

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.11

Commission Drafting Team Information

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I. CURRENT ABA MODEL RULE

**[There is no California Rule that corresponds to Model Rule 1.11,
from which proposed Rule 1.11 is derived.]**

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer 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 officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
- (b) When a lawyer is disqualified 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 disqualified lawyer is timely screened 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 having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, 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 and which, 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 which 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 disqualified lawyer is timely screened 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 officer 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 consent, confirmed in writing; or
 - (ii) negotiate for private employment with any person who is involved as a party or as lawyer 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).
- (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] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[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. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of 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 [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs 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] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

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

[9] 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.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20 & 21, 2017

Action: Recommend Board Adoption of Proposed Rule 1.11

Vote: 13 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 10, 2017

Action: Board Adoption of Proposed Rule 1.11

Vote: X (yes) – X (no) – X (abstain)

III. COMMISSION'S PROPOSED RULE 1.11 (CLEAN)

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* 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* 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.

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

[3] 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.

[4] 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).

[5] 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.

[6] 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].

[7] 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.

[8] 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.

[9] 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).

[10] 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.* (2006) 38 Cal.4th at 847, 851-54 [43 Cal.Rptr.3d 776] 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).

IV. COMMISSION'S PROPOSED RULE 1.11 (REDLINE TO MODEL RULE 1.11)

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

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public ~~officer~~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 ~~officer~~official or employee, unless the appropriate government agency gives its informed written consent, ~~confirmed in writing,*~~ to the representation. This paragraph shall not apply to matters governed by Rule 1.12(a).
- (b) When a lawyer is ~~disqualified~~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 ~~disqualified~~personally prohibited lawyer is timely screened* 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~~.Rule

- (c) Except as law may otherwise expressly permit, a lawyer ~~having~~who was a public official or employee and, during that employment, acquired information that the lawyer knows^{*} is confidential government information about a person^{*}~~acquired when the lawyer was a public officer or employee,~~^{*} 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~~and which, 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 ~~which~~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 ~~disqualified~~personally prohibited lawyer is timely screened^{*} 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 ~~officer~~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,~~confirmed in writing;~~^{*} 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).
- ~~(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.

~~[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.~~

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

~~[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.~~

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client ~~and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.~~ 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.

[4] 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).

[5] 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.

~~[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.~~

[56] 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. ~~However, because the conflict~~ Because conflicts of interest ~~is~~are governed by ~~paragraph (d)~~paragraphs (a) and (b), the latter agency is ~~not~~ required to screen the lawyer ~~as paragraph (b) requires a law firm to do.~~ The question of whether ~~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 [96]. See also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].

[67] Paragraphs (b) and (c) ~~contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures).~~ These paragraphs 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~~lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

~~[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.~~

~~[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.~~

[98] 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.

[9] 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).

[10] 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.* (2006) 38 Cal.4th at 847, 851-54 [43 Cal.Rptr.3d 776] 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).

~~[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.~~

V. RULE HISTORY

Although the origin and history of Model Rule 1.11 was not the primary factor in the Commission's consideration of proposed Rule 1.11, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 277 – 298 ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**

(In response to 90-day public comment circulation):

1. OCTC generally supports this rule, but has the same concerns regarding use of the term “knowingly” in subsection (b) of this rule as it has for proposed Rule 1.9 and the General Comments of this letter.
2. OCTC supports Comments 1, 2, 5, 6, 7, 8, and 9.
3. OCTC is concerned about Comment 3. It does not clarify the rule, but, instead, gives a philosophical basis for the rule.
4. OCTC is concerned about Comment 4 for the same reasons it is concerned about the use of the word “knowingly” in subsection (b) of the rule.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017**

(In response to 45-day public comment circulation):

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same. See 90-Day and 45-Day Public Comment Synopsis Tables, Attachments _____ and _____.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

Three comments, including the above comment from OCTC, were received. All agreed, only if modified, with the proposed rule. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

The ABA State Adoption Chart for the ABA Model Rule 1.11, from which proposed rule 1.11 is derived, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_11.pdf
- Twenty-two jurisdictions have adopted Model Rule 1.11 verbatim.¹ Most of the remaining jurisdictions largely track the Model Rule language, with only non-substantive changes. However, there are ten jurisdictions that have departed

¹ The jurisdictions are Connecticut, Delaware, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming.

