Amended Model Rule of Professional Conduct 1.11: Long-Standing Controversy, Imperfect Remedy, and New Questions

Patrick J. Johnston
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CONDUCT 1.11: LONG-STANDING CONTROVERSY,
IMPERFECT REMEDY, AND NEW QUESTIONS

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Before the recent amendments to the Model Rules of Professional Conduct, courts and commentators struggled for years with the application of the conflict of interest limits in Rule 1.9(a) and in Rule 1.11(a) to lawyers in private practice who had served as government officers or employees.¹ On February 5, 2002 the House of Delegates of the American Bar Association (ABA) had an opportunity to resolve that confusion when the House debated and adopted a number of amendments to the Model Rules, including amendments affecting Rule 1.9(a) and Rule 1.11(a).² This commentary explains why states

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¹ For a summary of the arguments concerning the relationship between Rule 1.9(a) and 1.11(a), see infra notes 122-37 and accompanying text.

I use "Rule" and the present tense to refer both to a Model Rule as amended in February 2002 and the Model Rule prior to the amendment when the amendment did not materially change the text of the Rule or its Comments. I generally use "Rule" and the past tense to refer to a Model Rule as it existed prior to the amendments adopted in February 2002 when the amendment did materially change the text of the Rule or its Comments. I use the phrase "Amended Rule" to refer to Model Rules as adopted by the House of Delegates in February 2002 when the context requires such specificity.

I sometimes use the term "government agent" to refer to both "public officer" and "government employee." I also use the term "government agency" to refer to the government entity for which the government agent provided service.


See infra note 12 for the text of Rule 1.9(a) prior to amendment, and see
considering adoption of the amended Rules should question the value of the amendment to Rule 1.11(a) in particular.\textsuperscript{3}

The ABA's Commission on Evaluation of the Rules of Professional Conduct (the Commission) proposed the amendments pursuant to a charge from the ABA in 1997 to evaluate the Model Rules of Professional Conduct and to formulate "recommendations for action."\textsuperscript{4} The Commission translated that charge into two intertwined principles that the Commission adopted for its work: (1) developing a set of rules that are "comprehensible to the public and provide clear guidance to the practitioner"\textsuperscript{5} and (2) creating a set of rules that states would likely adopt, thus promoting uniformity in

\textit{infra} note 13 for the text of Rule 1.11(a) prior to amendment. See \textit{infra} notes 12-13 for the texts of amended Rules 1.9(a) and 1.11(a), respectively.

At the ABA's annual meeting in August 2001, the House of Delegates began its consideration of the amendments to the Model Rules of Professional Conduct that were proposed by the ABA's Commission on Evaluation of the Rules of Professional Conduct. At that time the House voted on amendments to the Rules from the Preamble through Rule 1.10, and the House approved all of the Commission's recommendations on those materials, with a few exceptions not relevant to this article. See \textit{Comm'n on Evaluation of the Rules of Prof'l Conduct, Report to the ABA House of Delegates, Report 401 Amendments to Model Rules of Prof'l Conduct (Ethics 2000), at Ex. 3 (2002) (hereafter "February 2002 Report")}. The House of Delegates finished its consideration of the Commission's proposals at the ABA's midyear meeting in February 2002.

\textsuperscript{3} I limit my discussion in this commentary to Rule 1.9(a), Rule 1.11(a) and to Rules that either of the former incorporate.

\textsuperscript{4} The ABA's charge is found in the "Mission Statement" adopted for the Commission. The Mission Statement identified the following goals for the Commission:

(1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; (2) examining and evaluating the ABA Model Rules of Professional Conduct and the rules governing professional conduct in the state and federal jurisdictions;

(3) conducting original research, surveys and hearings; and (4) formulating recommendations for action.


ethics codes among the states. The ABA and the Commission could have done more in amending the Rules to resolve the controversy concerning the relationship between Rules 1.9(a) and 1.11(a). Moreover, ambiguity added by a new Comment to amended Rule 1.11 could create unforeseen problems for lawyers caught in the "revolving door" between government service and private practice. As such, amended Rule 1.11 seems inconsistent with the principles adopted by the Commission.

In Part I, I review the circumstances that created a need to clarify the relationship between Rules 1.9(a) and 1.11(a). That review includes: (a) an analysis of the text and goals of each Rule, (b) a description of some significant differences in the practical application of each Rule, and (c) a brief history of the long-standing debate about the relationship between Rules 1.9(a) and 1.11(a).

6 See id. at 1 (describing the growing disparity in state ethics codes as "[o]ne of the primary reasons behind the decision to revisit the Model Rules"); see also id. at 3 (noting "[the Commission’s] fervent hope that the goal of uniformity will be the guiding beacon" for consideration of the amendments by the House of Delegates and state supreme courts). The Commission, however, also described as its approach "to be comprehensive, but at the same time conservative, and to recommend change only where necessary." Id. The Commission subscribed to an admonition it attributed to Thomas Jefferson "moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects." Id.

7 For more complete discussion of this issue, see infra notes 122-37 and accompanying text.

8 The phrase "revolving door" has been used to characterize the fact that government service often is not a lifetime career, and many lawyers routinely move back and forth between government service and private practice. See, e.g., "Revolving Door," 445 A.2d 615 (D.C. 1982) (using the phrase in the context of amending the District of Columbia’s Code of Professional Responsibility); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.10.1, at 456 (1986) (noting "concerns with political evils of the ‘revolving door[,]’ the process by which lawyers and others temporarily enter government service from private life and then leave [government service] for large fees in private practice").

9 For a more complete discussion of this issue, see infra notes 138-56 and accompanying text.

10 When the review addresses issues that have not generated such controversy in the past, I do not always cite to primary sources. Instead, I refer the reader to prominent treatises such as GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (3d ed. Supp. 2002) and CHARLES W. WOLFRAM,
analyze the structure and likely effect of the amendment to Rule 1.11(a). Finally, I conclude that, despite the herculean efforts of the Commission, many questions remain concerning the scope and relationship of amended Rules 1.9 and 1.11.\footnote{At the ABA's midyear meeting in February 2002, the House of Delegates adopted Rules 1.9 and 1.11 as presented in Report 401 to the House, with an amendment to Rule 1.9's Comment [3] to make it conform to Rule 1.11 as adopted. See FEBRUARY 2002 REPORT, supra note 2.}

I. THE NEED TO CLARIFY THE RELATIONSHIP BETWEEN RULE 1.9(a) AND RULE 1.11(a)

A. The Rules' Text and Goals

Although Rule 1.9(a) and Rule 1.11(a) both address conflicts of interest that limit current client representation because of former client representation, the texts of the two Rules contain significant differences. Rule 1.9(a) addresses conflicts of interest between current and former clients without specifying a particular context for either the current or the former representation.\footnote{Prior to its amendment, Rule 1.9, "Conflict of Interest: Former Client," provided as follows:

(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 consents after consultation.

