consent in writing following disclosure. The proposed amendment made the consent requirement consistent throughout the rule.

Proposed amendment to subparagraph (F)(3)(b) deleted the words "members of." No substantive change was intended.

(~~E~~F) A member shall not accept compensation for representing a client from one other than the client unless:

- (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and
- (2) Information relating to representation of ~~a~~ the client is protected as required by Business and Professions Code section 6068, subdivision (e); and
- (3) The member obtains the client's informed written consents ~~after disclosure~~, provided that no disclosure or consent is required if:
 - (a) such nondisclosure is otherwise authorized by law;; or
 - (b) The member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or ~~members of the public~~.

C. Summary of 2002 Proposed Amendments

An amendment to rule 3-310 was adopted by the Board on May 4, 2002. The proposed amendments were developed in response to Business and Professions Code § 6068.11, requiring the State Bar to conduct a study, in consultation with representatives of the insurance defense bar, plaintiff's bar, the insurance industry and the Judicial Council, concerning the legal and professional responsibility conflict of interest issues arising from the decision of the California Court of Appeal in *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20].

The proposed new Discussion section paragraph clarified that subparagraph (C)(3) of rule 3-310 is not intended to subject an attorney to discipline when the lawyer-client relationship with an insurance company client arises from the handling of a defense matter for a policyholder of the insurance company such that the insurance company client's only interests is an indemnity provider and not as a direct party to the action. This proposed Discussion section was to appear between paragraphs eight and nine.

In *State Farm Mutual Auto Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422, the court held that subparagraph (C)(3) was violated when a member, retained by an insurer to defend one suit, and while that suit

was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, subparagraph (C)(3) is not intended to apply with respect to the relationship between an insurer and a member when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to action.

The first sentence of the proposed new Discussion section paragraph was intended to make clear that the *State Farm* holding on subparagraph (C)(3) of rule 3-310 occurred in a specific and narrow fact setting. It identified that the fact setting involved a member's direct action against an insurer client without having first obtained the insurer's informed consent. Nothing in the State Bar's proposal was intended to suggest that *State Farm* was wrongly decided given the specific facts of the case.

The second sentence of the proposed new Discussion section paragraph was intended to clarify that the rationale of the *State Farm* holding should not be construed to mean that subparagraph (C)(3) of rule 3-310 was violated in an identified fact setting that was similar but not identical to the fact setting in *State Farm*. Specifically, that fact setting was one where there is no direct action against an insurer client and the insurer client's only interest is that of an indemnity provider.

Finally, this new proposed language clarified the application of the rule to an insurance defense setting. That language was the last paragraph of the Discussion section which, in part, states: "Paragraph (F) [regarding fees paid by a person other than the client] is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interests." Like the State Bar's present proposal, this language addressed a specific relationship in the insurance defense context and clarified the intended limited applicability of the rule.

VII. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016
(In response to 90-day public comment circulation):**
 1. OCTC generally supports this rule. It is concerned, however, about the use of the term "knowingly" in subsection (b). By using the term "knowingly" in this subsection the Commission is excluding attorneys who commit a violation by recklessness, gross negligence, or willful blindness. For example, this rule appears to exclude an attorney who either does not have a program to check conflicts or does not actually check whether there is a conflict. That attorney can claim he or she does not have actual knowledge of the conflict. Thus, that attorney would not violate this rule, even though the attorney has engaged in willful blindness or gross negligence. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation]; *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 432-433 [finding attorney did not have actual knowledge of his suspension, but his willful blindness is tantamount to having actual knowledge that he was ineligible to practice law. That finding was based on statutes that did

not require actual knowledge.]) The rules should not permit an attorney to escape culpability by not having a conflict check procedure or by failing to check for conflicts. Although negligence is not a basis for discipline, gross negligence, recklessness, and willful blindness is a basis for discipline. (See *Lowe v. State Bar* (1953) 40 Cal.2d 564, 570 [“It has been held that ‘Gross negligence is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client. (Citations.) It warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability.’ (Citations.)”] Requiring actual knowledge in this rule will lessen the current standards governing attorney conduct and is contrary to well established standards for when attorney conduct is disciplinable. OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the conflict is the result of excusable negligence or gross negligence, recklessness, or willful blindness. See also OCTC’s comments in the General Discussion section of this letter about the proposal to use the term “knowingly” in several of the proposed rules.

2. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This would appear to be a significant change in the rule and law. Moreover, while the term “materially adverse” is in the ABA Model Rules, neither the subparagraph nor proposed Rule 1.0 clarifies what that means and why the lawyer, not the client, should decide whether it is material. Further, it creates uncertainty for lawyers and makes it more difficult to prosecute a violation.

Commission Response for Comment #1 and #2, above: The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge of a conflict situation.

3. OCTC supports the Commission’s inclusion of Business & Professions Code § 6068(e) in subparagraph (b)(2).

Commission Response: No response required.

4. OCTC has concerns about Comments [1] and [2]. They do not elucidate the rule but, instead, give a philosophical basis for the rule.

Commission Response: The Commission has not made the suggested change. It believes that both comments, by providing an explanation of the duties and policy rationale underlying the rule, afford important interpretative guidance in applying the rule.

5. OCTC supports Comment [3].

Commission Response: No response required.

6. OCTC has no position on Comment [4]'s discussion of advanced waivers.

Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017
(In response to 45-day public comment circulation):**

1. OCTC generally supports this rule. It is concerned, however, about the use of the term “knowingly” in subsection (b). By using the term “knowingly” in this subsection the Commission is excluding attorneys who commit a conflict violation by recklessness, gross negligence, or willful blindness. (See *Gendron v. State Bar* (1983) 35 Cal.3d 409, 424-425 [attorney was grossly negligent in failing to investigate and declare conflicts, in violation of the conflict rules and amounting to moral turpitude]. As previously discussed, a rule violation generally only requires that it was done willfully, i.e. purposely, not with bad faith or evil intent. This rule appears to exclude an attorney who either does not have a program to check conflicts or does not actually check whether there is a conflict. That attorney can claim he or she does not have actual knowledge of the conflict. Thus, that attorney would not violate this rule, even though the attorney has engaged in willful blindness or gross negligence. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation]; *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 432-433 [finding attorney did not have actual knowledge of his suspension, but his willful blindness is tantamount to having actual knowledge that he was ineligible to practice law. That finding was based on statutes that did not require actual knowledge.]) The rules should not permit an attorney to escape culpability by not having a conflict check procedure or by failing to check for conflicts. Although negligence is not a basis for discipline, gross negligence, recklessness, and willful blindness is a basis for discipline. (See *Lowe v. State Bar* (1953) 40 Cal.2d 564, 570 [“It has been held that ‘Gross negligence is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client. (Citations.) It warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability.’ (Citations.)”] Requiring actual knowledge in this rule will lessen the current standards governing conflicts of interest and is contrary to well established standards for when such attorney conduct is disciplinable. OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the failure to obtain conflict waivers is the result of excusable negligence or gross negligence, recklessness, or willful blindness. See also OCTC’s comments in the General Discussion section of OCTC September 27, 2016 letter about the proposal to use the term “knowingly” in several of the proposed rules.

Commission Response: The definition of “knowingly” in the proposed terminology rule (Rule 1.0.1(f)) includes the concept that a person’s knowledge can be inferred from circumstances. Thus, as used in the Rules, a requirement of knowing is consistent with the concept of recklessness, gross negligence or willful blindness.

2. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9, because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This is a significant change in the rule and law, making it far more difficult to enforce the rule and prosecute violations, and far less protective of clients, than the current law. While the term “materially adverse” is in the ABA Model Rules, neither the proposed subparagraph nor proposed Rule 1.0 clarifies what that means and why the lawyer, not the client, should decide whether something is material. Further, this addition to the rule creates uncertainty for lawyers and makes it more difficult to prosecute a violation.

Commission Response: The Commission disagrees with this concern because both the current rule’s term “adverse” and the proposed rule’s term “materially adverse” are subject to the State Bar Court’s and the Supreme Court’s practice of looking to the state of the law involving conflicts in civil proceedings (see *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602) and in doing so, the Commission believes that the term “materially adverse” is more descriptive of the actual standard in this area of the law.

3. OCTC supports the Commission’s inclusion of Business & Professions Code § 6068(e) in subparagraph (b)(2).

Commission Response: No response required.

4. OCTC has concerns about Comments [1] and [2]. They do not elucidate the rule but, instead, give a philosophical basis for the rule.