substantially from the language of the Model Rule,² including jurisdictions that address the issue of part-time government employment.³

**IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES;
NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

A. Concepts Accepted (Pros and Cons):

1. General: Recommend adoption of the Model Rules' framework of having:

(i) separate rules that regulate the different conflicts of interest situations currently regulated by a single rule, rule 3-310: proposed rules 1.7 (current clients), 1.8.6 (payments from one other than client), 1.8.7 (aggregate settlements) and 1.9 (former clients); and

(ii) several rules to address concepts that are currently found in case law but not in the Rules of Professional Conduct: proposed rules 1.10 (general rule of imputation of conflicts and ethical screening in private firm context), 1.11 (conflicts involving former and current government lawyers) and 1.12 (conflicts involving former judges, third party neutrals, and their staffs).

○ Pros: Such an approach should enhance compliance with and facilitate enforcement of conflicts of interest principles. Among other things, separate rules should reduce confusion and provide out-of-state lawyers, who often practice in California under one of the multijurisdictional practice rules (9.45 to 9.48) with quick access to the rules governing their specific conflicts problem. At the same time, this approach will promote a national standard in how the different conflicts of interest principles are organized within the Rules as every other jurisdiction in the country has adopted the ABA conflicts rules framework.

○ Cons: There is no evidence that the current conflicts rule regimen, i.e., a single rule (rule 3-310) and case law, has been ineffective in regulating conflicts of interest between or among clients.

2. General: Recommend adoption of proposed Rule 1.11, patterned on Model Rule 1.11, which would regulate conflicts of interest in the governmental context.

○ Pros: There are several reasons favoring the Commission's recommendation:

(1) adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law, should protect client interests by clearly establishing that imputation is the default situation that can be avoided only if the prohibited lawyer is screened as

² The jurisdictions are: Arizona, District of Columbia, Georgia, Missouri, New Jersey, New York, Oregon, Tennessee, Texas, and Virginia.

³ See, e.g., Missouri Rule 1.11(e).

provided in the rule, or the former government agency waives the rule's application.

(2) the addition of paragraph (c), the prohibition on a former government lawyers use of confidential government information (e.g., tax information), clarifies that a prohibition on representation can arise from information the former government employee might have acquired in situations other than in representation of the government employer, and emphasizes that the lawyer owes a duty of confidentiality to third persons. Such duties might not be readily apparent under current case law.

(3) the description of such prohibitions on representation in a rule of professional conduct will provide clear guidance to both former and current government employees regarding their professional duties, thus enhancing compliance and facilitating discipline.

- Cons: There is no evidence that the current abundant case law does not adequately regulate conflicts of interest in the governmental context.

3. Substitute the terms “prohibited” and “prohibition” for “disqualified” and “disqualification” throughout the rule.

- Pros: The substitution accurately reflects that the rule is a disciplinary rule rather than a civil standard for disqualification.
- Cons: Regardless of whether the rule is part of a set of disciplinary rules, it will be relied upon and cited to by courts in the context of disqualification motions, just as rule 3-310 currently is.

4. Recommend carrying forward California’s heightened requirement of “informed written consent.”

- Pros: It is a more client-protective requirement that a lawyer obtain the client’s “informed written consent,” which requires *written* disclosure of the potential adverse consequences of the client consenting to a conflicted representation. The Model Rules, on the other hand, employ a more lenient and less-protective requirement of requiring only “informed consent, confirmed in writing.” That standard permits a lawyer to confirm by email or even text message that the client has consented to a conflict and does not require written disclosure of the potential adverse consequences.

- Cons: None identified.

5. Recommend adoption of paragraph (a), derived from Model Rule 1.11(a), which sets out the basic prohibitions on representation of a private client by a former government official or employee.

- Pros: The rule is derived from Model Rule 1.11(a) but is revised for clarity

while at the same time promoting a national standard. Changes include: (i) “public official” is substituted for “public officer” to conform the rule to the term used in proposed rule 4.2 (communication with a represented person), (ii) California’s historical heightened “informed written consent” requirement is incorporated (see ¶.4); and (iii) a sentence from the first Commission’s proposed Rule 1.11 has been added to clarify that although judges and judicial employees are government employees and so would otherwise be presumed governed by Rule 1.11, their conduct after leaving government employment is governed by rule 1.12.

- Cons: See ¶.2, Cons.

