



The State Bar of California

Rule 1.9 Duties to Former Clients (Rule Approved by the Supreme Court, Effective November 1, 2018)

- (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 section 6068, subdivision (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 section 6068, subdivision (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 section 6068, subdivision (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]; *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 Bus. & Prof. Code, § 6131; 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(e).

[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]. For example, 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 section 6068, subdivision (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 section 6068, subdivision (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 [9]. 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.

**NEW RULE OF PROFESSIONAL CONDUCT 1.9
(Former Rule 3-310(E))
Duties to Former Clients**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 3-310 (Avoiding the Representation of Adverse Interests) in accordance with the Commission Charter. In addition, the Commission considered the national standard of the ABA counterparts, a series of rules that address conflicts of interest as they might arise in a number of different situations: Model Rules 1.7 (Current Client Conflicts); 1.8(f) (third-party payments); 1.8(g) (aggregate settlements); and 1.9 (Duties To Former Clients).

Rule As Issued For 90-day Public Comment

The result of the Commission’s evaluation is a two-fold recommendation for implementing:

- (1) the Model Rules’ framework of having separate rules that regulate different conflicts interest situations: 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
- (2) proposed Rule 1.9 (duties to former clients), which regulates conflicts situations that are currently regulated under rule 3-310(E). Proposed Rule 1.9 largely adheres to the internal framework of Model Rule 1.9, which addresses duties to former client in three separate provisions, MR 1.9(a) through (c), rather than the current rule’s approach to address those duties in a single provision, 3-310(E).

1. **Recommendation of the ABA Model Rule Conflicts Framework.** The Model Rule Framework has (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).¹

¹ Every other jurisdiction in the country has adopted the ABA conflicts rules framework. In addition to the identified provisions, the Model Rules also include Model Rule 1.8, which includes eight provisions in addition to paragraphs (d) and (f) that cover conflicts situations addressed by standalone California Rules (e.g., Model Rule 1.8(a) is covered by California Rule 3-300 [Avoiding Interests Adverse to a Client] and Model Rule 1.8(e) is covered by California Rule 4-210 [Payment of Personal or Business Expenses By or For a Client]).

Further, the Model Rules also deal with concepts that are addressed by case law in California: Model Rules 1.10 (Imputation of Conflicts and Ethical Screening); 1.11 (Conflicts Involving Government Officers and Employees); and 1.12 (Conflicts Involving Former Judges and Judicial Employees).

The Commission is also recommending rule counterparts to those rules, each of which is the subject of a separate memorandum.

2. **Recommendation of addressing duties to former clients in three separate provisions that track the organization of Model Rule 1.9.** There are three separate provisions, each of which addresses a different aspect of duties owed a former client or recognizes the different ways in which a lawyer can incur duties to a client that survive the lawyer-client relationship. The Commission determined that implementing Rule 1.9 will help make a lawyer's duties to a former client more apparent, thus promoting compliance with the rule. This is particularly important in the context of former clients. Although the principal value at issue in conflicts of interest involving former clients is confidentiality, there is a residual duty of loyalty that the Supreme Court has recognized. (See, e.g., *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564; *Oasis West Realty v. Goldman* (2011) 51 Cal.4th 811.) The proposed rule affirms that duty. (See paragraph (c)(3) and Comment [1].)

There are a number of reasons for the Commission's recommendation. *First*, adopting the structure, format and language of the Model Rule, as supplemented by language and law developed in California case law and statutes, should protect client interests by better demarcating the ways in which the lawyer might acquire confidential client information "material to the matter," (paragraphs (a) and (b)), and delimit the lawyer's precise duties in protecting that information once acquired, (paragraph (c)). *Second*, incorporating the concept of matters that are "substantially related" into the blackletter of the rule reflects how current rule 3-310(E) has been interpreted and applied in both civil (*H.F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445) and disciplinary contexts (*In re Matter of Lane* (1994) 2 Cal. State Bar Ct. Rptr. 735.)