Commission Response: These comments are more than just a philosophical basis for they rule because they explain the scope of the duty owed to a former client by citation to case law and statutory law.

5. OCTC supports Comments [3] and [5].

Commission Response: No response required.

6. OCTC is concerned with Comment [4] for the same reasons it is concerned with the use of “knowingly” in paragraph (b) of the proposed rule. Further, this Comment implies it will be the State Bar’s burden to prove that the person had actual knowledge of the confidential information, even though the law has long held that, for public protection, knowledge of confidential information is imputed to all the attorneys in a firm. (See *Adams v. Aerojet-General Corp* (2001) 86 Cal.App.4th 1324, [“The imputed knowledge theory holds that knowledge by any

member of a law firm is knowledge by all of the attorneys in the firm, partners as well as associates.' ”]; *City and Counsel of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847-848 [“Normally, an attorney's conflict is imputed to the law firm as a whole on the rationale “that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information.”)]. There are reasons to hold that the normal imputation to a member of the law firm should not strictly apply in discipline matters if the attorney can establish they did not have knowledge of the information, but, given the difficulty of establishing who in a law firm had confidential information, public protection requires that the attorney show that he or she did not have access to the confidential information. Likewise, as discussed, an attorney should not be rewarded for failing to establish adequate conflict procedures or failing to utilize them to determine if there is a potential conflict issue. Whether this constitutes gross negligence should be determined on a case-by-case basis.

Commission Response: See Response to #1, above. Further, imputation is a separate concept involving constructive knowledge. It should not be conflated with this knowledge standard. The case law on imputation is not intended to be altered by the Commission's knowledge standard.

7. OCTC has no position on Comment [6]'s discussion of advanced waivers.

Commission Response: No response required.

- **State Bar Court:** No comments were received from State Bar Court.

VIII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, thirteen public comments were received. One comment agreed with the proposed Rule and twelve comments agreed only if modified. During the 45-day public comment period, four public comments were received. All four comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

Two speakers appeared at the public hearing whose testimonies were in support of the proposed rule if modified. That testimony and the Commission's response is also in the public comment synopsis table.

IX. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Unlike Model Rule 1.9(a) or (b), rule 3-310(E) does not expressly state that the former matter the lawyer represented an adverse party must be the same as, or substantially related to the current matter to result in a prohibition against a lawyer representing a current client against the adverse party. Instead, the rule identifies the unethical conduct

that is proscribed, which in the case of opposing a former client who is now adverse to a current client, is a lawyer representing the new client when the lawyer is in possession of confidential information of the former client that is material to the new matter.

“Where the potential conflict is one that arises from the successive representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality.” *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.

1. Substantial Relationship Test.

Given that the standard in rule 3-310(E) is the “materiality” of the information to the current matter, it has been left to the courts to craft a test to determine whether information a lawyer likely acquired from a former client is “material.” The courts have accomplished this by creating a substantial relationship test that is applied in civil actions to determine whether a lawyer should be disqualified. See, e.g., *H.F. Ahmanson & Co. v. Salomon Bros., Inc.*, 229 Cal.App.3d 1445, 280 Cal.Rptr. 614 (1991) (To establish substantial relationship of matters, inquire re: (1) factual similarity of the cases; (2) their legal similarity; and (3) the extent of the lawyer’s involvement in the cases). See also *Adams v. Aerojet-General Corp.*, 86 Cal.App.4th 1324, 104 Cal.Rptr.2d 116 (2001); *City National Bank v. Adams*, 96 Cal.App.4th 315, 117 Cal.Rptr.2d 125 (Cal.App. 2002). Conversely, unlike rule 3-310(E), Model Rule 1.9(a) does not explain why the substantial relationship inquiry is made: to determine whether the lawyer acquired confidential information material to the present matter.