6. Recommend adoption of paragraph (b), derived from Model Rule 1.11(b), which sets out the basic rule of imputation for lawyers who are former government employees in its introductory clause and provides that a prohibited former government lawyer can be screened to avoid imputation.

- Pros: See ¶.2, Pros.

- Cons: See ¶.2, Cons.

7. Recommend adoption of paragraph (c), derived from Model Rule 1.11(c), which prohibits a lawyer who has acquired confidential government information (e.g., tax information) about a person from representing another private individual with interests adverse to that person “in a matter in which the information could be used to the material disadvantage of that person.”

- Pros: This is an important provision that should enhance respect for the legal profession and the administration of justice. It prohibits a lawyer who has acquired confidential information of a person, usually under compulsion by the government, from later using that information to the material disadvantage of that person. The information is not otherwise privileged or subject to the duty of confidentiality because the person was not a former client of the former government employee. Although a former government employee may already be subject to a similar prohibition under regulations that govern their conduct, it is appropriate to include the prohibition in a disciplinary rule to highlight this important duty owed to persons who have disclosed sensitive information to the government.

- Cons: Government employees are already prohibited from using such information under government regulations. There is no need for a further prohibition.

8. Recommend adoption of paragraph (d), derived from Model Rule 1.11(d), which identifies limitations on the conduct of a current government employee, including one who moves from private practice into government employment.

- Pros: The provision states a clear standard for governing: (i) a government

lawyer's representation of the government in a matter in which the lawyer participated personally and substantially while in private practice; and (ii) a government lawyer's ability to negotiate for private employment while still serving in government. With respect to the former, the government employee is precluded from such representation absent the consent of both the government agency and the former client (as the lawyer is subject to Rule 1.9).

With respect to the latter, the proposed rule as revised clarifies that a government lawyer is prohibited from negotiating not only with a lawyer or party involved in a matter in which the government employee is substantially participating, but also with anyone from a law firm of a lawyer involved in the matter.

- Cons: Government employees are already prohibited from engaging in representations adverse to a former private client, see *City of Santa Barbara v. Superior Court*, *supra*, 122 Cal.App.4th 17, 18 Cal.Rptr.3d 403 (2004), and are subject to government regulation regarding employment negotiations.

9. Recommend adoption of proposed Comment [2], which cross-references to Comment [2] of proposed Rule 1.7, which provides examples of what constitutes a "matter" derived from Model Rule 1.11(e). Comment [2] has been included rather than Model Rule 1.11(e), which provides a text definition of "matter" for purposes of Model Rule 1.11.

- Pros: Because Model Rule 1.11(e) does not provide an exclusive definition of the term "matter," but instead provides examples of what is included in the term "matter," it is more appropriately included as a Comment. Further, the broad set of examples of what constitutes a "matter" is more appropriately included in Rule 1.7, and cross-referenced in Rules 1.9 and 1.11, because the examples apply to the term "matter" as used in all three Rules.
- Cons: The deviation from the national standard is not justified. Although "matter" within the context of representation of private clients is typically limited to representations of a client in a legal proceeding or transaction, the ways in which a government employee, acting either as a lawyer or as a government official, provides services to the governmental client, is much broader. Further, Model Rule 1.11(e) is an attempt to capture the broader range of services that government lawyers often are called upon to provide and should be limited to Model Rule 1.11.

10. Recommend adoption of the comments to the proposed Rule.

- Pros: There are ten comments to Rule 1.11, all of which provide guidance in interpreting or applying the rule.

Comment [1] clarifies that Rule 1.10 does not apply to conflicts in the governmental context.

Comment [2] is discussed in paragraph 9 above.

Comment [3] clarifies that the prohibitions in paragraphs (a)(2) and (d)(2) apply regardless of whether the lawyer is adverse to a former client. The comment also provides guidance and examples with respect to when participation is “personal and substantial.

Comments [4] and [5], derived from RRC1 Rule 1.11, cmt. [4A] and NY Rule 1.11, cmt. [4A], have no counterpart in the Model Rule. RRC1 Comment [4A] has been divided into two comments to clarify the purposes of Rule 1.11(a)(1) and (c), respectively, and provide guidance on when those provisions apply. This is particularly true of paragraph (a)(1), which, through its recognition that the former government lawyer is subject to Rule 1.9(c) is intended to protect confidential government information regardless of whether the now private lawyer learned of the information when acting as a lawyer.