(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 relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

MODEL RULES OF PROF'L CONDUCT R 1.9 (2001).}

Amended Rule 1.9, "Duties to Former Clients," provides:

(a) A lawyer who has formerly represented a client in a matter shall not
hand, addresses the narrower circumstances of current client interests that conflict specifically with prior government service.\textsuperscript{13} The two

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 consent, confirmed in writing.

(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 relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Model Rules of Prof'l Conduct R. 1.9 (amended 2002).

\textsuperscript{13} Prior to its amendment in 2002, Rule 1.11, "Successive Government and Private Employment," provided as follows:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private 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 consents after consultation. 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 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.

(d) 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.


Amended Rule 1.11, "Special Conflicts of Interest for Former and Current Government Officers and Employees," now provides:

(a) Except as law may otherwise expressly permit, a lawyer who has
rules do not use the same terms to describe the circumstances that create disqualifying conflicts, nor do they set forth the same means to remedy such conflicts. For example, Rule 1.9(a) applies to current representations on matters that are "the same or substantially related" to matters on which the lawyer represented a former client, while Rule 1.11(a) applies only to matters as more narrowly defined in Rule 1.11. In addition, Rule 1.9(a) applies only if the current

(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.

(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.

MODEL RULES OF PROF'L CONDUCT R. 1.11 (amended 2002).

As used in Rule 1.11 prior to its amendment, matter was often characterized as a narrower set of circumstances described by the phrase substantially related matters used in Rule 1.9(a). See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-409 n.6, at 468 (1997) (describing some cases which considered whether the two matters were "substantially related" to determine if they were the same matter in applying Rule 1.11 and its predecessor, but concluding that the definition of matter under Rule 1.11(d) remained substantially narrower than the definition of matter under Rule 1.9); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 133 cmt. e (2000)
representation is "materially adverse" to a former client while Rule 1.11(a) does not include such a limitation. Finally, Rule 1.10(a) generally imputes the disqualification of any individual member of a firm under 1.9(a) to all members of that firm. Rule 1.11(a), however, identifies screening a disqualified member of a firm as a means to avoid imputing the disqualification to all members of the firm.

(noting that the use of matter in the Restatement's adoption in section 133(1) of Rule 1.11(a) is narrower than that governing former-client conflicts of interest in the Restatement's adoption in section 132 of Rule 1.9(a)); see id. at Reporter's Note to cmt. b (distinguishing the use of matter in § 133 and Rule 1.11(d) from cases which have extended matter as far as Rule 1.9(a) for disqualification of former government lawyers). Cf. HAZARD & HODES, supra note 10, § 15.5, at 15-15 (noting that the term matter used in Rule 1.11(d) has a "somewhat different meaning than when used in the law of lawyering generally.")

For additional discussion of matter as used in Rule 1.11, see infra notes 26-98 and accompanying text.

15 See supra notes 12-13.
16 Prior to amendment, Rule 1.10,"Imputed Disqualification: General Rule," provided as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.


As amended, Rule 1.10, "Imputation of Conflict of Interest: General Rule," provides in part:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

MODEL RULES OF PROF'L CONDUCT R. 1.10 (amended 2002).

17 See supra note 13 for the text of Rule 1.11(a). See supra note 16 for the text of Rule 1.10(a).
The accommodation of different goals led to some of the differences in the texts of Rules 1.9(a) and 1.11(a). For example, one treatise describes Rule 1.9(a) as intending to benefit client-lawyer relationships by providing "clients with [the] assurance during the representation that they have no need to fear suffering adverse consequences later because of having retained a lawyer currently."\(^{18}\) Rule 1.9 provides this assurance by protecting the confidential information of a former client\(^ {19}\) and limiting the extent that a lawyer's current representation can attack the lawyer's work-product for a former client.\(^ {20}\) Rule 1.9, however, also tries to balance the protection of former clients with current clients' needs for choice of counsel and a lawyer's need to serve a "variety of clients in a variety of matters" to maintain a law practice.\(^ {21}\)

Rule 1.11(a) reflects concerns in addition to those underlying Rule 1.9(a). First, conflict of interest rules related to either former or current government service must be carefully crafted so that restrictions on employment following government service do not unduly deter qualified individuals from accepting government employment. As the Comments to Rule 1.11 note, "rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer . . . to and from the government [because] [t]he government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards."\(^ {22}\) Rule 1.11(a) also addresses the concern that a current government officer or employee may exploit government service by acting primarily to benefit anticipated future clients and an anticipated career after government service rather than acting primarily in the public interest.\(^ {23}\) Commentators have recognized that the exploitation

\(^{18}\) HAZARD & HODES, supra note 10, § 13.3, at 13-7 (emphasis removed).

\(^{19}\) See id. § 13.5, at 13-11, 13-12 (tying the test of substantially related matters to the risk of disclosure of confidential information of a former client).

\(^{20}\) See id. at 13-12 (discussing whether the new matter will be called upon to set aside the lawyer's own work product from a prior representation).

\(^{21}\) See id. at, §13-3, at 13-7.

\(^{22}\) MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 3 (2001); MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 4 (amended 2002)

\(^{23}\) See MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 1 (2001); MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 4 (amended 2002); HAZARD & HODES, supra note 10, § 15.4, at 15-11.
of public office does not depend upon the concerns reflected in Rule 1.9(a). The exploitation may be accomplished without a breach of confidentiality and without attacking one's own work product.\textsuperscript{24}

The differences in the text and goals of Rules 1.9 and 1.11 have caused significant variations in the scope of the representations limited by each Rule. The next section addresses the practical affects of one of those differences: the scope of \textit{matters} giving rise to conflict of interests under each Rule.

\textit{B. The Application of the Differing Scope of "Matters" under Rule 1.9(a) and Rule 1.11(a)}

Rule 1.11(a) prohibited a current representation only if it was "in connection with a matter in which the lawyer participated personally and substantially" as a former government agent.\textsuperscript{25} Amended Rule 1.11 employs the same language to describe, in part, the circumstances that limit current representations by a former government agent.\textsuperscript{26} \textit{Matter} as used in Rule 1.11 was and is still defined as

\begin{itemize}
  \item[(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
  \item[(2)] any other matter covered by the conflict of interest rules of the appropriate government agency.\textsuperscript{27}
\end{itemize}

It is generally accepted that the ABA intended Rule 1.11 to codify the discussion of \textit{matter} originally set forth in ABA Formal Opinion 342.\textsuperscript{28} In that opinion the ABA's Committee on Ethics and

\begin{footnotes}
\textsuperscript{24} HAZARD \& HODES, supra note 10, § 15.4, at 15-11 (noting that "misuses of former government client confidences" or "switching sides" are not necessary for exploiting government service).
\textsuperscript{25} MODEL RULES OF PROF'L CONDUCT R. 1.11 (2001), supra note 13 (emphasis added).
\textsuperscript{26} See MODEL RULES OF PROF'L CONDUCT R. 1.11(a)(2) (amended 2002), supra note 13.
\textsuperscript{27} MODEL RULES OF PROF'L CONDUCT R. 1.11(d) (2001); MODEL RULES OF PROF'L CONDUCT R. 1.11(e) (amended 2002), supra note 13.
\end{footnotes}
Professional Responsibility interpreted a predecessor of Rule 1.11(a), DR 9-101(B) from the Model Code of Professional Conduct. DR 9-101(B) provided, "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The ABA Committee recognized in Opinion 342 the need to protect the confidential information of a former government employer, but it also recognized other objectives that supported a special disciplinary rule such as DR 9-101(B) relating only to former government lawyers. Those additional objectives included the goals identified above as peculiar to Rule 1.11 and which distinguished Rule 1.11 from Rule 1.9(a). Those goals are that rules governing lawyers should not be overbroad in constricting the lawyer's employment after leaving government service and that the rules should discourage government lawyers from exploiting government service for their own future gain.