In *Jessen v. Hartford General Casualty Co.*, 3 Cal.Rptr.3d 877, 884-885 (Cal.App. 2003), the court stated that the test for determining whether a substantial relationship exists between the current matter and the former matter “turns on two variables: (1) the relationship between the legal problem involved in the former representation and the legal problem involved in the current representation, and (2) the relationship between the attorney and the former client with respect to the legal problem involved in the former representation.” See also *Farris v. Fireman’s Fund Ins. Co.*, 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618 (2004) (Figure 17); *Brand v. 20th Century Ins. Co.*, 124 Cal.App.4th 594, 21 Cal.Rptr.3d 380 (2004) (Figure 18). In effect, *Jessen* conflates the first two factors of the H.F. Ahmanson test (similarity of factual and legal issues) into one. Although *Jessen*, *Farris* and *Brand* provide a test that arguably is broader and more likely to result in disqualification than the test originally set out in *H.F. Ahmanson*, more recent decisions have held that mere conclusory allegations by the moving party of the migrating lawyer’s alleged relationship to the former client will not be sufficient to meet the moving party’s burden to prove the matters are substantially related. See, e.g., *Faughn v. Perez*, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006) (moving party’s heavy reliance on inferences and failure to submit direct evidence that pointed to specific confidential information to which attorney could have had access required denial of disqualification motion)

2. Modified Substantial Relationship Test.

Model Rule 1.9(a) applies only if the lawyer whose prohibition or disqualification is sought actually represented the former client.² Similarly, California apply the substantial relationship test only if the lawyer had actually been involved in representing the client in the previous matter. Both the Ahmanson (the extent of the lawyer's involvement in the cases) and Jessen ("the relationship between the attorney and the former client with respect to the legal problem involved in the former representation") versions of the test demonstrate this. When lawyers are in the same firm, however, there is a presumption that every lawyer in a firm discusses his or her client matters with every other lawyer in the law firm. (See, e.g., Model Rule 1.6, cmt. [5].) This is sometimes referred to as the "water cooler" effect.

Model Rule 1.9(b) addresses this assumption regarding lawyers practicing together in a law firm and provides that even if a lawyer did not previously represent the former client, the lawyer may nevertheless have acquired a former firm client's confidential information that is material to the present matter.³ In *Adams v. Aerojet-General Corp.*, 86 Cal.App.4th 1324 (2001), the court adopted the concept in Model Rule 1.9(b), which subsequent courts have referred to as the "modified substantial relationship test." Under that test, there is a rebuttable presumption that a firm-switching lawyer (i.e., a lawyer who moves laterally from one firm to another) has obtained material confidential information when the moving party makes an adequate showing that the firm-switching lawyer was in a position while at the former law firm that the lawyer was likely to have acquired confidential information material to the current representation.⁴ If the moving

² Model Rule 1.9(a) provides:

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

³ Model Rule 1.9(b) provides:

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

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

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing. (Emphasis added).

⁴ Factors relevant to such a showing include: (i) Length of time lawyer worked for former client. (ii) Lawyer's exposure to formulation of strategy and policy. (iii) Geographic location of lawyer relative to other lawyers involved in the previous representation. (iv) Lawyer's management or administrative responsibilities. See *Adams v. Aerojet*, 86 Cal.App.4th at 1340. For example, the lawyer might have been exposed to the strategy contemplated in the new matter during a departmental lunch at which the matter was discussed, or the lawyer might have an office next to the lead lawyer on the new matter with whom the lawyer is known to discuss

party makes this showing, the firm-switching lawyer and new law firm must make an affirmative and substantive showing that the lawyer had no actual exposure to confidential information relevant to the current action while the lawyer was a member of the former law firm. Subsequent courts have noted that although an affirmative showing by the moving lawyer and the new firm of no exposure to confidential information is required, mere access to, or opportunity to acquire, confidential information does not provide a sufficient basis to find that confidential information material to the current representation would normally have been imparted to the attorney during that attorney's tenure at the old law firm. See, e.g., *Ochoa v. Fordel*, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007). See also *Faughn v. Perez*, 145 Cal.App.4th 592 (2006).