Comment [6], which is similar to proposed Rule 1.13, cmt. [6], explains that determining who or what is the client when more than one government agency is involved is beyond the scope of the rules.

Comment [7] includes an important clarification of how the screening requirement regarding fees in subparagraphs (b)(1) and (c)(1) is applied.

Comment [8] explains that joint representation of the government and a private person may be permitted.

Comment [9] provides a critical explanation of the requirements under paragraph (d) for obtaining consent not only from the government agency but also from the former client.

Comment [10] has been added to clarify that rule 1.11 is not intended to address imputation and screening within government agencies, and that these areas are left to be addressed by existing California case law and its development, as well as any applicable statutes.

- Cons: With the possible exception of paragraph (d) and Comment [9], the rule is sufficiently transparent so as to not to require further clarification in comments.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption in paragraphs (b) and (c) of a provision based on Colorado Rule 1.10(d)(4), which would have required that:

“the personally prohibited lawyer, and any other lawyer participating in the matter in the firm with which the personally prohibited lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information will be effective in preventing material information from being

disclosed to the firm and its client.”

- Pros: This clause provides an objective standard (“reasonably believes”) for testing the effectiveness of the screen. It provides a better test of an ethical screen’s effectiveness than does MR 1.10(a)(2)(iii)’s requirement that the prohibited lawyer and a partner of the screening firm provide at regular intervals upon request of the former client “certifications of compliance with the Rules and with the screening procedures” with which the former client has been provided as required by rule 1.10(d)(2)(ii). The imposition of an objective standard (“reasonably believe”) is more protective of a former client’s interests than the Model Rule’s formulaic requirement of providing “certifications” at “reasonable intervals.” As provided in proposed Rule 1.0.1(l), “Reasonable belief” or ‘reasonably believes’ when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.” That the lawyers’ reasonable belief is tested under an objective standard that will be measured by the surrounding circumstances provides an incentive to the responsible lawyers to ensure that the screen is effective. Further, if a supervising lawyer has a reasonable belief that the screen is effective but the associate does not, then the partner’s decision would be a “reasonable resolution of an arguable question of professional duty,” so there would be no conflict with rule 5.2(b) as posited in the “Cons,” below.
- Cons: The provision is awkwardly worded and not very elegant. In addition, the interplay between this requirement and the Commission’s proposed rule 5.2(b) is unclear. Proposed rule 5.2(b) provides that: “A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” Where a subordinate and supervisor are both participating in a matter and the subordinate does not believe the firm’s screening procedures are reasonable but the supervisor disagrees, is paragraph (d)(2)(iii) satisfied?

11. Recommend adoption of Model Rule 1.11(e), which provides a definition of “matter” for purposes of Model Rule 1.11, rather than include proposed Comment [2], which cross-references to Comment [2] of proposed Rule 1.7, which provides examples of what constitutes a “matter” derived from Model Rule 1.11(e).

- Pros: Proposed Comment [2], which is a deviation from the national standard that places the definition of “matter” in the blackletter text, is not justified. Although “matter” within the context of representation of private clients is typically limited to representations of a client in a legal proceeding or transaction, the ways in which a government employee, acting either as a lawyer or as a government official, provides services to the governmental client, is much broader. Model Rule Paragraph (e) is an attempt to capture the broader range of services that government lawyers often are called upon to provide and should be limited to Model Rule 1.11.

- Cons: Because Model Rule 1.11(e) does not provide an exclusive definition of the term “matter,” but instead provides examples of what is included in the term “matter,” it is more appropriately included as a Comment. Further, the broad set of examples of what constitutes a “matter” is more appropriately included in Rule 1.7, and cross-referenced in Rules 1.9 and 1.11, because the examples apply to the term “matter” as used in all three Rules.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule or Other California Law:

1. Although the concepts of imputation and screening in proposed Rule 1.11 exist in current law, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17; *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 175 Cal.Rptr. 575; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 164 Cal.Rptr. 864, the proposed rule would nevertheless be a substantive change in that the concept would now be included as a disciplinary rule.

D. Non-Substantive Changes to the Current Rule:

Not applicable.

E. Alternatives Considered:

None.

X. COMMISSION RECOMMENDATION FOR BOARD ACTION

Recommendation:

That the Board of Trustees of the State Bar of California proposed Rule 1.11 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 1.11 in the form attached to this Report and Recommendation.