

## AGENDA MATERIALS FOR

### III.A. Rule 3-310 [1.9] (Duties To Former Client)

#### New Agenda Materials for May 6 & 7 Meeting

- Redline Comparison of Revised Rule 1.9 DFT2.3 (04-20-16) to Rule 1.9 DFT2 (04-01-16) – Annotated

**Note:** This redline compares the revised proposed Rule 1.9 Draft 2.3 to the post-meeting Draft 2 (04-01-16). This redline is annotated. The Report & Recommendation that was circulated for the March 31<sup>st</sup> - April 1<sup>st</sup> meeting does not reflect these revisions.

- Langford Memo to Draft Team (04-15-16)

#### Previously Circulated Materials from April 31 & May 1 Meeting

- Report & Recommendation
- Kehr and Martinez Emails (02-14-16)



**NOTE: THE BLACK LETTER OF THE RULE WAS ACCEPTED AT THE LAST MEETING, HOWEVER, THE ENTIRE RULE (BLACK LETTER AND COMMENTS) IS SUBJECT TO THE COMMISSION’S CONSIDERATION OF THE COMMENTS.**

**Rule 1.9 Duties To Former Clients**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.
  
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a 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; or
  - (3) without the informed written consent of the former client, accept representation adverse to the former client where, by reason of the representation of the former client, the lawyer has obtained confidential information material to the representation.

**Comment:**

[1]<sup>1</sup> After termination of a lawyer-client relationship, the lawyer owes two duties to ~~the a~~<sup>2</sup> former client. The lawyer may not (i) do anything that will injuriously affect ~~his or her~~<sup>3</sup> former

<sup>1</sup> Drafting team consensus during 4/18/16 teleconference to retain the exact language from Wutchumna and also include the two examples from MR 1.9, cmt. [1], slightly revised, and include citations to both Oasis and Wutchumna as illustrative of the duties described.

The language is not an exact quote because the original Wutchumna quote is not gender-neutral.

client in any matter in which the lawyer represented the former client, or (ii) at any time use against ~~his or her~~ 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]; *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. Nor may a lawyer who has prosecuted an accused person properly represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131.<sup>4</sup> These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer ~~by assuring that during the representation the client can entrust the client's matter to the lawyer and can confide to the lawyer information protected by Rule 1.6 and Business and Professions Code section 6068(e) without fear that any such information later will be used against the client.~~<sup>5</sup> Paragraph (a) addresses both of these duties.<sup>6</sup>

[2] 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 Rules 1.6, 1.9(c), and Business and Professions Code § 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. [See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.]

~~[3] — A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6, 1.9(c), and Business and Professions Code § 6068(e).<sup>7</sup>~~

~~[4] See Rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. However, the ~~The~~ fact that information can be discovered in a public record ~~does~~ may not, by~~

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<sup>2</sup> Use of indefinite article per RRC2 style.

<sup>3</sup> Substitution of "the" for "him or her" per RRC2 style; preferred approach to gender neutrality.

<sup>4</sup> Examples from MR 1.9, cmt. [1] added to clarify what is meant by the language from *Wutchumna* and *Oasis*.

<sup>5</sup> Drafting team consensus during 4/18/16 teleconference to delete the remainder of the penultimate sentence of the comment because it is merely an explanation of the policy underlying the duties imposed under the Rule and does not explain the meaning of the rule or how the rule should be applied.

<sup>6</sup> Drafting team consensus during 4/18/16 teleconference to delete the last sentence of the comment as unnecessarily repetitive and inaccurate, as paragraph (a) no longer addresses both duties.

<sup>7</sup> Drafting team consensus during 4/15/16 teleconference to delete Comment [3], derived from MR 1.9, cmt. [7], as modified in RRC1 Rule 1.9, cmt. [10]. The deletion of the reference to "disqualification" in the Model Rule, although appropriate in a disciplinary rule, renders the comment confusing.

RRC2 – Rule 1.9 [3-310]  
Draft 2.3 (4/20/16) – COMPARED TO DFT2 (4/1/2016)  
Following April 20, 2016 Teleconference  
For May 6-7, 2016 Meeting

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.<sup>8</sup>

~~[54] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed written consent. See Rule 1.0.1(e-1).~~ [With regard to the effectiveness of an advance waiver, see Comment [228] to Rule 1.7. [With regard to 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.]<sup>9</sup>

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<sup>8</sup> Drafting team consensus during 4/15/16 teleconference to: (i) delete the first two sentences of Comment [4] (now [3]), which is derived from RRC1 Comment [11]; (ii) substitute “may” for “does”; (iii) add the phrase “under paragraph (c)(1)”; and (iv) substitute “See, e.g.” for “See” as the citation signal.

