

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

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

[1A] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

[1B] Two matters are "the same or substantially related" for purposes of this Rule if they involve a substantial risk of a violation of one of the two duties to a former client described

above in Comment [1]. This will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Rule 1.6 and Business and Professions Code section 6068(e), and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.¹

[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.

¹ Comment [1A] based on RRC1's proposed Rule 1.9, cmt. [6]. Comment [1] added in response to public comments from Carroll, X-2016-65a, and Department of Justice, X-2016-86a.

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- (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; 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.

[1A] For what constitutes a "matter" for purposes of this Rule, see Rule 1.7, Comment [2].

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

[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.

¹ Comment [1A] based on RRC1's proposed Rule 1.9, cmt. [6]. Comment [1] added in response to public comments from Carroll, X-2016-65a, and Department of Justice, X-2016-86a.

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Synopsis of Public Comments

TOTAL = 12 **A = 1**
D = X
M = 11
NI = X

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
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) (Baldwin)	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 that the absolute prohibitions on use or disclosure in subparagraphs	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3) and add a new comment addressing when two matters are “the same or substantially related.” With this modification, the Commission agrees that the prohibitions set out in paragraphs (a) and (b), the prohibitions on use and disclosure of confidential information, and 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

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

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					(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).	protection against harm to the former client.
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 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	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3) and add a new comment addressing when two matters are "the same or substantially related." The Commission notes that paragraph (c)(3) carried forward current rule 3-310(E) nearly verbatim. The

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					<p>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 Supervisors don’t like it. They consider the PD office liberal. These offices survive only because they’re so much</p>	<p>Commission also notes that proposed paragraphs (a) and (b) impose the same obligations on lawyers as does current rule 3-310(E). The Commission also notes that the commenter’s statement that “mere possession [of material confidential information] does not create a conflict” may be inconsistent with case law regarding disqualification. See, e.g., <i>Costello v. Buckley</i> (2016) 245 Cal.App.4th 748, 755 (in a case where a lawyer could have acquired confidential information from a former client that can be used to the former’s client’s disadvantage in a current case, the lawyer “is not only prevented from actually using the confidential information, but also is prevented from accepting subsequent employment representing an adverse party to the former client when he may be called upon to use such information.” [citing <i>Kraus v. Davis</i> (1970) 6 Cal.App.3d 494, 489, 85 Cal.Rptr. 846.] Thus, the possession by a lawyer of confidential information of a former client that is material in a current</p>

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					<p>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 "<i>Wachumna</i>" 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>	<p>matter in which the lawyer represents a client with interests adverse to the former client prohibits the lawyer from accepting or continuing the current representation. Nevertheless, a court might conclude that a lawyer in the prohibited lawyer's firm can represent the client if the prohibited lawyer is timely and effectively screened. See, e.g., <i>In re Charlissee C</i> (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597].</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)	<p>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,"</p>	<p>The Commission did not make the suggested change. To limit prohibitions to the "same matter" in which a lawyer represented the former client is at odds with well-settled law. See, e.g., <i>Jessen v. Hartford Casualty Ins. Co.</i> (2003) 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877 (Applying substantial relationship test); <i>H.F. Ahmanson & Co. v. Salomon Bros., Inc.</i> (1991) 229 Cal.App.3d 1445, 280 Cal.Rptr. 614 (same).</p>