Informed written consent. In addition to the foregoing considerations, the Commission recommends carrying forward California's 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 less-strict 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.

Paragraph (a) of proposed Rule 1.9 recognizes that a lawyer who has participated in the same or a substantially related matter in which the lawyer's new client has interests adverse to the former client, the lawyer will have acquired confidential information material to the new matter and will be prohibited from representing the new client unless the former client gives informed written consent.

Paragraph (b) incorporates Model Rule 1.9(b), which was adopted as the law of California by the court in *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4th 1324. In effect, Rule 1.9(b) will codify the *Adams v. Aerojet* case. The concept recognized by *Adams* and MR 1.9(b) is that a lawyer in a law firm may become privy to the confidential information of a firm client even if the lawyer did not personally represent the client in the same or a substantially related matter. This is sometimes referred to as the "water cooler" phenomenon, the lawyer having acquired the information by consulting with another firm lawyer who actually worked on the case. Incorporating this concept into a rule of professional conduct would afford greater client protection regarding adverse use of confidential information by alerting lawyers to how confidential information might be acquired even without having actually represented a client.

Paragraph (c) has three subparagraphs. Subparagraph (c)(1) prohibits a lawyer from "using" a former client's information to the client's disadvantage except as permitted under the Rules or the State Bar Act, or if the information has become generally known. This is the former client

counterpart to proposed Rule 1.8.2, which prohibits a lawyer from “using” a current client’s confidential information to the client’s disadvantage. Subparagraph (c)(2) prohibits a lawyer from “revealing” a former client’s confidential information except to the extent such disclosure is permitted by the Rules or the State Bar Act. Subparagraph (c)(3) has no counterpart in Model Rule 1.9. It carries forward current rule 3-310(E), modified to conform to the Commission’s format and style requirements. The intent of including this subparagraph is to ensure that the concept of residual loyalty recognized in the *Wutchumna* and *Oasis West* cases cited above is incorporated into the Rule. This provision is somewhat controversial as a minority of the Commission takes the position that the concept addressed in subparagraph (c)(3) is already adequately addressed in paragraph (a) and subparagraphs (c)(1) and (c)(2), and the inclusion of (c)(3) might cause confusion without adding any public protection.

There are four comments to proposed Rule 1.9, all of which provide interpretative guidance or clarify how the proposed rule, which is intended to govern a broad array of complex conflicts situations, should be applied. Comment [1] clarifies that there is a residual duty of loyalty owed former clients so that a lawyer is prohibited from attacking the very legal services that the lawyer has provided the former client, and provides two examples of prohibited representations. Comment [2] explains how paragraph (b), which codifies *Adams v. Aerojet-General*, should be applied, and provides additional clarification on how the rule should be applied when a lawyer moves laterally from one firm to another. Comment [3] draws an important distinction between information that is in the public record (e.g., a former client’s criminal record) and information that is “generally known,” and cites to *In the Matter of Johnson*, a Review Department case that imposed discipline on a lawyer for revealing public record information of a former client’s criminal history. Comment [4] provides cross-references to related rules that govern other situations involving former clients, for example, when the former client is a governmental agency.

Post Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission deleted paragraph (c)(3). The Commission determined that the concept contained in (c)(3) would be adequately addressed in paragraphs (a) and (b), coupled with the prohibitions on use and disclosure of confidential information as contained in subparagraphs (c)(1) and (c)(2). The Commission also added two new comments. A new Comment [2] provided a cross reference to Rule 1.7, Comment [2] for the definition of the term “matter.” A new Comment [3] explained when two matters should be regarded as “the same or substantially related.”

With these changes, the proposed rule was submitted to the Board of Trustees (Board) for authorization for an additional 45-day public comment period.