<sup>9</sup> Drafting team consensus during 4/15/16 teleconference to: (i) delete the first sentence of Comment [5] (now [4]), derived from RRC1 Comment [12]; (ii) remove the brackets from the first sentence; and (iii) retain brackets around the second and third sentences pending consideration of the cross-referenced rules.

MEMORANDUM

TO: RULE 1.9 WORKING GROUP  
FM: CAROL LANGFORD  
DATE: 4/12/2016  
RE: 1.9 COMMENTS SECTION

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After attending the Symposium yesterday in San Francisco I got the impression that Rule 1.9 needs a comment to explain exactly what is allowable with regard to the use against a former client of confidential information learned during the course of the representation that has since become generally known and/or in the public domain.

We all understand the difference between generally known and publically available information. Facts that are publically available might not be generally known. For example, if my client had a DUI from 2006 it might come up if someone pulled up an Intellus report on him, but otherwise the world might be blissfully unaware of his conviction.

Initially, it seemed as if the group thought that if information learned from a client were generally known, it was free fodder to use against your former client in a cross examination of that client. The following hypotheticals illustrate my concern with that belief.

*Hypothetical #1: Kim Kardashian comes into your office and tells you she has the unfortunate experience of being the victim of a revengeful ex who has leaked a sex videotape she made with him, thinking it was private. You advise her on her options, including an injunction and perhaps even going into business with Vivid Entertainment to sell the tape since it is already in the public realm. She is embarrassed, but leaves happy with your sound advice.*

*Two years later Client B, a national gossip rag, walks into your office and wants you to defend them from a defamation claim by Kim Kardashian. They called her "a tramp" and she sued them. You show up at trial and do a cross of Kim asking her "Well, didn't you make a sex tape that you sold to Vivid Entertainment, a known purveyor of pornography?"*

*Hypothetical #2: You work with Kim advising her on her sex tape. Two years later at a cocktail party someone comes up to you and says "Wow, I watched the news today and that Kim Kardashian sex tape scandal is just everywhere! I watched the tape on the internet. What a laugh!" Can you say "It sure is everywhere. What a tape!"*

*Hypothetical #3: You assist Client A in getting a patent for mobile phone technology. Patents are filed with the PTO and are available to the public, although maybe not generally known, at least by the average American citizen.*

*A few years later, Company A goes bankrupt and its patent assets are sold to the highest bidder (this occurred a lot during the dot com bubble). A patent troll buys the patent. You have other clients in the wireless communication industry and want to assist one (Client B) to design around the patent the troll seeks to enforce.*

*Would it make a difference to your analysis if Client A did not go bankrupt and was still the patent owner? Is the focus on the patent itself or on the client? Is this different from seeking to invalidate Client A's patent on behalf of Client B (I think so).\**

We have stated in our draft Rule 1.9 in section A that "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." However, we add in section 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 & Professions Code section 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." We then add a comment [4] that states: "See rule 1.6(a) with respect to the confidential information of a client the lawyer is obligated to protect, and Rule 1.6(b) for situations where the lawyer is permitted to reveal such information. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. However, the fact that information can be discovered in a public record does not, by itself, render that information generally known. See In the Matter of Johnson (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179".

It seems to me that what exactly falls under proposed Rule 1.9 with regard to generally known and/or public information is not just a question of revealing confidential information. In fact, I believe the Rule conflates two different concepts - 1) what information that has become public and/or generally known, but was initially learned during a former representation, can be revealed to another client and 2) what information that has become public and/or generally known can be used against a former client. I submit that using information against a former client in, for example, Hypothetical 1 should be subject to a higher scrutiny. In other words, notwithstanding A in 1.9, does C still apply to Hypothetical 1?

California lawyers are likely to be unsure about how to interpret proposed Rule 1.9. Part of the reason is because 6068(e) and Rule 3-310 do not include the concept of information that has become "generally known". Instead, the ethics opinions and other guidance use the old "confidences and secrets" concepts where the bottom line in a close case has always been whether a lawyer's use or disclosure of confidential information (both confidences and secrets) would be embarrassing or detrimental to a client, or would be contrary to a client's specific instructions that the lawyer not reveal the information. In ABA jurisdictions, these concepts were abandoned in favor of a broad general prohibition against a lawyer gossiping about a client regardless of whether the pertinent client information is confidential or not, but subject to the "generally known" standard as an exception so long as the situation is not one where a lawyer is representing another client adverse to the former client in the same or substantially related matter.