In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] (duty to avoid using confidential information to a client's detriment even with respect to action the attorney takes on his or her own behalf)
- *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505] (duties of loyalty and confidentiality continue after representation ends)
- *H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454 [280 Cal.Rptr. 614] (an attorney's possession of confidential information is presumed when "a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney.")
- *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 592 [283 Cal.Rptr. 732] (when an attorney hires a former employee of opposing counsel who possesses confidential information materially related to pending litigation, the hiring attorney should obtain the informed written consent of the former employer)
- *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934 [197 Cal.Rptr. 185] (the ethical prohibition against adverse representation of a former client includes both the actual, and potential, use of previously acquired confidential information)
- *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 (duty to protect information in public record that is not easily accessible).
- *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [43 Cal.Rptr.3d 771] (City Attorney and his entire office disqualified from pursuing fraud a statutory claims on behalf of the city against the City Attorney's former client)

client matters. See, e.g., *Ochoa v. Fordel*, 146 Cal.App.4th 898 (2007). In addition, the lawyer might be shown to have accessed the electronic file database of the files in the new matter. (*id.*)

B. ABA Model Rule Adoptions

Model Rule 1.9. The ABA State Adoption Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 1.9: Duties to Former Client,” revised September 15, 2016, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_9.authcheckdam.pdf (Last visited on 2/7/17)
- Twenty-two jurisdictions have adopted Model Rule 1.9 verbatim.⁵ Twenty-seven jurisdictions have adopted a slightly modified version of Model Rule 1.9.⁶ Two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.9.⁷

X. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. **General Concepts.** The Commission is recommending that the conflict rules move to the ABA Model Rule structure of separate rules addressing current clients (1.7), certain specific types of conflicts (the 1.8 series), former clients (1.9), imputation of conflicts (1.10), conflicts for former and current government employees (1.11), and conflicts for former judges, arbitrators, mediators, or other third-party neutrals (1.12). Consistent with this approach, the Commission recommends proposed Rule 1.9, which uses as its starting point ABA Model Rule 1.9 in an attempt to more clearly capture the principles that are largely hidden in current rule 3-310(E). Current rule 3-310 prohibits a lawyer without a client’s informed written consent from accepting employment adverse to the client or former client “where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.” The Commission recommends dividing the current rule’s single paragraph into three separate paragraphs, as the ABA Model Rule does, to help make a lawyer’s duties to a former client more apparent, thus promoting compliance with the rule and consistency with national standards.

⁵ The twenty-two jurisdictions are: Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, and Washington.

⁶ The twenty-seven jurisdictions are: Alabama, Alaska, Arizona, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, Wisconsin, West Virginia, and Wyoming.

⁷ The two jurisdictions are: California and Texas.

- Pros: Adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law and statutes, should protect client interests by better demarcating the ways in which the lawyer might acquire confidential client information “material to the matter,” (paragraphs (a) and (b)), and setting out the lawyer’s precise duties in protecting that information once acquired. In addition, incorporating the concept of matters that are “substantially related” into the blackletter of the rule reflects how current rule 3-310(E) has been interpreted and applied in both civil (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445) and disciplinary (*In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735) contexts.
 - Cons: Over twenty years of California jurisprudence has been developed under current rule 3-310(E). The case law properly addresses what duties California attorneys owe to their former clients.
2. Recommend adoption of Model Rule 1.9(a), with substitution of the requirement that the lawyer obtain the client’s informed written consent to the lawyer’s adverse representation, as opposed to the Model Rule’s less client-protective “informed consent, confirmed in writing.” This paragraph incorporates the limited duty of loyalty owed to former clients, which prohibits an attorney from attacking the very work he or she provided to a former client, as has been recognized by the California Supreme Court. (see, *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811).
- Pros: Requiring the former client’s informed written consent to the lawyer’s adverse representation affords more client protection and is consistent with California’s requirement of informed written consent in other conflict situations. The “substantially related” concept of Model Rule 1.9(a) reflects how current rule 3-310(E) has been interpreted and applied in both civil and disciplinary contexts to cover the limited duty of loyalty owed to former clients. See also discussion of Comment [1].
 - Cons: There is no evidence that any change is necessary to current rule 3-310(E), which has been in place for more than 20 years and is the subject of extensive interpreting case law.
3. Recommend adoption of Model Rule 1.9(b) as modified, with substitution of the requirement that the lawyer obtain the client’s informed written consent, as opposed to the Model Rule’s less client-protective “informed consent, confirmed in writing.” Proposed paragraph (b) is substantially the same as the corresponding Model Rule paragraph. By its terms, paragraph (a) requires that the lawyer have represented the former client. Paragraph (b), on the other hand, addresses the circumstance where a lawyer’s former law firm, but not the lawyer, represented a client, but the lawyer nevertheless “actually acquired” confidential information material to a present matter.