In an attempt to accommodate all of these objectives, "insofar as possible," Opinion 342 described matter as follows:

[The term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter.]

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29 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-409 n.6 (1997); see also MODEL RULES OF PROF'L CONDUCT R. 1.11, MODEL CODE COMPARISON, 88 (2001) (describing Rule 1.11(a) as similar to DR 9-101(B)).
33 Id.
34 See supra notes 22-24 and accompanying text.
35 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975). The other policies identified by the Committee included "treachery of switching sides[,] the safeguarding of confidential governmental information from future use against the government[,] . . . and the professional benefit derived from avoiding the appearance of evil." Id.
By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.\footnote{Id. (citations omitted).}

The following examples provide simple illustrations of matter as described in Formal Opinion 342. Assume Lawyer, as a member of a state prosecutor's office, participates personally and substantially in the initial prosecution of Z. The prosecution results in a hung jury and Lawyer then leaves the employ of the prosecutor's office. Z subsequently seeks to have Lawyer represent Z in a retrial by the prosecutor's office.\footnote{For similar facts, see generally State v. Romero, 578 N.E.2d 673 (Ind. 1991).} Both representations involve the same "discrete, identifiable transactions or conduct involving a particular situation and specific parties," and they would constitute the same matter under Formal Opinion 342.\footnote{ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975).} In contrast, assume Lawyer, who as an employee of a government agency, develops and fosters generally applicable policies of deregulation to stimulate competition among airlines. Lawyer, after leaving government service, then represents an airline as a plaintiff in a suit alleging that competitors harmed the plaintiff through various anti-competitive behaviors. While the representations in the second example may involve some of the same economic issues and affect some of the same airlines, the policymaking in the first representation was not addressed to the specific conduct of a particular party or parties.\footnote{The second example tracks the facts of Laker Airways Ltd. v. Pan Am. World Airways, 103 F.R.D. 22, 34 (D.C. 1984). Laker has often been identified as a prime example of two representations that do not involve the same matter for purposes of Formal Opinion 342. See HAZARD & HODES, supra note 10, § 15.5, at 15-32 n.1 (describing Laker as "one of the best known examples"); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 133 Reporter's Note to cmt. e (2000) (identifying Laker facts as outside the scope of Rule 1.11(d)).} The two representations in
the second example would not involve the same matter under Formal Opinion 342.\(^{40}\)

Formal Opinion 342 also excluded general knowledge of a former government client's policies or practices from the factors relevant in determining whether a current representation is the same matter as the object of former government service. Formal Opinion 342 noted:

Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrent to lawyers ever to accept employment with the government.\(^ {41}\)

While Rule 1.11(a) applied to matters as defined above, Rule 1.9(a) has applied to current representations on matters that are "the same or substantially related" to matters in which the lawyer represented the former client.\(^ {42}\) The phrase *substantially related* has a long and complex history.\(^ {43}\) That history demonstrates that courts have not limited the meaning of substantially related matters to "discrete, identifiable transactions or conduct involving a particular situation" as Formal Opinion 342 did for *matter* under Rule 1.11.\(^ {44}\) Moreover, contrary to the understanding of *matter* in Formal Opinion 342, knowledge of a former client's general policies and practices may

\(^{40}\) See *Laker*, 103 F.R.D. at 34 (reaching the same conclusion on similar facts). While the court in *Laker* accepted that generally "rule-making and policy-making do not constitute a 'matter' within the meaning of [DR 9-101(B)]," the court noted that rule-making "confined to specified issues and identifiable parties such that it may be properly characterized as 'quasi-judicial' in nature" would be subject to the restrictions of DR 9-101(B). *Id.*


\(^{42}\) For the text of Rule 1.9(a) before and after amendment, see *supra* note 12.

\(^{43}\) See ABA CTR. FOR PROF'L RESPONSIBILITY, ETHICS 2000 COMM'N, MODEL RULE 1.9 REPORTER'S EXPLANATION OF CHANGES ¶ 3 (2001) (noting that the term has been the subject of considerable case law).

\(^{44}\) See *supra* note 36 and accompanying text.
be relevant in determining whether current and former representations are substantially related. It is necessary, then, to understand the uncertainty lurking in the phrase *substantially related* to comprehend the importance of clarifying the relationship between Rule 1.9(a) and Rule 1.11.

Courts and commentators have considered a former representation to be substantially related to a current representation if there is a substantial risk that confidential factual information that a lawyer normally would have obtained in the former representation would be relevant to the current representation.\(^{45}\) This definition focuses on protecting former clients' confidential information from being used against them,\(^{46}\) and is generally considered to be the most commonly employed meaning of *substantially related*.\(^{47}\)

The ABA added this definition of *substantially related* to the

\(^{45}\) *See* HAZARD & HODES, *supra* note 10, § 13.5, at 13-13 (noting that the predominant approach focuses on the "factual contours of both . . . [representations] . . . and ask[s] whether the affected lawyer reasonably could have learned confidential information in the first representation that would be of significance in the second") (emphasis removed); *Id.* at 13-14 (describing the single inquiry now commonly used by courts as whether "the lawyer could have obtained confidential information in the first representation that [could] have been relevant in the second"); *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 132(2) (2000) (identifying one category of substantially related matters as including "a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known"). The Restatement describes a "substantial risk" as existing "where it is reasonable to conclude that it would materially advance the client’s position in the subsequent matter to use confidential information obtained in the prior representation." *Id.* cmt. d(iii).

\(^{46}\) Although Rule 1.9(c) prohibits using or revealing confidential factual information of a former client, an extra layer of protection for the former client is added by including *substantially related matters* in the description of disqualifying representations in Rule 1.9(a). *See supra* note 12 for the text of Rule 1.9(c). *See also infra* note 51 and accompanying text for a discussion concerning the presumption established by finding two matters to be substantially related.