It seems to me that we have to assume that more than "I made a tape" was said to the lawyer at his meeting with Ms. Kardashian. In fact, that lawyer may have learned a lot; he may have learned that she is embarrassed, and she wants to cut a deal with Vivid Entertainment and stop all talk of the tape immediately. Perhaps that means she'd like to settle quickly with the newspaper that later called her a tramp just to move on so she does not lose sponsorship money? It seems clear to me that the lawyer might be tempted to use other information about the tape he learned from her *against* her. Moreover, someone might ask "Was this attorney for the gossip rag picked because he represented Kim Kardashian in the past?" Good question.

If you look at our confidentiality Rule from a prophylactic perspective we would want to protect her, even if she is the type of person who would make a sex tape that was leaked to the public. Moreover, the issue is not just confidentiality but also loyalty, even though she is a former client. I do not think this is just a pure risk management problem; i.e. you can do it but it is wise not to do so.

With regard to hypothetical #2, I think the lawyer *can* talk at the cocktail party. I don't like it; a better lawyer would say "I have represented her and I cannot talk about that." But still, I do

not think he can be disciplined for talking at the party. He is not using anything against Ms. Kardashian. However, there are limits as to what he can say even there.

Hypothetical #3 is tougher, and it comes up a lot in law practices in the Bay Area. I think if the patent is sold, you still might have learned, for example, that there are problems with it while representing the original owner, Client A. You also learn a lot by looking at all the prior art and talking with the engineers. You also may have learned about the financial viability of the company to fight infringers. However, it seems more remote where the patent - a property asset only - has been sold. Do we focus on the law firm's prior involvement? Or on the client? Or on the patent itself?

Compounding the problem is that if a patent is for, say, a chemical compound, it can be tough for that to come up on a conflicts check. For example, I assist Client A with a drug for Alzheimer's disease. The compound is AEDIX4590x. I put the name of "Client A" in my conflicts checking system. But I don't put in the compound - I'm not a scientist! Then Client B walks in and seeks to use the same or a similar compound but to cure loss of hair. No one will equate the two clients when they check conflicts.

Case law is instructive on at least some of these issues. In the Costello case (Court of Appeal 2016, Sup. Ct. 37-2014-00043440-CU-CO-CTL) the lawyer had represented Leslie Costello in an easement dispute where he learned about her romantic relationship with her boyfriend Peter Buckley. Later, Peter hired the lawyer to assist him in defending a lawsuit by Leslie against him to collect money she allegedly loaned him during their relationship. While the information the lawyer learned was not generally known, what is important about that case is that the court disqualified the lawyer even where the cases were not substantially similar, and the information learned was arguably not necessary for Leslie to prevail in her collection case.

Oasis West Realty LLC v. Goldman (2011) 51 Cal.4th 811, even if one argues was only about a SLAP suit, still emphasizes that loyalty and confidentiality are the fiduciary obligations owing to a former client. However, it is "Loyalty" with a lower case "l." Still, the California Supreme Court was reminding us of our obligations to former clients and telling us loyalty is not dead.

This is also apparent in BASF Opinion 2014-1. It found that an attorney cannot respond even to an untrue online review where she would violate her duty of confidentiality (major ugh!). Last but certainly not least is COPRAC 13-0005. That Opinion was very clear that secrets need to be protected (vs. confidential information). Secrets were said to be broader than confidential information; confidential information was said to be a subset of secrets. Secrets are anything embarrassing or detrimental to a client as we all know from Business & Professions Code section 6068(e).

We don't give any real guidance on these issues, and in fact encourage lawyers to use information against former clients in our draft Rule. The working group needs to make a fix for this. I believe proposed paragraph (c) (3) should be added ("**Without the informed written consent of the former client, accept representation adverse to the former client where, by reason of the representation of the former client, the lawyer has obtained confidential information material to the representation**"), because without it a lawyer who reads the Rule might not understand that (a) is not automatically trumped in every situation by paragraphs (c) (1) and (c) (2).

\* Thanks to James "Matt" Rice for this hypothetical: a brilliant law student at Boalt Hall.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]**

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

**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, 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.

\* \* \* \* \*

**II. DRAFTING TEAM'S RECOMMENDATION AND VOTE**

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

**III. PROPOSED RULE 1.9 (CLEAN)**

**Rule 1.9 Duties To Former Clients**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter:
  - (1) 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; or
  - (2) engage in conduct that injuriously affects the former client in any matter in which the lawyer formerly represented the client,

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]**

**Lead Drafter:** Martinez  
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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; or

(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 the former client. The lawyer may not (i) do anything that will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide to the lawyer information protected by Rule 1.6 and Business and Professions Code section 6068(e) without fear that any such information later will be used against the client. Paragraph (a) addresses both of these duties.