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X-2016-66i	San Diego County Bar Association (SDCBA) (Riley)	Y	A		Supports the adoption of this proposed rule as a significant improvement over current Rule 3-310(E)—while maintaining client protections of the current rule—in that it incorporates the judicially developed “substantial relationship” test and addresses the increasing issue of potential conflicts arising from lawyers moving from one firm to another. We further believe the Comments provide valuable guidance to lawyers.	No response required.
X-2016-67d	Orange County Bar Association (OCBA) (Friedland)	Y	M	1.9(c)(1) Comment [3]	Believes that Proposed Rule 1.9 should not include the exception in subsection 1.9(c)(1) that allows lawyers to “use information... to the disadvantage of the former client... when the information has become generally known,” or the corresponding Comment [3]. The provisions in this Rule should be consistent with the provisions of Proposed Rule 1.6 regarding the confidentiality obligations of lawyers. The current version of Proposed Rule 1.6 does not include any exception for information that is “generally known,” so there should not be a backdoor exception to lawyers’ confidentiality obligations in this Rule 1.9. By way of this comment, the OCBA takes no	The Commission disagrees that paragraph (c)(1) would provide a “back door” exception to proposed Rule 1.6 [3-100]. The provision only permits the use of the former client’s confidential information that has become generally known; the lawyer is still absolutely prohibited from revealing a former client’s confidential information under paragraph (c)(2) and is absolutely prohibited from using confidential information to a <i>current</i> client’s disadvantage by proposed Rule 1.8.2. Thus, for example, a lawyer could use information of a <i>former</i> client that was confidential when learned but

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					position on whether the confidentiality provisions of Rule 1.6 should or should not include an exception for information that is "generally known."	is now generally known to make investment decisions. The lawyer could not do the same with information from a current client, or reveal that information.
X-2016-65a	Carroll, Dan	No	M	Comment [2]	<p>Opposes adoption of Proposed Rule 1.9 in its present form, but would support its adoption if inclusion of the concept of conflicts due to "substantially related matters" were removed.</p> <p>1. There is absolutely no discussion in either the proposed rule or the comments as to how a lawyer is to determine whether matters are "substantially related." The word "substantial" is defined in Proposed Rule 1.0.1(l), but not in a fashion that is helpful to this inquiry.</p> <p>2. The referenced lack of discussion includes absolutely no discussion as to whether the proposed rule is or is not intended to be evaluated under California case law concerning the "substantial relationship rule" as applied by courts in lawyer disqualification cases. Similarly, there is no discussion as to</p>	<p>The Commission has not made the suggested change. The inclusion of the term "substantially related" is necessary to capture those situations under which a lawyer might have obtained confidential information material to the present matter.</p> <p>1. The Commission has added a comment discussing when two matters are "the same or substantially related."</p> <p>2. See response to comment 1, above. Further, when courts apply the substantial relationship test in a disqualification motion, they nearly always use current rule 3-310(E) as a starting point. The Commission notes that paragraphs (a) and (b) impose the same obligations on</p>

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					<p>whether the proposed rule intends to create a new and different concept of "substantially related" to be applied for the purposes of lawyer discipline, These two issues are bound to lead to confusion in both lawyer analysis of the proposed rule as written and state bar disciplinary evaluation. Conflict of interest based on matters being "substantially related" should be left to be addressed by the courts in disqualification motions, not the disciplinary process. While I urge that the proposed rule be revised to remove all reference to "substantially related matters," if those references remain, I strongly urge the Committee include a specific comment clarifying whether lawyer disqualification "substantial relationship" case law should be consulted in analyzing conflicts under the proposed rule. I urge the Committee to state that lawyer-disqualification "substantial relationship" case law does not apply to analysis under this rule. The court-created "Substantial Relationship Test" was not adopted for the purpose of attorney discipline.</p> <p>3. Finally, notes Comment [2] to</p>	<p>lawyers as does current rule 3-310(E).</p> <p>3. The Commission disagrees</p>

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					the proposed rule is inconsistent with the proposed rule's content. Proposed Rule 1.9(b) forbids knowing representation of a person "in the same or a substantially related matter" in which a lawyer's former firm represented a client. Comment [2], however, inconsistently declares "the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by" lawyer-client confidentiality. That is not what Proposed Rule 1.9(b) states. Rather, the proposed rule states it is a conflict of interest for the lawyer to knowingly represent a client as described in the proposed rule even in the absence of actual knowledge if the matters are "substantially related."	with the commenter's assertion that paragraph (b) "states it is a conflict of interest for the lawyer to knowingly represent a client as described in the proposed rule even in the absence of actual knowledge if the matters are 'substantially related.'" Subparagraphs (b)(1) and (b)(2) must both be satisfied for paragraph (b) to apply. Under subparagraph (b)(2), it must be shown that "the lawyer <i>had acquired information</i> [about the former client] protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter." (Emphasis added.)
X-2016-86a	United States Department of Justice (US DOJ) (Ludwig)	Yes	M		<p>1. Supports the adoption of proposed Rule 1.9.</p> <p>2. However, as drafted, proposed Rule 1.9 provides lawyers with no guidance regarding two of the Rule's key concepts: (1) what constitutes a "matter" and (2) when matters are substantially related." We think that it is important to define these terms and recommend doing so</p>	<p>1. No response required.</p> <p>2. In response to public comment, the Commission has added comments discussing what constitutes a "matter" and when two matters are "the same or substantially related." The Commission is not adding a comment to provide guidance on matters such as</p>