\(^{47}\) *See* HAZARD & HODES, *supra* note 10, § 13.5, at 13-13 (describing the "predominant approach"); *See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 132 cmt. d(iii) (2000) (describing the "standard employed most frequently"). I will limit my discussion to this understanding of "substantially related."
Comment to amended Rule 1.9. The Comment to amended Rule 1.9 also provides the following example of substantially related matters: "[A] lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person’s spouse in seeking a divorce." Because the

48 Comment [3] to the amended Rule 1.9 provides:
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. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person’s spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

MODEL RULES OF PROF’L CONDUCT R. 1.9 cmt. 3 (amended 2002).

49 Id. Comment [3] also provides the following example:
[A] lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer
personal financial status of the business person is likely to be relevant to material issues in the divorce proceeding such as distribution of assets, support, or alimony, the two representations could be considered substantially related despite the different legal issues in the two representations. If, however, the lawyer formerly represented the business person only in securing zoning permits for business operations, the nature of that representation would seem much less likely to require an understanding of the business client’s financial assets. In this latter circumstance, the former representation and current divorce representation are less likely to be considered substantially related.

There has been some confusion about the types of information would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

Id.

50 The Commission might have derived its example from the Hazard & Hodes treatise. See HAZARD & HODES, supra note 10, § 13.5, at 13-15 (providing in Illustration 13.3 a very similar but factually more complicated illustration).

51 The application of this understanding of substantially related does not require the former client to reveal the confidential information at issue. HAZARD & HODES, supra note 10, § 13.5, at 13-14. To do so would subvert the purpose of employing the phrase: protecting a former client’s confidential information. Id.; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. d(iii) (2000) ("A concern to protect a former client’s confidential information wold be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation.") Accordingly, in implementing this meaning of substantially related, courts typically avoid requiring disclosure of confidential information and focus instead upon the "general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation." Id.; see HAZARD & HODES, supra note 10, § 13.5 at 13-14 (noting that "[t]he proofs on either side should be limited . . . to the ‘categories’ of information that the lawyer reasonably would have had access to, not the specifics of information actually shared or withheld"). A finding that a current matter is substantially related to a former matter is generally accepted as creating a presumption that the lawyer did learn in the former representation confidential factual information relevant to the current representation. See id. (describing the presumption as "irrebuttable"); but see ABA/BNA LAWYERS’ MANUAL ON PROF’L CONDUCT § 51:201 (2001) (describing a minority of courts as treating the presumption as somewhat rebuttable).
that should be considered when determining whether a current and former representation are substantially related. For example, one type of information concerns policies and practices generally applied by the former client to the type of circumstances involved in the former representation. In contrast is information about the specific acts, omissions, or conditions of the former client at issue in the former representation. Using the business client/divorcing spouse scenario from above, an example of the first type of information might include information about the client's philosophy in allocating or investing assets (risk adverse or not), while the second type would include information about what the client did with a particular asset or the specific value of a particular asset.

Including presumed knowledge of the policies and practices of a former client in the definition of \textit{substantially related} significantly expands the meaning of that term and the scope of current representations prohibited as substantially related to a former client representation. \textit{Chugach Electric Association v. United States District Court} has often been used as an example of how courts struggle with whether information about a former client's general policies or practices should be relevant to the definition of \textit{substantially related}. In \textit{Chugach}, a trustee in bankruptcy brought an antitrust suit and the defendant moved to disqualify the trustee's lawyer. The trustee's lawyer had served as general counsel to the defendant for over two years, but the lawyer resigned prior to the specific activities on which

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52 See \textit{RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS} §132 cmt. d(iii) (2000) (discussing this qualification of the meaning of \textit{substantially related} designed to protect confidential information of the former client); \textit{Id.} at Reporter's Note for Illustration 3 (describing court opinions in which information about general policies and practices of the former client was not considered relevant in determining the meaning of \textit{substantially related}); \textit{but see HAZARD & HODES, supra} note 10, § 13.5, at 13-13 (describing as a separate approach an understanding of \textit{substantially related} "where the lawyer learns such subtleties as the former client's strategic decisionmaking processes or levels of risk aversion rather than confidential information as such").

53 370 F.2d 441 (9th Cir. 1966).


55 \textit{Chugach}, 370 F.2d at 442.
the antitrust claim were based. The district court denied the defendant's motion to disqualify because the defendant failed to establish that the lawyer, as general counsel, "received or had access to secret or confidential information related to [the antitrust claim]." Thus, the defendant failed to establish a substantial relationship between the antitrust claims and the lawyer's prior representation as general counsel. The court of appeals directed the district court to enter the order of disqualification because the antitrust claims concerned not only what the former client had done, but also why it had done so. As the court of appeals stated:

[t]he problem here is not limited to the question whether [the lawyer] was connected with [defendant] as its counsel at the time agreements were reached and overt acts taken, but includes the question whether, as attorney, he was in a position to acquire knowledge casting light on the purpose

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56 Id. at 442, 443.
57 Id. at 443
58 Id. The opinion in Chugach was published seventeen years before the adoption of the ABA's Model Rules of Professional Conduct in 1983. The district court relied on a substantial relationship test that it fashioned from Canons 6 and 37 of the ABA's Canons of Professional Ethics adopted by the Supreme Court of Alaska in 1963. Id. at 442, n.1. Those Canons provide, in pertinent part:

Canon 6: Adverse Influences and Conflicting Interests. The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Canon 37. Confidences of a Client. It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

Id. For a discussion of the use of the substantial relationship test in the common law before the adoption of the ABA's Model Rules of Professional Conduct, see HAZARD & HODES, supra note 10, § 13.5, at 13-11 to 13-12.
of later acts and agreements . . . . A likelihood here exists which cannot be disregarded that [the lawyer's] knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery. 59

That is to say, the disqualified lawyer likely obtained knowledge during his former representation of the defendant of the policies of the defendant pursuant to which the alleged antitrust violations occurred.

A concern raised by the Chugach opinion is that a lawyer who represented a client over a lengthy period of time with respect to a large variety of matters presumably learned many policies and practices of the client. 60 Those policies and practices may be indirectly at issue or reflected in countless matters after the lawyer quits representing the client. If knowledge of such policies and practices is relevant to the meaning of substantially related, then "virtually any [current representation] undertaken for a new client against the former client is 'substantially related' to the prior representation, and hence prohibited in the absence of client consent." 61

It is generally agreed, 62 therefore, that tying the meaning of

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59 Chugach, 370 F.2d at 443.
61 HAZARD & HODES, supra note 10, § 13.7, at 13-17. In addition to recognizing the danger of considering general policies and practices of a former client as confidential information sufficiently material to the representation of a current client, the Hazard & Hodes treatise also notes that some courts simply concluded that the current client "would have an improper advantage if the lawyer [were] permitted to make use of the general tactical information" of the former client. Id.
62 The Hazard & Hodes treatise notes that "[f]ew courts take such a broad view [as the court in Chugach] . . . while other courts reject the concept altogether." HAZARD & HODES, supra note 10, § 13.7, at 13-18 (citing Duncan v. Merrill Lynch Pierce Fenner & Smith, 646 F.2d 1020 (5th Cir. 1981); Guzewicz v. Eberle, 953 F. Supp. 108 (E.D. Pa 1997); Unified Sewage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981); In re Chantilly Constr. Corp., 39 B.R. 466 (Bankr. E.D. Va. 1984)). It is not clear that the Hazard & Hodes treatise has accurately cited these cases. See infra notes 97-98 and accompanying text. The Restatement cites to ABA Formal Opinion 99-415 as "apparently agreeing with criticism of the
substantially related to information concerning general policies and practices of a former client should not extend too far. Commentators have recommended that when considering how knowledge about a former client’s policies and practices affects whether matters are substantially related, the following should be explored: (1) whether the policy will be directly at issue in the current representation, (2) whether knowledge of the policy is of unusual value in the current representation, and/or (3) whether the policy is blended into more specific factual information such as the same modus operandi in a particular type of matter. These recommendations require that distinctions be made on a sliding scale relating the importance of the current representation to the policy or practice of the former client.


