

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

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public official or employee of the government:
- (1) is subject to Rule 1.9(c); and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public official or employee, unless the appropriate government agency gives its informed written consent* to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).
- (b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter unless:
- (1) the personally prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written* notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule
- (c) Except as law may otherwise expressly permit, a lawyer who was a public official or employee and, during that employment, acquired information that the lawyer knows* is confidential government information about a person,* may not represent a private client whose interests are adverse to that person* in a matter in which the information could be used to the material disadvantage of that person.* As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm* with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom.
- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public official or employee:
- (1) is subject to Rules 1.7 and 1.9; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent;* or
 - (ii) negotiate for private employment with any person* who is involved as a party, or as a lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially, except

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

Comment

[1] Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.

[1A] For what constitutes a “matter” for purposes of this Rule, see Rule 1.7, Comment [2]. For purposes of this Rule, “matter” also includes any other matter covered by the conflict of interest rules of the appropriate government agency.

[2] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client. Both provisions apply when the former public official or employee of the government has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate’s participation. Substantial participation requires that the lawyer’s involvement be of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, a lawyer participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

[3] By requiring a former government lawyer to comply with Rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. This provision applies regardless of whether the lawyer was working in a “legal” capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by paragraph (a)(1).

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

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because conflicts of interest are governed by paragraphs (a) and (b), the latter agency is required to screen the lawyer. Whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [6]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

[6] Paragraphs (b) and (c) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer’s compensation to the fee in the matter in which the lawyer is disqualified.

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

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

[9] This Rule is not intended to address whether in a particular matter: (i) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency or (ii) the use of a timely screen will avoid that imputation. The imputation and screening rules for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th at 847, 851-54 and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403]. Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code § 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264]. Concerning prohibitions against former prosecutors participating in matters in which they served or participated in as prosecutor, see, e.g., Business and Professions Code § 6131 and 18 U.S.C. § 207(a).

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- (b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter unless:
- (1) the personally prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written* notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule
- (c) Except as law may otherwise expressly permit, a lawyer who was a public official or employee and, during that employment, acquired information that the lawyer knows* is confidential government information about a person,* may not represent a private client whose interests are adverse to that person* in a matter in which the information could be used to the material disadvantage of that person.* As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority, that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm* with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened* [in accordance with Rule 1.0.1(k)] from any participation in the matter and is apportioned no part of the fee therefrom.
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that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

~~(e) As used in this Rule, the term “matter” includes:~~

- ~~(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and~~
- ~~(2) any other matter covered by the conflict of interest rules of the appropriate government agency.~~

Comment

[1] Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule.

[1A] For what constitutes a “matter” for purposes of this Rule, see Rule 1.7, Comment [2]. For purposes of this Rule, “matter” also includes any other matter covered by the conflict of interest rules of the appropriate government agency.

[2] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client. Both provisions apply when the former public official or employee of the government has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate’s participation. Substantial participation requires that the lawyer’s involvement be of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, a lawyer participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

[3] By requiring a former government lawyer to comply with Rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. This provision applies regardless of whether the lawyer was working in a “legal” capacity. Thus, information learned by the lawyer while in public service in an administrative, policy or advisory position also is covered by paragraph (a)(1).

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

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because conflicts of interest are governed by paragraphs (a) and (b), the latter agency is required to screen the lawyer. Whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13, Comment [6]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

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

[9] This Rule is not intended to address whether in a particular matter: (i) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency or (ii) the use of a timely screen will avoid that imputation. The imputation and screening rules for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. See *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th at 847, 851-54 and *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403]. Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code § 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264]. Concerning prohibitions against former prosecutors participating in matters in which they served or participated in as prosecutor, see, e.g., Business and Professions Code § 6131 and 18 U.S.C. § 207(a).

