

**Rule 1.9 [3-310(E)] Duties To Former Clients**  
**(Commission's Proposed Rule Adopted on May 6 – 7, 2016 – Clean Version)**

- (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 virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation.

**Comment**

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15

P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person\* could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131 and 18 U.S.C. § 207(a). These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

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

[4] With regard to the effectiveness of an advance consent, see Comment [8] 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.

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  - (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 virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation.~~

### Comment

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**Proposed Rule 1.9 [3-310(E)] Duties to Former Clients**  
**Synopsis of Public Comments**

**TOTAL = XX**    **A = X**  
**D = X**  
**M = X**  
**NI = X**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response <b>A = 12</b> <b>NI = 0</b>
2016-32o	Law Professors (Zitrin) (07-25-16)	Yes	M	(c)(1)	In MR 1.9 (c)(1) an exception to the use of confidential information by a former lawyer when the information is “generally known.” Although this tracks the ABA rule, the word “generally” is not otherwise defined. In order to truly secure client confidence and secrets, we recommend the rule state the exception as information that is “generally <u>and widely</u> known.”	The commenters’ requested revision was not implemented because the Commission believes that “generally known” has the same meaning as “generally and widely known.”
X-2016-43r	Committee on Professional Responsibility and Conduct (COPRAC)	Yes	M	(c)(3)	COPRAC supports the proposed rule, with the exception of proposed subparagraph (c)(3). COPRAC believes that subparagraph (c)(3) should be deleted for two reasons. First, the problem that paragraph (c) is intended to address is likely to arise very infrequently. The substantial relationship test contained in paragraphs (a) and (b) is a very broad prophylactic rule. Accordingly, it will be a rare case in which a lawyer is not disqualified by the substantial relationship but still has any material confidential information. Second, in those cases the Committee believes	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3). The Commission agrees that the prohibitions on use and disclosure of confidential information, coupled with the existing case law recognizing the client’s right to seek disqualification on the basis of proof that the lawyer has actually received confidential information material to the matter provide adequate client protection against harm to the former client.

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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					that the absolute prohibitions on use or disclosure in subparagraphs (c)(1) and (c)(2), coupled with the client's recognized right to seek disqualification on the basis of proof that the lawyer has actually received confidential information material to the matter, provide adequate protection against harm to the former client. Accordingly, we respectfully suggest that the proposed rule be conformed to the approach of every other American jurisdiction by deleting subparagraph (c)(3).	
2016-520	Law Professors (Zitrin) (08-24-16)	Yes	M	(c)(1)	In MR 1.9 (c)(1) an exception to the use of confidential information by a former lawyer when the information is "generally known." Although this tracks the ABA rule, the word "generally" is not otherwise defined. In order to truly secure client confidence and secrets, we recommend the rule state the exception as information that is "generally <u>and widely</u> known."	The commenters' requested revision was not implemented because the Commission believes that "generally known" has the same meaning as "generally and widely known."
Public Hearing	Menaster, Albert (Provided oral public hearing testimony on July 26, 2016. See pages 29-34 of the public hearing transcript.)	No	M	(c) (3) Comment 1 (ii)	What the rule articulates is that "A former client with whom we've obtained confidential information, we cannot now represent a new client." The Office of the Public Defender (PD) has a written	

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					<p>conflict policy which is used as a model for other PD offices around the state. Our written policy says that “if a former client is a prosecution witness or a victim and we are looking at whether to represent a current client, we are not permitted to use any of the information from the former client that will create a conflict, but mere possession does not create a conflict.” That’s the line that the office policy draws. There’s no ethical problem from having information that’s not being used. The problem is using it. The distinctions between possession and use acquired is the word that the draft Commission rules articulate.</p> <p>The significance of that point is there are a very large number of cases where former clients are prosecution witnesses. I suspect that if the rule is that possession is enough to disqualify us in cases, my office will never handle another gang case because somebody in the prosecution’s case is going to be a client of mine. The number of cases we would be required to conflict on would be substantially large. Many PD offices around the state are in precarious positions because their Board of</p>	

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					<p>Supervisors don't like it. They consider the PD office liberal. These offices survive only because they're so much cheaper than the private party. The more conflicts we have to declare, the worse acquisition becomes, and eventually we're going to hit a point where it's going to endanger the PD offices throughout the state.</p> <p>There is actually an inconsistency between the proposed rule and the comments. The rule says "acquiring information" but the comment says "use". We urge this Commission to adopt the comments which correctly cites the "Wachumna" case.</p> <p>One final collateral thought. What if we only represent a client at an arraignment where we ask questions regarding: true name, birthdate, family, work information and prior criminal history. All of these are clearly confidential. They have nothing to do with anything. Why would that be a conflict. Well, it's not, unless the rule is "acquiring information". We would be satisfied with the rule by the Commission adding the language from the comments which says the use of information precludes the representation of the client.</p>	



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Public Hearing	Alternate Public Defender for Los Angeles (Goodman, Michael) (Provided oral public hearing testimony on July 26, 2016. See pages 62-64 of the public hearing transcript.)	Yes		(a) (c) (3)	The rule talks about representing people where you have an adverse relationship as a result of representing somebody else. The current rule talks about the subject matter of the former client's representation. The new rule should add that the adverse aspects of the relationship are adverse as it relates to prior representation of that client, not simply that it's adverse to the client. The difficulty is that we have an enumerable number of (often gang involvement) cases where as a result of our representation, clients/former clients don't like the fact that we represent those people. Representing a new person, can potentially put that person at risk, simply by virtue of our representation, which we think is something adverse to that client's interest but not adverse to the former client's interest in the particular matter in which we represented them --- which is what we think the language of new rule should include. We would like language in the new rule which limits the conflict of interest "the same matter that was the subject of the former representation,"	