- Pros: Paragraph (b) recognizes that a lawyer in a law firm might have actually acquired confidential information about a former client of the firm even without having ever represented that former client – e.g. during a litigation section lunch. As noted above, incorporating this concept into a rule of professional conduct would afford greater client protection regarding adverse use of confidential information by alerting lawyers to how confidential information might be acquired even without having actually represented a client. (See, *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324 [applying Model Rule 1.9]; *Ochoa v. Fordel* (2007) 146 Cal.App.4th 898 [applying Model Rule 1.9].)

Proposed paragraph (b)(2) adds the reference to Business and Professions Code § 6068(e) which is consistent to how the duty of confidentiality has been referenced in the other proposed rules. Paragraph (b) also requires the former client’s informed written consent to the lawyer’s adverse representation which, as stated above, affords more client protection and is consistent with California’s approach in other conflict situations.

- Cons: None identified.
4. Recommend adoption of Model Rule 1.9(c) as modified. Proposed paragraph (c) addresses a lawyer’s duty with respect to both use and disclosure of a former client’s confidential information. Paragraphs (c)(1) and (c)(2) have been revised to add reference to Business and Professions Code § 6068(e), Rule 1.6, and the State Bar Act and replaces the phrase “relating to the representation” with “acquired by virtue of the representation.” The proposed paragraphs also delete the concept that a lawyer might be “required” to disclose a client’s confidential information. The Model Rules contain some mandatory disclosure requirements but there is no such requirement in either the California Rules or in the State Bar Act.

- Pros: The use of the phrase “acquired by virtue of the representation” in place of the Model Rule’s “relating to the representation of the former client” is intended to eliminate the possibility of a narrow reading that the duty applies only to information that relates to the subject matter of a former representation. A lawyer’s continuing duty of confidentiality under § 6068(e) and Rule 1.6 applies to all information obtained by a lawyer by virtue of a lawyer-client relationship if the use or disclosure of the information likely would be harmful or embarrassing to the client or if the client has directed the lawyer to not use or disclose the information. The phrase “by virtue of” is derived from the *Wutchumna Water* case.

The proposed paragraph also adds reference to a “current” client. Because this rule is concerned with duties owed to former clients, adding reference to “current” client where the rule expressly analogizes to duties owed to *current* clients should help to avoid misunderstanding by clarifying the intended meaning.

- Cons: Paragraph (c)(1) retains the reference from the ABA Rule permitting use of information that has become generally known. Stating a specific example may imply this is the only exception that applies. Further, there is no bright-line definition as to when information has become “generally known.”
5. Recommend adoption of Comment [1], which is derived from the first Commission’s Comment [1], and which more fully explains how and why proposed Rule 1.9 protects former clients. In addition, Comment [1] is intended to avoid any suggestion that proposed Rule 1.9 modifies long-standing California authority regarding a lawyer’s duties to former clients.
- Pros: The Supreme Court’s opinion in *Wutchumna Water Co. v. Bailey* (cited in proposed Comment [1]), and other authority such as *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 159, and *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811, emphasize that a lawyer has two duties to former clients. Both of these duties underlie and are implemented by the proposed Rule. A Comment explaining the duties underlying the Rule provides interpretive guidance that will assist lawyers in understanding application of the proposed Rule.
 - Cons: The Comment provides only the philosophical basis for the Rule, which does not provide meaningful guidance for its application.
6. Recommend adoption of Comment [2], which cross-references to proposed Comment [2] in proposed Rule 1.7, which provides examples of what constitutes a “matte,” those examples being derived from ABA Model Rule 1.11(e)(1).
- Pros: The Comment provides important interpretative guidance and explanation to lawyers on how paragraphs (a) and (b) should be applied, thus enhancing both compliance and client protection. In particular, the examples in the cross-referenced Comment make clear that the Rule may apply in the context of litigation, transactions, and investigations.
 - Cons: The Comment amounts to a definition of the term “matter” that should more properly be in the text of the rule as it is in ABA Model Rule 1.11(e). The addition of the Comment is an unnecessary departure from national uniformity since ABA Model Rules 1.7 and 1.9 have no similar Comment.
7. Recommend adoption of Comment [3], which provides guidance and examples regarding when two matters are “the same or substantially related.” The first sentence of the Comment refers back to the two duties to former clients discussed in proposed Comment [1]. The second sentence of the Comment provides two general examples derived from the first sentence of Model Rule 1.9, Comment [3].
- Pros: The Comment provides important interpretative guidance and explanation to lawyers on how paragraphs (a) and (b) should be applied, thus enhancing both compliance and client protection. The cross-reference to the

duties discussed in proposed Comment [1] is consistent with California case law citing these duties as a basis for current rule 3-310(E).