In particular, the Hazard & Hodes treatise raised the concern that if the scope of disqualification under the "substantially related" standard of Rule 1.9(a) extends to include presumed knowledge of a former client’s policies and practices that have little to do with a current representation, then disqualifications under Rule 1.9(a) become indistinct from disqualifications under Rule 1.7(a). Rule 1.7(a) prohibits the representation of a current client adverse to the representation of another current client, even if the two matters are wholly unrelated. Model Rules of Prof’l Conduct R. 1.7 cmt. 3 (2001). It is generally thought that Rule 1.9(a) was not intended to be as restrictive with respect to former client representations as Rule 1.7(a) is with respect to current client representations, because to do so would restrict too severely the "availability of counsel" for other clients and the "freedom of action" necessary for a viable "independent private law practice."

Hazard & Hodes, supra note 10, §13.3 at 13-7.


Id.


As the ABA Standing Committee on Ethics and Professional Responsibility noted:

Although some courts have continued to consider a general knowledge of the client’s organization, practices and strategy to constitute protected information, others have rejected that concept. These two seemingly inconsistent lines of cases emphasize that the decision whether the lawyer has protected information depends on the facts and circumstances of each particular case.

ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 99-415 (1999). The Standing Committee however also concluded:
The ABA appears to have adopted a similar cautious approach concerning the relevance of knowledge about a former client's policies and practices to the understanding of the phrase *substantially related matters*. Comment [3] to amended Rule 1.9 provides, in part:

In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. 68

The Comment does not provide that knowledge of the policies and practices of a former client cannot preclude a subsequent representation; it only provides that such knowledge *ordinarily* will not do so. Although Comment [3] does not specify what extraordinary circumstances would take account of a former client's practices and policies, it may suggest that knowledge of policies relevant to or at issue in a subsequent representation may preclude that representation. In short, Comment [3] may be read as requiring the same "sliding scale" distinctions suggested above.

Some courts have also used the sliding scale distinctions to determine how knowledge about a former client's policies and practices affects whether matters are substantially related. Opinions from those courts provide a reasonable understanding of how courts might apply Comment [3] to amended Rule 1.9. 69 The results are not consistent with the longstanding assumption that a current

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68 MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt 3 (amended 2002).

69 The cases I discuss and to which I cite on this point do not explicitly refer to the commentary provided in the Restatement or in the Hazard and Hodes treatise concerning how to limit the impact of knowledge of the policies and practices of a former client in understanding the phrase *substantially related matters*. Many of the cases are, however, cited by both authorities as examples on this point.
representation would not be considered substantially related to a former representation simply because both representations involved the same type of problem or issues.\(^{70}\)

Some courts have concluded that knowledge of a former client's policies or practices for handling a type of representation is relevant in considering whether the current representation is substantially related to the former representation. For example, in \textit{Contant v. Kawasaki Motors Corp.,} \(^{71}\) the court disqualified the plaintiff's lawyer in a products liability action concerning one of the defendants' motorcycles because the lawyer had previously represented the defendants in defending three products liability suits involving different plaintiffs and different motorcycles. \(^{72}\) In finding the current representation "substantially related" to the former representations, the court relied in part on the fact that the lawyer "became aware of the practices used by [the defendant] in fighting a product liability action." \(^{73}\) Similarly, in \textit{Kaselaan & D'Angelo Associates, Inc. v. D'Angelo,} the court disqualified a lawyer from representing the defendant in an action brought against a former employee of the

\(^{70}\) \textit{See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 2 (2001); MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 2 (amended 2002) (providing, "[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.") (emphasis added).}

\(^{71}\) 826 F. Supp. 427 (M.D. Fla. 1993).

\(^{72}\) \textit{Id.} at 428.

\(^{73}\) \textit{Id.} (The court applied \textit{FLORIDA RULES OF PROF'L CONDUCT} 4-1.9(a) (2001), the substance of which is the same as Rule 1.9(a)).

\(^{74}\) \textit{Id.} at 429. The court also relied on the fact that the former and current representations involved the same issue of "crashworthiness," and that the lawyer acquired information about the corporate relationship of the defendants. \textit{Id. See also} Cardona v. Gen. Motors Corp., 942 F. Supp. 968, 973 (D. N.J. 1996) (disqualifying plaintiff's law firm in "lemon-law" actions against defendant because a screened member of the firm had knowledge of the defendant's "claims and litigation philosophy, [and] its methods and procedures for defending claims" due to the member's former defense of General Motors in different "lemon-law" cases). \textit{Cf.} Ullrich v. Hearst Corp., 809 F. Supp. 229, 236 (S.D.N.Y. 1992) (describing adverse use of confidential information as including not only disclosure, but also "knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon[,] . . . what settlements to accept[,] and what offers to reject").
plaintiffs for breach of various duties arising out of the defendant's former employment by the plaintiff. The defendant's lawyer previously represented the plaintiff in suits involving similar claims against other former employees. In finding the current representation of the defendant substantially related to the former representations of the plaintiff, the court in Kaselaan considered relevant the knowledge of the former client's "normal course of action in prosecuting and defending employment claims." The court also noted that knowledge of the former client's "tactical approach to dealing with departing employees confers a distinct advantage upon [the lawyer] arising from his retention by [the former client] in such employment matters in the recent past."