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					<p>in the proposed Rule or its commentary using language consistent with that found in Comments [2] and [3] to Rule 1.9 of the American Bar Association's Model Rules of Professional Conduct . We also think that it would be helpful for the Commission to explain how a lawyer, without personally representing a client, may have "acquired information protected by B&P Code § 6068(e) and Rules 1.6 and 1.9(c)" about that client that generally would disqualify the lawyer from "knowingly represent[ing] a person in the same or a substantially related matter" under proposed Rule 1.9(b). Although proposed Comment [2] makes clear that, under proposed Rule 1.9(b), "[a] 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 B&P Code § 6068(e)," we do not think that it sufficiently alerts lawyers to the circumstances in which they might obtain actual knowledge of such information outside of a direct attorney-client relationship—e.g., the "water cooler" phenomenon" To provide such guidance and maximize the</p>	<p>the "water cooler effect" because it believes such a comment would be practice guidance inconsistent with the Commission's Charter.</p>

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					protection of former clients, we recommend that the Commission incorporate the language of Comment [6] to Model Rule 1.9 into the proposed Rule's commentary.	
X-2016-87b	Attorneys Liability Assurance Society (ALAS) (Garland)	Yes	M		Paragraphs (a) and (b) of Proposed Rule 1.9 are the same as ABA Model Rule 1.9 except that they incorporate California's more client-protective requirement for obtaining a client's "informed written consent" and refer to B&P § 6068(e). Due to their similarity to the ABA Rule, adopting paragraphs (a) and (b) of Proposed Rule 1.9 will facilitate compliance and enforcement by promoting a national standard.	No response required.
X-2016-104x	Office of Chief Trial Counsel (OCTC) (Dresser)	Yes	M		<p>1. OCTC generally supports this rule.</p> <p>2. It is concerned, however, about the use of the term "knowingly" in subsection (b). By using the term "knowingly" in this subsection the Commission is excluding attorneys who commit a violation by recklessness, gross negligence, or willful blindness. For example, this rule appears to exclude an attorney who either does not have a program to check conflicts or does not</p>	<p>1. No response required.</p> <p>2-3. The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge of a conflict situation.</p>

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					<p>actually check whether there is a conflict. That attorney can claim he or she does not have actual knowledge of the conflict. Thus, that attorney would not violate this rule, even though the attorney has engaged in willful blindness or gross negligence. Although negligence is not a basis for discipline, gross negligence, recklessness, and willful blindness ...warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability. Requiring actual knowledge in this rule will lessen the current standards governing attorney conduct and is contrary to well established standards for when attorney conduct is disciplinable.</p> <p>OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the conflict is the result of excusable negligence or gross negligence, recklessness, or willful blindness.</p> <p>3. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9 because the</p>	<p>3. The commenter does not explain whether it believes the use of term “materially</p>

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					<p>Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This would appear to be a significant change in the rule and law. Moreover, while the term “materially adverse” is in the ABA Model Rules, neither the subparagraph nor proposed rule 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.</p> <p>4. OCTC supports the Commission’s inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2).</p> <p>5. OCTC has concerns about Comments 1 and 2. They do not elucidate the rule but, instead, give a philosophical basis for the rule.</p> <p>6. OCTC supports Comment 3.</p> <p>7. OCTC has no position on</p>	<p>adverse” would result in a difference in how the current rule is applied. The Commission believes that absent evidence that the rule is different from the current standard, Rule 1.9 should move toward the national standard of “materially adverse.”</p> <p>4. No response required.</p> <p>5. The Commission has not made the suggested change. It believes that both comments, by providing an explanation of the duties and policy rationale underlying the rule, afford important interpretative guidance in applying the rule.</p> <p>6. No response required.</p> <p>7. No response required.</p>