[2] 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 Rules 1.6, 1.9(c), and Business and Professions Code § 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

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**Meeting Date:** February 19-20, 2016

relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. [See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.]

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

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

[5] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed written consent. See Rule 1.0.1(e-1). [With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to 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.]

### IV. PROPOSED RULE 1.9 (REDLINE TO CURRENT CALIFORNIA RULE 3-310(E))

#### **Rule 3-310 Avoiding the Representation of Adverse Interests** **Rule 1.9 Duties To Former Clients**

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter:
- (1) 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;  
or
  - (2) engage in conduct that injuriously affects the former client in any matter in which the lawyer formerly represented the 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

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

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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; or
  - (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.
- (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 Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to the former client. The lawyer may not (i) do anything that will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide to the lawyer information protected by Rule 1.6 and Business and Professions Code section 6068(e) without fear that any such information later will be used against the client. Paragraph (a) addresses both of these duties.

[2] 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 Rules 1.6, 1.9(c), and Business and Professions Code § 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. [See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.]

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

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

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

[5] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed written consent. See Rule 1.0.1(e-1). [With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to 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.]

~~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. PROPOSED RULE (REDLINE TO MODEL RULE 1.9)

### Rule 1.9 Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter:

~~(a1) 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;  
or

(2) engage in conduct that injuriously affects the former client in any matter in which the lawyer formerly represented the 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

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

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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 relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.~~

[1] After termination of a lawyer client relationship, the lawyer owes two duties to the former client. The lawyer may not (i) do anything that will injuriously affect his or her former client in any matter in which the lawyer represented the former client, or (ii) at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship. *Wutchurna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer by assuring that the client can entrust the client's matter to the lawyer and can confide to the lawyer information protected by Rule 1.6 and Business and Professions Code section 6068(e) without fear that any such information later will be used against the client. Paragraph (a) addresses both of these duties.

~~[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~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

~~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] 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~~

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

~~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.~~

[52] 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 Rules 1.6 ~~and~~, 1.9(c), and Business and Professions Code § 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm ~~is disqualified from~~ would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. [See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.]

~~[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.~~

[73] ~~Independent of the question of disqualification of a firm, a~~ A lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 ~~and~~, 1.9(c), and Business and Professions Code § 6068(e).

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

[95] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed written consent, ~~which consent must be confirmed in writing under paragraphs (a) and (b)~~. See Rule ~~1.01.0.1(ee-1)~~. [With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to 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.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

### VI. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, Date:**

A comment on current rule 3-310 is anticipated.

- **RUSSELL WEINER, OCTC, 6/15/2010:**

1. 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 law. Moreover, while the term “materially adverse” is in the 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. OCTC supports the Commission’s inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2) and thanks them for making that change.
2. OCTC is concerned with the use of the term “knowingly” in subparagraph (b). This appears to sanction a lack of conflict procedures regarding an attorney’s former clients at another firm and is inconsistent with Comment 4, 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.” Although negligence is not a basis for discipline, gross negligence or recklessness is. 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. Further, by using the term “knowingly” the Commission may inadvertently also affect disqualification rulings in civil and criminal cases.
3. OCTC is concerned about the phrase “except as these Rules or the State Bar Act would permit . . . when the information has become generally known” in subparagraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by “information generally known.” Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not “generally known.”
4. Paragraph (c)(2) applies some exceptions to revealing information of former clients “with respect to current clients.” Like paragraph (c)(1), paragraph (c)(2) has the issue of

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when subparagraph (c)(1) applies or when subparagraph(c)(2) applies.

5. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to established State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. The Comment does not even advise or address the *Lane* decision. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that the conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) Excluding the presumption in disciplinary and civil cases would force OCTC and the other party/former client to try to prove what was provided to the attorney and what is in the attorney’s mind. It would force the State Bar and parties to civil litigation to obtain and reveal confidential information. It would create numerous disputes as to what the client really told the lawyer. OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

The presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) It also springs from the common sense notion that clients necessarily provide confidential information material to their lawyers. Thus, the duty of confidentiality compliments the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

Having such a presumption is not unusual in discipline cases. As previously discussed, under rule 3-300 (proposed rule 1.8.1) the attorney has the burden of showing that the transaction is fair and reasonable and fully known and understood by the client. While the primary purpose of the presumption under proposed rule 1.9 is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrtcy S.D.N.Y. 2005) 312 B.R. 640, 656.)