Comment [3] to amended Rule 1.9 appears to distinguish knowledge of policies of a former client from knowledge of facts about that former client. Some courts, however, have equated

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76 Id. at 239.
77 Id. (applying NEW JERSEY RULES OF PROF'L CONDUCT R. 1.9(a) as interpreted by the New Jersey courts). The substance of the New Jersey rule is the same as Rule 1.9(a). See Id. at 238 (providing text of NEW JERSEY RULES OF PROF'L CONDUCT R. 1.9(a)(1)).
78 Id. at 244. The opinion in Kaselaan might be read not as holding that knowledge of a former client's litigation strategies for particular types of litigation makes a current representation substantially related to a former representation in that type of litigation. Instead, one might view Kaselaan as holding that knowledge of a former client's policies is relevant only when the policy is specifically at issue in a subsequent representation, and not just related to the issues in the subsequent representation. For a discussion of this latter category of cases, see supra notes 81-98 and accompanying text. Cf. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, § 132 cmt. d(iii) (2000) (providing that knowledge of the following types of policies would not be relevant in determining whether a current and former representation are substantially related unless the policies are directly at issue or of unusual value in the current representation: (1) knowledge of "former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, [(2)] willingness . . . to be deposed by an adversary, and [(3)] financial ability to withstand extended litigation or contract negotiations").
79 Id.
80 Comment [3] to amended Rule 1.9 provides:
Matters are "substantially related" for purposes of this Rule if . . . there otherwise is a substantial risk that confidential factual information as
"knowledge of policies" with "knowledge of facts" when the policy clearly is at issue in a subsequent representation. Accordingly, distinguishing knowledge of policies from knowledge of facts might not be as easy as Comment [3] suggests.

*Ullrich v. Hearst Corp.* provides a good example of when a court might equate knowledge of policies with knowledge of facts. In that case, former employees of the defendant brought claims accusing the defendant of various illegal employment activities, including age discrimination, harassment because of pregnancy, retaliatory discharge, sex discrimination, and discrimination in severance payments. The plaintiffs' lawyer previously represented the defendant for over twenty years on general matters of employment law. In ruling on the defendant's motion to disqualify the plaintiffs' lawyer, the court identified the "most significant issue" to be "by what standard the court should adjudicate the question whether the representation of these plaintiffs is 'substantially related' to [the

would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. . . . In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

*Model Rules of Prof'l Conduct R. 1.9 cmt. 3 (amended 2002)* (emphasis added).


83 Id. at 231. The Hazard and Hodes treatise characterizes the *Ullrich* opinion as a good example of courts finding matters substantially related where information about former client policies and practices "blends into more specific factual information that could be put to adverse use." HAZARD & HODES, supra note 10, § 13.7, at 13-19.

lawyer’s] prior representation of [the defendant]." The court focused on the nature of the prior representation and "the likelihood that, in the course of it, confidences were reposed . . . [by the defendant] that could be used adversely to" the defendant in the current litigation. The court disqualified the plaintiffs’ lawyer because the lawyer’s prior representation of the defendant gave the lawyer knowledge of specific facts that would be relevant and useful to the current plaintiffs’ claims. Those facts included information concerning the general performance of other employees of the defendant against whom the plaintiffs would be measured. The court also noted, however, that the plaintiffs’ charges did not focus merely on "isolated tortious acts unconnected to continuing policies of [the defendant]." The plaintiffs’ allegations arguably were connected to and required consideration of employment policies of the defendant. For example, the allegation of retaliatory discharge made the defendant’s practices concerning retaliation against employees that complained about the defendant relevant to the lawyer’s current representation of the plaintiffs. One of the plaintiffs’ allegations about the defendant’s failure to comply with a state statute concerning maternity leave made policies concerning maternity leave relevant. Finally, the allegation of discrimination in severance packages made policies concerning severance relevant. In concluding that the matters were substantially related, the court also relied on the fact that the lawyer’s prior representation of the defendant required him to be intimately familiar

85 Id. at 233.
86 Id. at 234.
87 Id.
88 Id. at 235.
89 Id.
90 Id.
91 Id.
92 Id.
93 The court applied Disciplinary Rule 5-108 of New York’s Code of Professional Responsibility. Id. at 232-33. There are no material differences in the substance of Rule 5-108 and Rule 1.9(a) with respect to the description of circumstances causing disqualification. The court stated that "the most significant issue for this dispute is by what standard the court should adjudicate the question whether the representation of these plaintiffs is ‘substantially related’ to [the lawyer’s] prior representation of [the defendant]." Id. at 233.
with the corporation's employment practices and policies, including those described above. The court noted that the lawyer obtained this disqualifying knowledge not only from providing general counsel to the defendant in the past, but also from representing the defendant in numerous individual cases concerning employment issues. The court in *Ullrich*, then, equated knowledge of specific personnel facts about the defendant's employees with knowledge of the defendant's general employment practices. Both were "confidential information pertinent to [the] present [representation]" and there was a "strong, clear likelihood that [such] information . . . [would] be used against the interests of that former client." Even cases that are often cited as rejecting knowledge of former client policies and practices as relevant in any way to the definition of substantially related do not engage in such a wholesale rejection. Instead, an accurate reading of some of those cases demonstrates that the former clients seeking disqualification of a lawyer in an adverse current representation generally failed to demonstrate the likelihood that the lawyer had knowledge of a policy of the former client sufficiently at issue in the current representation.

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94 Id. at 231.
95 Id. There are statements in *Ullrich* that suggest the court thought that policies of the former client not directly tied to the specific claims and defenses in the subsequent litigation against the former client were relevant in determining whether the two matters were substantially related. For example, the court noted that the lawyer had negotiated settlements of disputes and claims on behalf of the former client. *Id.* The court also found relevant that the lawyer's "negotiation of severance packages and settlements . . . in cases of other employees . . . [gave] him unquestionable confidential information as to how [the defendant's] management assesses its vulnerability on such claims." *Id.* at 235.
96 *Id.* at 236.
98 For example, in *Duncan*, the court denied the defendant's motion to disqualify despite allegations that a prior representation made plaintiffs' counsel privy to the defendant's internal practices and procedures. The court found that the defendant failed to prove that the lawyer had knowledge of the particular practices
It is important, therefore, to clarify whether Rule 1.9(a) applies in any way to current representations related to a lawyer's former government service. The scope of matters for current clients that are substantially related to matters addressed for former clients under Rule 1.9(a) can greatly exceed the scope of matters relevant under Rule 1.11. That significant difference might have fostered the intensity of the debate about the relationship between Rule 1.9(a) and 1.11(a), which I describe next.

C. The Debate About the Relationship Between Rule 1.9(a) and Rule 1.11(a) Before Amendment of the Rules

Neither the text of Rule 1.9(a) nor the text of Rule 1.11(a) addressed whether Rule 1.9(a) should play any role in limiting representations of current clients by former government agents,\(^99\) and

\(\text{\textit{Duncan, 646 F.2d at 1031-32. In \textit{Unified Sewage Agency}, the only discussion about the former client's policies and practices concerned the "personality of the client," not whether the lawyer had information about policies specifically raised by the current litigation against the former client. \textit{Unified Sewage Agency}, 646 F.2d at 1342. The same is true of \textit{In re Chantilly Constr. Corp.}, 39 B.R. at 470-71. The opinion in\textit{ Guzewicz}, cited both by the Hazard and Hodes treatise and Formal Opinion 99-415, simply did not address the issue of whether knowledge of a former client's practices and policies is relevant in any way to determining whether matters are "substantially related." \textit{Guzewicz}, 953 F. Supp. at 109-110. In \textit{Guzewicz}, former counsel for a corporation was permitted to represent minority shareholders in a derivative action against the majority shareholders with the corporation named as a nominal defendant. Id. The claim of the minority shareholders did not involve matters on which the former counsel had represented the corporation. Id. at 111. The court first concluded that the current representation was not adverse to the former corporate client, because the corporation was only a nominal defendant in the derivative action. Id. The court also concluded that the party seeking disqualification failed to demonstrate any specific confidential information the lawyer received as former counsel or how it might be used against the former clients. Id. at 111-13. Formal Opinion 99-415 simply mis-cites \textit{Guzewicz} when it describes the opinion as "former general counsel permitted to represent plaintiffs in a discrimination suit where the claim did not involve matters with which the general counsel directly was involved." Formal Op. 99-415, \textit{supra} note 67, at n.17.}