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

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					Comment 4's discussion of advanced waivers.	
X-2016-93e	Los Angeles County Public Defender (Brown)	Yes	M		The text of Proposed Rule 1.9(c)(3) and the Comment to that Rule are inconsistent. The text of the Rule bars representation where the lawyer "acquires" information, but the Comment only bars representation where the lawyer "uses" previously acquired information. We contend that the Comment correctly states the rule.	In light of public comment, the Commission has modified the proposed Rule to delete proposed subparagraph (c)(3) and add a new comment addressing when two matters are "the same or substantially related." The Commission notes, however, that it disagrees with the commenter's assertion that the former proposed subparagraph (c)(3) and the Comment were inconsistent. The comment does not state that a lawyer is prohibited from representation only where the lawyer "uses" protected information.
X-2016-115c	Lamport, Stanley	No	M		1. Proposed Rule 1.9(a) and (c)(3) have overlapping and potentially conflicting standards that will not be understood by the average practitioner and are unlikely to be applied consistently by the courts. Clients pay for this rule in the sense that the subject matter of this rule is frequently litigated in disqualification motions and	1. The Commission agrees and has deleted paragraph (c)(3) while adding a comment discussing when two matters are "the same or substantially related for purposes of paragraph (a).

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					breach of duty cases.	
					<p>2. Changing the standards will inevitably result in the courts having to reconsider settled principles under the current rule. The current rule is not broken. There is no need to create a new rule with a hodgepodge of different standards with overlapping application that produces unnecessary litigation at the inevitable cost to clients.</p>	<p>2. The Commission disagrees that “changing the standards will <i>inevitably</i> result” in settled principles being reconsidered by the courts. (Emphasis added). Paragraphs (a) and (b) will accomplish the same result but provide clearer guidance on when a conflict situation will arise, thus enhancing compliance with the rule. Further, substituting paragraphs (a) and (b) will remove an unnecessary difference between California and a preponderance of the jurisdictions, consistent with the Commission’s Charter.</p>
					<p>3. <i>Suggested Revision Replaces Proposed Paragraph (a) With Paragraph (c)(3)</i></p> <p>Paragraph (c)(3) in the Proposed Rule is based on current rule 3-310(E) [which] eloquently and correctly states the duty.</p> <p>In practical terms, the current rule</p>	<p>3. The Commission has not made the suggested change. It believes that the standards set out in paragraphs (a) and (b), coupled with the new comment discussing when two matters are “the same or substantially related,” provide a clearer explanation of determining when a conflict with a former</p>

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					<p>means that a lawyer cannot accept a representation in circumstances where the lawyer could potentially use or disclose the former client's confidential information in a manner that would be contrary to the former client's interests. Proposed paragraph (a) ties adversity to the interests of the lawyer's current client. The rule should be instructing the profession to view protection of a former client's interests in confidentiality from the former client's perspective and not from the perspective of the lawyer's new client. There is no reason to have two rules (paragraphs (a) and (c)(3) in the Proposed Rule) that cover the same subject, particularly when one of those rules (proposed paragraph (a)) is under inclusive.</p> <p>4. Paragraph (c) in the Proposed Rule applies to a lawyer's present or former firm. While this tracks Model Rule 1.9, California courts have held that the imputation rules do not extend to a lawyer who has terminated an association with a firm. That lawyer only has duties with respect to the information the lawyer actually acquired at the former firm. The reference to</p>	<p>client arises. See response to comment 1, above.</p> <p>4. The Commission disagrees with the commenter's concern and notes that both (c)(1) and (c)(2) require the lawyer him or herself to have acquired protected information by virtue of the prior representation – this Rule does not impute to the lawyer information known to others within the present or former firm. Imputation is covered by Rule 1.10.</p>