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Current Government Officials and Employees
Synopsis of Public Comments**

TOTAL = 5	A = 3
	D = 1
	M = 1
	NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response A = 12 NI = 0
X-2016-43bd	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin) (09-08-16)	Y	M		1. As COPRAC recommended with respect to proposed Rule 1.10, we recommend that the Commission add a comment providing guidance as to the meaning of “participated substantially” as used in subparagraphs (a)(2), (d)(2)(i), and (d)(2)(ii). We also note that the phrase “participated substantially” is slightly different than the term “substantially participate” used in proposed Rule 1.10, yet there is no indication how or whether the Commission intended these terms to be construed differently.	1. The Commission has added a comment providing guidance as to when participation is personal and substantial as follows: “Personal participation includes both direct participation and the supervision of the participation of a subordinate. Substantial participation requires that the lawyer's involvement be of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial participation may occur when, for example, a lawyer participates through decision, approval, disapproval,

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

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					<p>2. In addition, we recommend that the Commission use the phrase “participated personally and substantially,” which is the phrase used in Model Rule 1.11(a)(2). Inclusion of “personally” would conform California’s rule to the national standard, which we understand is one of the goals of the Commission. We recognize that the Commission felt that the inclusion of “personally” is redundant, but we think that conforming to the national standard is a worthwhile benefit that outweighs that concern.</p>	<p>recommendation, investigation or the rendering of advice in a particular matter.”</p> <p>2. The Commission has made the suggested change to “participated personally and substantially” to provide uniformity with the ABA Model Rule, as well as with various government statutes and regulations that use the same phrase. See, e.g., 18 USC 208; 5 CFR 2640.103.</p>
X-2016-89b	League of California Cities (Leary) (09-27-16)	Y	A		<p>1. I write in support of Proposed Rule 1.11 on behalf of the City Attorneys’ Department of the League of California Cities (“League”). Proposed Rule 1.11 establishes specific conflict of interest rules for former and current government attorneys. Because this rule provides clear and necessary guidance to both former and current government lawyers regarding their professional duties, the League fully supports its adoption by the</p>	<p>1. No response required.</p>

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					<p>California State Bar’s Board of Trustees (“Board”).</p> <p>2. However, the League urges the Board to modify Proposed Rule 1.11 by substituting “public officer” for “public official.” This modification would clarify the scope of the rule, by utilizing terminology that is already well defined in California public agency law, as explained at length in the League’s comments to Proposed Rule 4.2.</p>	<p>2. The Commission believes the term public officer implies a limitation to public officials of a certain level that should not exist, and that the Rule should extend to any public official or government employee.</p>
X-2016-104z	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Y	M	(b), Cmts. 3, 4	<p>1. Supports rule but concerned with use of “knowingly” in paragraph (b).</p> <p>2. Supports cmts. 1, 2, 5, 6, 7, 8 & 9.</p> <p>3. Comment [3] does not clarify rule and should be deleted.</p>	<p>1. The definition of “knowingly” in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. With this definition, the Commission believes that the “knowingly” standard is appropriately used in paragraph (b), which addresses when a lawyer associated with the former government employee may undertake or continue representation. This is consistent with the ABA Model Rule and so furthers national uniformity.</p> <p>2. No response necessary.</p> <p>3. The Commission believes this comment provides</p>

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					4. Concerned with use of “knowingly” in Comment [4].	important guidance regarding paragraph (a)(1)'s incorporation of Rule 1.9(c) as applicable to government employees. 4. The Comment’s use of the term “actual knowledge” as defined in Rule 1.1.1(f), is consistent with the intended reach of paragraph (c) of the Rule.
X-2016-120m	LGBT Bar Association of Los Angeles (King) (09-27-16)	Y	A		Supports the adoption of proposed Rule 1.11.	No response required.
X-2016-121b	California Commission on Access to Justice (Hartston) (09-23-16)	Y	A		The Access Commission supports proposed Rule 1.11. By establishing that imputation of a conflict of interest is the default situation, it could protect the many Californians who interact with the justice system without sophisticated knowledge of the system. It will bring California into line with the conflict rules of every other jurisdiction which has adopted some version of Model Rule 1.11. This will help to ensure that out-of-state lawyers will know the rule. We appreciate that the proposed rule protects clients better than the Model Rule by requiring informed written consent which requires written disclosure of the potential	No response required.

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					adverse consequences of the client consenting to a conflicted representation.	