Any concern about tangential matters being covered by this presumption is already addressed in the presumption. There is a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases or civil cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the conflict rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its holding is equally applicable in discipline and civil cases. Further, as previously discussed, the presumption is already in the disciplinary case law. OCTC requests that that portion of Comment 5 implying that the presumption does not apply to discipline cases be stricken.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]**

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

6. If the Commission adopts OCTC's position that knowingly should be stricken from subparagraph (b) then Comments 8-9 should be stricken.
7. Again, there are too many comments and they are more appropriate for treatises, law review articles, and ethics opinions, especially comments 1-4 and 7. Comment 10 belongs in proposed rule 1.6, not this rule. The first sentence of Comment 11 is unnecessary. Comment 11 refers to subparagraph (c) of proposed rule 1.9. OCTC is concerned that, like in proposed subparagraph (c) itself, what is meant by "generally known information" and this Comment appears inconsistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. OCTC opposes any change to the requirement that precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.
8. As previously discussed regarding other conflict rules, OCTC opposes advanced waivers. (See OCTC's discussion to rule 1.7.) It recommends that the second sentence of this Comment be stricken. The commission should also consider whether the rest of the Comment is necessary in light of the rules cited in the Comment.

• **MIKE NISPEROS, OCTC, 9/27/2001:** OCTC provided the following comment on rule 3-310:

OCTC's recommends expanding the duties of an attorney when declining or terminating employment and adding to the rule more reasons which would support an attorney's withdrawing from representation.

Revise the rule as follows:

**Rule 3-310. ~~Avoiding interests Adverse to a Client~~ Avoiding Conflicts of Interest with Clients.**

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of adequate information and an explanation of the relevant circumstances, ~~and~~ of the actual and reasonably foreseeable adverse consequences and material risks to the client or former client, and providing the client or former client with reasonable available alternatives to the proposed course of action;

(2) "informed written consent" means the client or former client's written agreement to the representation following written disclosure and adequate time to make an intelligent reasoned decision to give the consent;

(3) "Written" means any writing as defined in Evidence Code section 250.

~~(B) A member shall not accept or continue representation of a client without providing~~

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]**

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

written disclosure to the client where:

~~—(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or~~

~~—(2) The member knows or reasonably should know that:~~

~~—(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and~~

~~—(b) the previous relationship would substantially affect the member's representation; or~~

~~—(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or~~

~~—(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.~~

~~(C) A member shall not, without the informed written consent of each client:~~

~~—(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or~~

~~—(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or~~

~~—(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.~~

(B) Except as provided in paragraph (c) a member or law firm shall not accept representation or continue to represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest embraces all situations in which an attorney's loyalty to, or efforts on behalf of a client are threatened or a reasonable client would believe could be threatened by the member's responsibilities or relationship to another client, to a third person, or by the member's own interests. This will include, but not be limited to:

(1) when the representation of one client will be directly adverse to another client;

(2) there is a significant risk that the representation of one or more clients will be materially limited by the member's responsibilities or relationship to another client, a former client, a third person, or by a personal interest of the lawyer.

(C) Notwithstanding the existence of a concurrent conflict of interest under paragraph (B)

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]**

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

a member or law firm may represent a client if:

(1) the member or law firm reasonably believes that the member will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the member in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed written consent confirmed in writing after disclosure as that term is defined in paragraph (a) of this rule.

(D) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

(E) A member or law firm 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 material relevant to the employment.

(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;

(2) Information relating to representation of the client is protected as required by Business & Professions Code section 6068, subdivision (e); and

(3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if:

(a) such non-disclosure 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 the public;

(G) A member 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.

(H) A member shall not, unless the former client gives informed written consent, agree to or continue to represent a person in the same or substantially related matter in which the

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]**

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

firm with which the lawyer formerly was associated had previously represented a client:

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

(2) about whom the lawyer has acquired information protected by Business & Professions Code section 6068, subdivision (e).

(I) A member or firm who formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter must not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known: or

(2) reveal information relating to the representation except as these rules would permit or require with respect to the client.

(J) While members are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by these rules unless the prohibition is based on a personal interest of the prohibited lawyer and does not represent a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(K) When a member has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated member and not currently represented by the firm unless:

(1) the matter is the same or substantially related to that in which the formerly associated member represented the client; and

(2) any lawyer remaining in the firm has information protected by Business & Professions Code section 6068, subdivision (e), that is material to the matter.