\(\text{\textit{WOLFRAM}, supra note 8, § 8.10.2, at 464; cf. \textit{HAZARD & HODES}, supra note 10, § 15.4, at 15-13 (noting that the text of the rules before amendment do}\)
commentators offered a number of opinions to fill the void. I will briefly describe those opinions that leading treatises set forth in more detail. I will not address which is the better argument. I intend only to demonstrate that reasonable grounds existed for the Commission to attempt to resolve the seemingly endless debate about the relationship between Rules 1.9(a) and 1.11(a).

There was general agreement that Rule 1.11(a) applied when the interests of a lawyer's current client and a former government or agency client were "congruent." There was a longstanding disagreement, however, over what rule applied when a former government lawyer represented a current client in a matter substantially related to the former government representation and materially adverse to the former government client. Some argued that Rule 1.9(a) applied because a former government client deserves Rule 1.9(a) protections from breaches of confidentiality and "side switching" as much as any former client. Rule 1.11(a), then, applied only when a current representation was not materially adverse to the

not "unequivocally answer which will apply in the case of a former government lawyer who is switching sides"). For a discussion of whether the amended rules resolve the issue, see infra notes 122-155 and accompanying text.

See, e.g., HAZARD & HODES, supra note 10, § 15.4; WOLFRAM, supra note 8, § 8.10.2, at 463-64.

One should not underestimate the determination of the parties to the debate. For example, despite the determination in ABA Formal Opinion 97-409 that Rule 1.9(a) did not govern former government lawyers, the Hazard and Hodes treatise continued to argue for the application of Rule 1.9(a). HAZARD & HODES, supra note 10, § 15.4, at 15-13. Moreover, the text of Rule 1.11(a) that the Commission initially proposed for consideration at the meeting of the House of Delegates in August of 2001 explicitly incorporated Rule 1.9(a) into Rule 1.11(a). See Rule 1.11(a) in AUGUST 2001 REPORT, supra note 5. It was not until the ABA's annual meeting in August 2001 that the Commission accepted an amendment that deleted the reference to Rule 1.9(a) from the proposed amendment to Rule 1.11. See Introduction, FEBRUARY 2002 REPORT, supra note 2.

See HAZARD & HODES, supra note 10, § 15.4, at 15-13. Rule 1.11(a) describes conflicts of interests arising out of service either as a "public officer or employee." See supra note 13 for the text of Rule 1.11.


See WOLFRAM, supra note 8, § 8.10.2, at 464 (noting in a related context that it "would be incongruous to give governmental clients less protection . . . than former clients that are not governmental entities").
interests of the former government employer.\textsuperscript{105} This argument treated Rule 1.11 as "supplement[ing] rather than supplant[ing]" Rule 1.9(a)\textsuperscript{106} because Rule 1.9(a) by its terms only limited current representations that were materially adverse to the former client's interests.\textsuperscript{107} Rule 1.11(a) was necessary to limit the representations of current clients whose interests were congruent with the interests of former government clients because former government lawyers could exploit government service to foster post government employment either congruent with or adverse to government interests.\textsuperscript{108}

Others argued, however, that Rule 1.11 alone regulated conflicts arising from current client representation and former government service, whether or not the interest of the current client was adverse to the former government agency.\textsuperscript{109} The ABA Standing Committee

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\textsuperscript{105} HAZARD & HODES, \textit{supra} note 10, \S 15.4, at 15-13.
\textsuperscript{106} \textit{id.}
\textsuperscript{107} \textit{See supra} note 12 and accompanying text.
\textsuperscript{108} \textit{See}, e.g., HAZARD & HODES, \textit{supra} note 10, \S 15.4, at 15-12 (describing the "disloyalty in congruent interest cases under Rule 1.11(a) depends upon an ability to manipulate the manner in which a matter will be handled . . . such as opting for a costly high-profile trial instead of a quick settlement").

At least one other set of circumstances supports the need for retaining both Rule 1.9(a) and Rule 1.11(a). Rule 1.9(a) applies only when there is a lawyer representing a current client who also acted as a lawyer representing a former client. Rule 1.11(a), however, literally applies when a lawyer currently representing a client previously served as a public officer or employee, \textit{i.e.}, not necessarily as a government lawyer. \textit{See}, e.g., Del. River Port Auth. v. Home Ins. Co., No. Civ. A. 92-3384, 1994 WL 444710 (E.D. Pa. 1994) (applying Rule 1.9(a) to a lawyer that formerly acted as counsel for the Port Authority, but applying Rule 1.11(a) to another lawyer who previously served as a Commissioner for the Port Authority).

\textsuperscript{109} HAZARD & HODES, \textit{supra} note 10, \S 15.4, at 15-13. Loyalties have changed during the course of the debate. For example, in 1986, Charles Wolfram opined that the "better interpretation" was not to regard Rule 1.11 as an entirely "free standing enterprise" but rather as a regulation complimentary to other ethical rules governing conflict of interests. WOLFRAM, \textit{supra} note 8, \S 8.10.2, at 463-64. In addition, Professor Wolfram argued that because even rule making involved confidential information, Rule 1.9(a) should apply to subsequent representations substantially related to rule making as a former government officer or employee. \textit{Id.} at 477. The Hazard and Hodes treatise, however, describes Professor Wolfram as stating in 1996 that Rule 1.11 exclusively regulated former government agents in lieu of rule 1.9. HAZARD & HODES, \textit{supra} note 10, \S 15.4, at 15-32 n.4.
on Ethics and Professional Responsibility, in particular, concluded in 1997 that "Rule 1.11 alone determines the scope of a former government employee’s conflict of interest obligations under the Model Rules, and not Rule 1.9(a) and (b)."\textsuperscript{110} The Standing Committee concluded from the "fact that the provisions of Rule 1.9(a) and (b) and 1.11 overlap and sometimes conflict with one another" that "both rules were not intended to apply in the same situation."\textsuperscript{111} In addition, the Standing Committee focused on the peculiar concerns that Rule 1.11(a) does not share with Rule 1.9(a): preventing the exploitation of public office and avoiding the creation of an undue deterrent to lawyers entering government service.\textsuperscript{112} These concerns exist in all circumstances where a former government agent represents a new client and thus justified the application of Rule 1.11(a) alone. The Standing Committee also asserted that its conclusion was "consistent with the position taken by most courts that had considered the [issue]."\textsuperscript{113}