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					<p>“former firm” in paragraph (c) does not account for the foregoing limitation. It should be removed from paragraph (c).</p> <p><i>5. The Suggested Revision Expands Paragraph (b) To Apply To Any Use Or Disclosure Of Confidential Information</i></p> <p>Proposed paragraph (b) in the Proposed Rule (as well as the Model Rule) addresses the duty with respect to information a obtained by a lawyer while formerly associated with a firm, but proposed paragraph (b) relates only to paragraph (a) in the Proposed Rule. However, proposed paragraph (a) only relates to use or disclosure of confidential information in representational settings. It does not extend to use and disclosure of confidential information in non-representational circumstances, even though the lawyer’s duty is the same and the rules limiting imputation with respect to a lawyer’s former firm should be the same. The Suggested Revision attempts to address this in paragraph (b) by stating that a lawyer who is formerly associated with a firm must comply with all of paragraph (a) and (c) if the</p>	<p>5. The Commission did not make the suggested change. Aside from creating an unnecessary difference in the rules between California and a preponderance of the jurisdictions that have adopted the Model Rule provision, the Commission notes that California courts have had no trouble in applying Model Rule 1.9(b). See <i>Adams v. Aerojet-General Corp.</i>, 86 Cal.App.4th 1324, 104 Cal.Rptr.2d 116 (2001); <i>Ochoa v. Fordel</i>, 146 Cal.App.4th 898, 53 Cal.Rptr.3d 277 (2007) (applying “modified substantial relationship test” as set forth in <i>Adams</i>); <i>Faughn v. Perez</i>, 145 Cal.App.4th 592, 51 Cal.Rptr.3d 692 (2006) (same).</p>

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					<p>lawyer received confidential information while associated with the former firm. Given that (b) would refer to both (a) and (c), it would make sense to move (b) to the end of the Rule and move paragraph (c) in the Proposed Rule to paragraph (b).</p> <p><i>6. The Suggested Revision Adds Reference To Information Acquired By The Lawyer Or The Lawyer's Firm</i></p> <p>Paragraphs (c)(1) and (c)(2) in the Proposed Rule refer to information "acquired by virtue of representation of the former client" without specifying whether the acquisition is by the lawyer or the firm or both. To provide clarity, the Suggested Draft revises those paragraphs to state that the information was acquired by "the lawyer or firm" by virtue of the representation of the former client.</p> <p><i>7. The Substantial Relationship Test Should Not Be In The Rule</i></p> <p>Under Rule 3-310(E), the focus is on whether the lawyer acquired material confidential information by virtue of representing a former client. That is the relevant inquiry.</p>	<p>6. The Commission has not made the suggested change.</p> <p>7. The Commission disagrees. The substantial relationship test has been used in discipline cases. See, e.g., <i>In the Matter of Lane</i>, 2 Cal. State Bar Ct. Rptr. 735 (1994).</p>

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					<p>It is more inclusive in that it focuses on the information the lawyer received rather than the nature of the matter in which the lawyer represented the client. The “same or a substantially related matter” language is an evidentiary standard that is unique to lawyer disqualification motions. The substantial relationship test was not intended to be and does not operate as a substantive rule of law. It is a rule of evidence created specifically for disqualification motions</p> <p>The ABA formulation, from which the “same or a substantially related matter” language is derived, has lead courts in other states that have Model Rule 1.9 to fashion an ongoing duty of loyalty to a former client. By adopting an ABA standard, we run the risk of importing this case law into the California court's construction of the new rule. These cases blur the distinction between the duty to maintain a client’s confidential information and not do anything injurious with respect to the matter in which the lawyer represented the former client on the one hand and a duty of loyalty that is not connected to those two duties. There is no functional reason for extending</p>	

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					<p>the duty of loyalty to beyond the two duties that the California Supreme Court has repeatedly stated since the 1930s.</p> <p>Changing the current standard in Rule 3-310(E) to the “same or a substantially related matter” is likely to be viewed by some as a new and different standard. It unnecessarily invites litigation at client expense of settled principles based on the new formulation. There is nothing wrong with the current formation in Rule 3-310(E), which is retained in proposed paragraph (c)(3). There is no reason to change the rule.</p>	