

**Rule 1.9 [3-310(E)] Duties To Former Clients
(Commission's Proposed Rule Adopted on October 21–22, 2016
as Amended by the Board on November 17, 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.

Comment

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

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

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

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

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

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

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

TOTAL = 4 **A = 0**
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
Y-2016-18c	Lamport, Stanley (01-09-17)	N	M	(a)	Paragraph (a) should be revised to state the language in current Rule 3-310(E). Rule 3-310(E) eloquently and correctly states the duty.	
				(c)(1) & (2)	Paragraph (c)(1) & (2) should be revised to clarify that a lawyer is required to comply with Rule 1.9(c) with respect to information acquired by the lawyer's former firm when the lawyer acquired the information when associated with that former law firm. This concept is in paragraph (b), which related specifically to representational conflicts governed by paragraph (a). The language in paragraph (b) does not related to the language in paragraph (c), but it should.	
Y-2016-23b	Sall, Spencer, Callas & Krueger (Sall) (01-09-17)	Yes	M		The elimination of subdivision (c)(3) leaves a gap in the coverage of the rule in comparison to existing Rule 3-310 in that proposed Rule 1.9 fails to prohibit the representation of a client adverse to a former client, without informed written consent from the former client, where the attorney actually received confidential information material to the representation but	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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

TOTAL = 4 **A = 0**
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>where the prior and current representation are not substantially related. See, <i>Costello v. Buckley</i> (2016) 245 Cal.App.4th 748.</p> <p>Comment [3] is ambiguous and is contrary to the Commission's Charter not to legislate through Comments.</p> <p>Comment [4] is likewise contrary to the Commission's Charter not to legislate through Commetn and inconsistent with existing law.</p> <p>The phrase "or when the information has become generally known" in subsection (c)(1) is inconsistent with the State Bar Act and California law.</p>	
Y-2016-21j	State Bar Office of Chief Trial Counsel (OCTC) (Dresser) (01-09-17)	Yes	M		<p>1. OCTC generally supports this rule. However, we are concerned about the use of the term "knowingly" in subsection (b). By using the term "knowingly" in this subsection the Commission is excluding attorneys who commit a conflict violation by recklessness, gross negligence, or willful blindness.</p> <p>2. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9, because the</p>	

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

TOTAL = 4 **A = 0**
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					<p>Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This is a significant change in the rule and law, making it far more difficult to enforce the rule and prosecute violations, and far less protective of clients, than the current law.</p> <p>2. OCTC supports the Commission's inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2).</p> <p>3. OCTC has concerns about Comments [1] and [2] because they do not elucidate the rule but, instead, give a philosophical basis for the rule.</p> <p>4. OCTC supports Comments [3] and [5].</p> <p>5. OCTC is concerned with Comment [4] for the same reasons it is concerned with the use of "knowingly" in paragraph (b) of the proposed rule. Further, this comment implies it will be the State Bar's burden to prove that the person had actual knowledge of the confidential information, even though the law has long held that, for public protection, knowledge of confidential</p>	

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

TOTAL = 4 **A = 0**
D = 0
M = 4
NI = 0

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
					information is imputed to all the attorneys in a firm.	
Y-2016-7q	State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) (Spencer) (01-06-17)	Yes	M	Comment [3]	<p>COPRAC repeats its support for Rule 1.9 and agrees with all changes reflected in the revised Rule, except for Comment [3], defining “the same or substantially related.”</p> <p>The Committee believes that while the proposed definition is adequate for disciplinary purposes, it may be too narrow for other purposes in which the courts may look to this rule, for example, in a disqualification context.</p> <p>To avoid potential confusion or inconsistency, the Committee recommends that a final sentence should be added to Comment [3] reading as follows: “The definition in this Comment is intended for disciplinary purposes, and may not exhaust all situations in which a court could conclude that two matters are ‘the same or substantially related’ in other contexts.”</p>	