- Cons: The first sentence of the Comment provides only the philosophical basis for the Rule, which does not provide meaningful guidance for its application. The examples in the second sentence do not add meaningfully to what is already stated in the Rule.
8. Recommend adoption of Comment [4], which is derived from the first Commission's Comment [8], which in turn is derived from Model Rule 1.9, Comment [5].
- Pros: The Comment provides important interpretative guidance and explanation to lawyers on how paragraph (b) should be applied, thus enhancing both compliance and client protection.
 - Cons: None identified.
9. Recommend adoption of Comment [5], which is derived from the first Commission's Comment [11], which in turn is based on Model Rule 1.9, Comment [8].
- Pros: This Comment provides important interpretative guidance with respect to paragraph (c) by referring the lawyer to Rule 1.6 for information the lawyer is obligated to protect with respect to a former client, as opposed to non-confidential information that a lawyer might have learned in the course of representing a former client. Further, the citation to *Matter of Johnson* clarifies a lawyer's obligation with respect to information that is in the public record. This reflects the understanding that information in the public record that is not easily accessible should not be considered generally known.
 - Cons: None identified.
10. Recommend adoption of Comment [6], which is derived from the last two sentences of Model Rule 1.9, Comment [9], and cross references to Rule 1.7 for the effectiveness of an advance consent, to Rule 1.10 for imputation of conflicts within a firm, and to Rule 1.11 for when former government lawyers are required to comply with the Rule.
- Pros: These cross-references provide important notice to lawyers that other Rules may apply.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Add a subparagraph (d) to define the phrases "the same or substantially related," and "materially adverse" for purposes of the Rule. The Commission considered defining these terms in the blackletter of the rule by drawing from the appropriate

the first Commission's Comments. The Commission decided not to define either phrase in the text, but to include guidance and examples regarding when matters are "the same or substantially related" in proposed Comment [3], which is discussed in Section X.A.7, above.

- Pros: Providing a definition of these terms would promote understanding and compliance with the rule by informing attorneys what these terms mean when applying the various sections of the rule.
- Cons: Including a general definition of these terms might inappropriately limit the circumstances when either a substantial relationship, or materially adverse interests, may be found. The Commission believes these conclusions are best left for either the State Bar Court, or a civil court, where the particular facts and circumstances can be weighed to make an appropriate determination. The Commission's approach is consistent with the ABA Model Rule, which provides general guidance as to when matters are "substantially related" in a Comment, and otherwise leaves these conclusions for disciplinary authorities and courts based on particular facts.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Although the proposed rule would change the current rule's single paragraph into four separate paragraphs, none of these provisions would be a substantive change in the current law of California regarding the duties owed to former clients.
2. The reference in paragraph (c)(1) of the clause from the Model Rule that permits an attorney to use information of a former client "when the information has become generally known" is a substantive change.

D. Non-Substantive Changes to the Current Rule:

1. Substitute the term "lawyer" for "member".
 - Pros: The current rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)
 - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters).
 - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

1. The Commission also considered simply carrying forward the various provisions in current rule 3-310 as separate standalone rules, with 3-310's provisions amended to incorporate the global changes the Commission has agreed to ("lawyer" for "member," etc.) and the standalone rule corresponding to the ABA numbering. The Commission abandoned that approach at an early stage of its deliberations. A copy of the rules considered under this approach is attached to the Report and Recommendation for Rule 1.7.
2. At its meeting on March 9, 2017, the Board considered but did not adopt revisions to the Commission's final version of the proposed rule. The Board considered revising Comment [3] by substituting the first sentence of ABA Model Rule 1.9, Comment [3] for the Commission's proposed language. Refer to the rule 1.9 executive summary for more information, including a redline/strikeout version of Comment [3] showing the revisions considered but not adopted by the Board.

XI. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 1.9 [3-310(E)] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.9 [3-310(E)] in the form attached to this Report and Recommendation.