(L) When a member becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which the lawyer is disqualified under the rules unless:

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

(2) written notice is promptly given any affected former client to enable the former client to ascertain compliance with the provisions of the Rule.

Discussion

This rule, although written differently than former rule 3-310, is not intended to change

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]**

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

existing law. It merely simplifies and expands the language so that it embraces the Supreme Court's rulings on this issue. However, this rule as rewritten does require informed written consent for all conflicts or potential conflicts, not just some, as was the case in the former rule.

...

~~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 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 Paragraphs (B) and (E) are to apply as complimentary provisions.~~

~~... Paragraph (B) is intended to apply only to member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.~~

...

**OCTC COMMENTS:**

The current rule is confusing and at times has left gaps that do not address what would appear to be a conflict of interest as defined by case law. OCTC suggests that some of the categories be more like the proposed ABA rules. (See proposed Model Rules 1.7-1.11.) Moreover, as the Supreme Court has held "[c]onflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests." (People v. Bonin (1989) 47 Cal.3d 808, 835.) This rule should, therefore, embrace and incorporate that principle in its categories. Although, due to time constraints, we have not done so, the Commission should consider dividing this rule into more than one rule and possibly simplifying the rule even more. Obtaining an interest in subject matter of the litigation still would constitute a conflict of interest. The purpose of the conflicts rules is to protect the client's expectation of loyalty and the duty of the attorney to preserve his or her client's confidences and secrets and not use them for anyone else's advantage, including the attorney's advantage. Anything that reasonably raises questions about a lawyer's impartiality is a conflict.

Furthermore, all conflicts should require informed written consent. This will ensure that consent is fully understood and agreed to and it protects the attorney from accusations by the client later and any argument as to whether the attorney obtained the consent.

The proposed rule uses the term "when permitted" in reference to ethical walls or

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

screens within a law firm. Thus, as written, it does not change the law regarding whether ethical walls or screens should be permitted. However, OCTC suggests that the Commission might want to explore the issue of ethical walls or screening. In California, the law has been that once an attorney in a firm has been found to have a conflict of interest, the conflict extends to the entire firm. (See e.g. *People ex rel Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135.) Generally, screens to avoid conflicts have not been accepted in California, except as to government and former government lawyers. (See e.g. *Henricksen v. Great American Savings and Loan* (1992) 11 Cal. App.4th 109, 115-116.) A recent Ninth Circuit decision has, however, cast doubt on that principle. (See *In re County of Los Angeles* (2000) 223 Fed.3d 990.) That decision may be speculative as to the California Supreme Court's position. Thus, now might be the time to address this issue in the rule. (See proposed Model Rule 1.10 and 1.11) The general principle that ethical screens are not valid makes OCTC's job much easier. But OCTC also recognizes that others may see the need for ethical screens in a time of global firms, larger law firms, and more mobile attorneys. OCTC therefore asks that, if the Commission decides to address ethical walls, that at the very least attorneys be required to inform every client in writing of the conflict and the screening and that everything is done to protect a client's confidences and secrets.

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

## VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

**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 May 13, 2015, is available at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_1\\_9.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_9.authcheckdam.pdf) [last visited 1/29/16]

Twenty-two jurisdictions have adopted Model Rule 1.9 verbatim.<sup>1</sup> Twenty-seven jurisdictions have adopted a slightly modified version of Model Rule 1.9.<sup>2</sup> Two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 1.9.<sup>3</sup>

<sup>1</sup> 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.

<sup>2</sup> 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.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

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

#### A. Concepts Accepted (Pros and Cons):

1. **General Concepts.** The drafting team recommends that the Commission agree to the following general concept reflected in proposed Rule 1.9, which used as its starting point ABA Model Rule 1.9 in 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 drafting team 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.
  - **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 delimit 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) as modified**, which incorporates Model Rule 1.9(a) as proposed rule 1.9(a)(1),<sup>3</sup> except for the 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."

Proposed subparagraph (a)(2) 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

<sup>3</sup> The two jurisdictions are: California and Texas.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

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**Meeting Date:** February 19-20, 2016

California's requirement of informed written consent in other conflict situations. Articulating an attorney's duty of loyalty owed to a former client in a rule of professional conduct fills an important gap as that limited duty is currently only stated in case law.