Proposed Rule as Amended by the Board of Trustees on November 17, 2016

The proposed rule was considered by the Board at its meeting on November 17, 2016. The Board revised the rule to address two potential ambiguities.

First, in Comment [4], the Board revised the third and fourth sentences to add the phrase “lawyers in” before the references to a law firm. This was done to make clear that it is the lawyers in a firm and not a firm itself as an entity that are subject to the rule.

Second, in Comment [6], the Board revised the second sentence to delete a reference to the “disqualification of a firm” and substitute the phrase “imputation of conflicts to lawyers in a firm.” This was done to clarify that the attorney conduct standards set by the rules are not intended to be standards of law firm disqualification in non-disciplinary proceedings.

The redline strikeout text below shows the changes made by the Board:

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[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.

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[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](#) ~~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.

With these changes, the Board voted to authorize an additional 45-day public comment period on the proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made one non-substantive change to the proposed rule. At the start of the second sentence of Comment [3], the Commission substituted the phrase “For example, this” for the word “This” to read: “For example, 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”

With these changes, the rule Commission voted to recommend that the Board adopt the proposed rule.

Board’s Consideration of the Commission’s Proposed Rule on March 9, 2017

At its meeting on March 9, 2017, the Board considered but did not adopt revisions to the Commission’s final version of the proposed rule.² The Board considered revising Comment

² After the Board meeting, Board member Sean M. SeLegue submitted a March 23, 2017 memorandum identifying issues of concern related to the alternative discussed by the Board. The full text of this Board member memorandum follows this executive summary.

[3] as follows by substituting the first sentence of ABA Model Rule 1.9, Comment [3] for the Commission's proposed Comment [3]:

~~[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]. For example, 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. [3] Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.~~

In discussing this revision, it was observed that Model Rule, Comment [3] describes only matters that are “substantially related,” while the Commission's Comment describes what is meant by the phrase “same or substantially related.” Matters that are the same primarily implicate the duty of loyalty, although confidentiality is relevant. The substantial relationship test, on the other hand, pertains to a lawyer's duty of confidentiality; it is an analytical concept employed in litigated matters to ascertain whether a court should presume that a lawyer sought to be disqualified possesses confidential information of a former client. Given that the concept of “same” should not require clarification, it was suggested that the comment should mirror the Model Rule comment and address only the term “substantially related.” Moreover, it was observed that the Commission's final version of proposed Comment [3] might lead to confusion because the comment language refers to the duty of loyalty by referring to Comment [1] and the loyalty concepts and cases found in that comment. The objective of the proposed change was to eliminate this potential confusion by limiting the scope of the comment to the “substantially related” prong of the proposed rule. It was also observed that a more concise comment that eschews examples would more closely track the Commission's Charter which provides that comments be used sparingly.

The Board adopted proposed rule 1.9 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as modified by the Court to be effective November 1, 2018. In Comment [1], citation style was revised to conform to the California Style Manual. In Comments [2] and [6], internal citations are corrected. In addition, omitted asterisks for defined terms were added.

~~Rule 3-310(E) Avoiding the Representation of Adverse Interests~~
Rule 1.9 Duties to Former Clients
(Redline Comparison to the California Rule Operative Until October 31, 2018)

- (Ea) ~~A member shall not, without the~~ 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 ~~of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment. .*~~
- (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 section 6068, subdivision (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 section 6068, subdivision (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 section 6068, subdivision (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~~Discussion~~

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~~Paragraph (B) is not intended to require either the disclosure of the new engagement to a former client or the consent of the former client to the new engagement. However, both disclosure and consent are required if paragraph (E) applies.~~

~~While paragraph (B) deals with the issues of adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation, paragraph (E) is intended to protect the confidences of another present or former client. These two paragraphs are to apply as complementary provisions.~~

[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]; *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 Bus. & Prof. Code, § 6131; 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(e).

[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]. For example, 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 section 6068, subdivision (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 section 6068, subdivision (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 [9]. 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.