- Cons: Incorporating the duty of loyalty into subparagraph (a)(2) may create a negligence standard. This arguably is aspirational and not appropriate in a rule of discipline.
3. Recommend adoption of Model Rule 1.9(b) as modified. 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 [same].)
- 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

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

lawyer's continuing duty of confidentiality under section 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 (a)(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 RRC1 Cmt. [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 are described in the proposed Rule and further explained in the proposed Comment. The proposed rule is consistent with these California principles.
  - **Cons:** None identified.
6. **Recommend adoption of Comment [2]**, which is derived from RRC1 Cmt. [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.
7. **Recommend adoption of Comment [3]**, which is identical to RRC1 Cmt. [10], which in turn is substantially the same as Model Rule 1.9, Comment [7]. The proposed Comment removes from the Model Rule Comment the reference to disqualification. Although Rule 1.9, like current rule 3-310(E), will likely be cited when disqualification issues are raised in a civil context, the California Rules are intended primarily for disciplinary purposes. The Commission should not draft rules in a way that appears to dictate to courts how exercise their inherent authority to control matters brought before them, for example, under C.C.P. § 128(a)(5).

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
**Co-Drafters:** Cardona, Eaton, Harris, Stout  
**Meeting Date:** February 19-20, 2016

- Pros: The citation to Rules and statute provide additional explanation to lawyers about their continuing duties owed to former clients, thus enhancing both compliance and client protection.
  - Cons: None identified.
8. Recommend adoption of Comment [4], which is derived from RRC1 Cmt. [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.
9. Recommend adoption of Comment [5], which is derived from RRC1 Cmt. [12], which in turn is derived from Model Rule 1.9, Comment [9]. The last three sentences of this Comment are placed in brackets pending the Commission's decision with respect to proposed Rules 1.7, 1.10 and 1.11.
- Pros: The first sentence of the Comment revises the Model Rule language to impose the more client-protective requirement of "informed written consent" in place of the Model Rule's requirement of "consent confirmed in writing." This change is consistent with proposed paragraphs (a) and (b) of this Rule and is consistent with the same change made in other proposed conflicts Rules.
  - Cons: The first sentence of this Comment simply restates the Rule.

### **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 drafting team considered defining these terms in the blackletter of the rule by drawing from the appropriate RRC1 Comments.
- 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: The drafting team concluded that including a general definition of these terms may limit the circumstances when either a substantial relationship, or materially adverse interests, may be found. The drafting team 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.

## DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]

**Lead Drafter:** Martinez  
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**Meeting Date:** February 19-20, 2016

### 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 drafting team 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 drafting team abandoned that approach at an early stage of its deliberations. A copy of the rules considered under this approach is attached to the Report & Recommendation for Rule 1.7.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]**

**Lead Drafter:** Martinez  
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**Meeting Date:** February 19-20, 2016

**IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER**

(1) Whether (a)(2) can be the subject of the former client’s consent given that what the client would be consenting to is conduct that by definition “would injuriously affect the former client”? Alternatively, should (a)(2) be revised to avoid use of “injuriously affect” language such as “engage in conduct adverse to the client in the same or a substantially related matter where, by reason of the representation of the client, the lawyer obtained confidential information material to the representation.”

**X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS**

- Martinez**
- [Date]: Email Comment
- Cardona**
- [Date]: Email Comment
- Eaton**
- [Date]: Email Comment
- Harris**
- [Date]: Email Comment
- Stout**
- [Date]: Email Comment

**XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION**

**Recommendation:**

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-310(E) [1.9] in the form attached to this Report and Recommendation.

**Proposed Resolution:**

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-310(E) [1.9] in the form attached to this Report and Recommendation.

**XII. DISSENTING POSITION(S)**

None.

**DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 1.9 [3-310(E)]**

**Lead Drafter:** Martinez  
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**Meeting Date:** February 19-20, 2016

**XIII. FINAL COMMISSION VOTE/ACTION**

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

**February 14, 2016 Kehr Email re 1.9 to Drafting Team, cc Difuntorum, Mohr, McCurdy & Lee:**

Here are my thoughts on this proposal ---

1) The pros and cons of proposed paragraph (a)(2) are set out beginning at the foot of p. 18 of 24, but there is another con. While it certainly is correct that the *Wutchumna* line of cases imposes on lawyers a narrow continuing duty of loyalty as well as a continuing duty of confidentiality to former clients, I think it is right to say that, until the recent opinion in *Oasis West Realty v. Goldman*, 51 Cal.4th 811 (2011), all applications of this standard involved a lawyer's subsequent engagement by a new client. This new proposal is an effort to state the holding of *Oasis West* in rule form, but I don't think the opinion can be captured that neatly. The Court of Appeal had concluded that Goldman had not disclosed confidential information. *Id.* at 819. The Supreme Court reversed, in part because it found it reasonable to infer that Goldman was using confidential information adverse to his client. *Id.* at 822 *passim*. Thus, *Oasis West* is narrower than proposed (a)(2) in that, while referring to the continuing duty of loyalty, it focused on Goldman's possession and presumed use of confidential client information adverse to his former client. That topic is covered by Rule 1.9(c)(1) and needs no restatement in paragraph (a). The issue with (a)(2) is not theoretical but would have practical consequences. The most obvious of these is that it seemingly would prevent a lawyer from suing a former client in any way related to the subject of a former representation, including for unpaid fees. The more subtle concern is that proposed (a)(2) would come into play in situations in which there is no reason to think the lawyer is using a former client's confidential information. I offer this hypothetical: A Law Firm represents Client A in obtaining institutional financing for Client A's acquisition of a company whose sole asset is a patent that Client A intends to commercialize. The Law Firm obtained no confidential information regarding the patent or Client A's manufacturing or marketing plans b/c the nature and value of the patent did not come into play in obtaining institutional financing. After its representation of Client A ends, Law Firm accepts the representation of Client B, and Client B: (i) seeks to attack the validity of the patent; or (ii) seeks to obtain financing for R&D on a technology that threatens to make Client A's patent passé; or (iii) seeks to corner the market on a raw product needed to manufacture under the patent; or (iv) simply is a business competitor of Client (A). It is doubtful whether any of these four situations should be prohibited, but that might well be the result of proposed (a)(2). I think it is better to treat *Oasis West* as a confidential information case, avoid an overstated paragraph (a) that would have unintended and undesirable consequences, and leave to case law the development of the loyalty prong of *Wutchumna*. I would remove (a)(2) and collapse (a) and (a)(1) into a single paragraph.

2) I generally agree with the shortening of the Comments, but I do think we should include a discussion of the meaning of "matter". I suggest including at least the second and third sentences of the first Commission's Comment [4] and the first sentence of its Comment [6]. The first Commission was asked to define "matter" and, while this is not possible, discussion of the concept would provide helpful guidance as the application of the Rule. In addition, this insertion would avoid any attempt to distinguish the continuing duty in a non-litigation matter from the duty in litigation.

The term "matter" for purposes of this Rule includes civil and criminal litigation, transactions of every kind, and all other types of legal representations. The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. 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].

**February 14, 2016 Martinez Email re 1.9 to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:**

I think I agree with your concerns about an overly broad reading of Oasis and *Wutchumna*. I believe Kevin had similar concerns. We attempted to codify *Wutchumna*, but with limited success (or bit off more than we can chew). I had proposed language to narrow (a)(2) so that it would be more consistent with Oasis and the possession of confidential information. See attached. We could remove (a)(2) and collapse (a) and (a)(1), as you suggest, but perhaps there is another way to “safely” capture *Wutchumna* and Oasis.

Attached:

**February 4, 2016 Martinez Email re 1.9 to Drafting Team, cc Difuntorum, Mohr, A. Tuft & Andresen:**

Thanks, Andrew. One big concern: The notion under (a)(2) that a lawyer can obtain consent to engage in conduct that will injuriously affect the former client seems incongruous and may not sit well with the Supreme Court or the idea that some adverse conduct is not consentable. At least on its face, (a)(2) suggests that a client could consent to the lawyer harming (“injuriously affect”) the former client. The Supreme Court could view the consent option in (a)(2) as contrary to *Wutchumna*’s flat prohibition that a lawyer may not do anything to injuriously affect a former client. Or it may view it as going too far, perhaps contrary to Oasis.

One possibility would be to merge parts of 3-310(E) into (a)(2) as follows:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter:
- (1) 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; or
  - (2) engage in conduct that injuriously affects the former client in any matter in which the lawyer formerly represented the client, engage in conduct adverse to the client in the same or a substantially related matter where, by reason of the representation of the client, the lawyer obtained confidential information material to the representation;
- unless the former client gives informed written consent.

I believe this approach is more consistent with Oasis and links the duty of loyalty to possession of confidential information. At the same time, the idea would be to avoid making an overly broad pronouncement on the duty of loyalty and to avoid the suggestion that the client can consent to what could otherwise be viewed as a breach of fiduciary duty.

Since Lee and Dean could not be on the last call I believe it’s important to get their take on this before this rule goes out tomorrow.