The Comments to Rules 1.9, 1.10, and 1.11 supported both sides of the debate and thus added to the confusion about the relationship between Rules 1.9(a) and 1.11(a).\textsuperscript{114} For example, Comment [1] to

\begin{footnotes}
\textsuperscript{111} \textit{Id.} at 470.
\textsuperscript{112} \textit{Id.} at 471-72. For a discussion of the particular concerns underlying Rule 1.11(a), see \textit{supra} notes 22-24 and accompanying text.
\textsuperscript{113} ABA Formal Op. 97-409 (1997), \textit{supra} note 14, at 473. The Standing Committee also concluded that while Rule 1.9(a) was not applicable to a former government lawyer who wished to represent private clients against the former government client, Rule 1.9(c) remained applicable. \textit{Id.} at 474. Rule 1.9(c) restricted the use and revealing of confidences of the former government employer, thus presenting a substantial practical impediment. \textit{Id.}
\textsuperscript{114} Regarding the official Comments, the Model Rules have provided as follows: "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." \textit{Model Rules of Prof’l Conduct} pmbl. cmt. 13 (2001); \textit{Model Rules of Prof’l Conduct} pmbl. cmt. 14 (amended 2002). In addition, the Model Rules have provided that "[t]he Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." \textit{Model Rules of Prof’l Conduct} pmbl. cmt. 13 (2001); \textit{Model Rules of Prof’l Conduct} pmbl. cmt. 14 (amended 2002).

One treatise described the Comments as "authoritative so far as the American
Rule 1.9 provided that Rule 1.9, not Rule 1.11, disqualified a lawyer "who has prosecuted an accused person" from representing the accused "in a subsequent civil action against the government concerning the same transaction."\(^{115}\) This is clearly an example of former government service precluding a subsequent representation. Comment [4] to Rule 1.10 concluded that Rules 1.6, 1.7, and 1.9 generally bound individual lawyers that join private firms after leaving government service.\(^{116}\) Finally, Comment [5] to Rule 1.10 stated that "[t]he government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11."\(^{117}\) Commentators used these Comments to support the argument that Rule 1.9(a) was intended to apply to conflicts of interest arising from former government service.\(^{118}\)

While the bulk of the Comments supported the application of both Rule 1.9(a) and Rule 1.11(a) to former government lawyers, a portion of Comment [3] to Rule 1.11 was used to support a counter-argument. That portion provided: "However, 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."\(^{119}\) The

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\(^{117}\) Id. at cmt. 5. One could read this Comment as referring only to the portions of Rule 1.9 and Rule 1.11 that specifically addressed confidential information, such as Rule 1.9(c) and Rule 1.11(b), and not as referring to Rules 1.9(a) or 1.11(a). The Comment did not clearly make that distinction.

\(^{118}\) See, e.g., HAZARD & HODES, supra note 10, § 15.4, at 15-13 to 15-14 (arguing that these Comments "assume that Rule 1.11 is not meant to serve as a grant of immunity from Rule 1.9").

ABA Standing Committee on Ethics and Professional Responsibility relied on this Comment in concluding that Rule 1.11(a) alone applied to conflicts of interest arising from former government service.\textsuperscript{120}

Given the lack of direction in the text of Rules 1.9 and 1.11 and the "regrettably opaque references"\textsuperscript{121} in their respective Comments, it made sense for the Commission to clarify the relationship between the Rules. As described in the next part, however, the amendments to these rules and their Comments may not achieve the desired effect.

II. THE RELATIONSHIP BETWEEN AMENDED RULES 1.9(a) AND 1.11(a)

A. The Remaining Need for Clarity

The Commission's reports\textsuperscript{122} reflect a desire to clarify the relationship between Rules 1.9(a) and 1.11(a). The "Reporter's Explanation of Changes" for amended Rule 1.11 states:

There has been disagreement whether individual lawyers who have served as government officials or employees are subject to Rule 1.9 regarding their obligations to former clients or whether their obligations under Rule 1.11(a) are exclusive. The question is an important one . . . . The Commission decided that representation adverse to a former government client is better determined under Rule 1.11(a).\textsuperscript{123}

One may view the text of amended Rule 1.11 and its Comments as proof of the ABA's intention to make Rule 1.9(a) inapplicable to

\textsuperscript{120} ABA Formal Op. 97-409, \textit{supra} note 14, at 472.

\textsuperscript{121} \textit{Id.} at 474.

\textsuperscript{122} I do not mean to suggest that one can always determine a uniform motive for groups such as the Commission or the ABA. The Commission's Chair, Justice Norman E. Veasey, noted that the production of the Commission's reports was not without "controversy or a respectful division within our ranks" and that the Commission proposals were adopted by "majority vote on a rule-by-rule-basis." \textit{August 2001 Report}, \textit{supra} note 5, at 3. \textit{Cf.} Peter C. Hoffer, \textit{Text, Translation, Context, Conversation: Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure}, 37 \textit{Am. J. Legal Hist.} 409, 437 (1993) (noting in a similar context that records of the drafting committee for the Federal Rules of Civil Procedure reflect compromise among committee members).

\textsuperscript{123} \textit{February 2002 Report}, \textit{supra} note 2, at Ex. 1.
former government agents. Amended Rule 1.11(a) specifically provides that former government agents are subject to Rule 1.9(c).\footnote{See supra note 13 for the text of amended Rule 1.11(a)(1).} Amended Rule 1.11(d)(1), however, makes lawyers currently serving as government agents subject to all of Rule 1.9.\footnote{Amended Rule 1.11(d)(1) provides:}

\begin{quote}
(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.[.]
\end{quote}

MODEL RULES OF PROF’L CONDUCT R. 1.11 (amended 2002).

One might conclude, therefore, that the ABA carefully selected the circumstances in which the particular sections of Rule 1.9 would apply to former and current government agents. Accordingly, it is reasonable to infer the ABA intended that only Rule 1.9(c) would apply to former government agents. Moreover, paragraph (a)(2) in amended Rule 1.11 incorporates the description of the circumstances that constitute an impermissible conflict of interest for a former government agent found in pre-amendment Rule 1.11(a).\footnote{See supra note 13 for the texts of both prior and amended Rule 1.11(a).} Comment [3] to amended Rule 1.11 then provides that paragraph (a)(2) applies "regardless of whether a lawyer is adverse to a former client[.]."\footnote{MODEL RULES OF PROF’L CONDUCT R. 1.11 cmt. 3 (amended 2002) (emphasis added). Unfortunately, the only example the Commission included in the Comment to demonstrate its point is that of a current representation not adverse to a former government client. The Comment provides: "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.[." Id.} That is to say, amended Rule 1.11(a)(2) governs the specific circumstances on which the long debate about the relationship between Rule 1.9(a) and Rule 1.11(a) has centered.\footnote{For a discussion of that debate, see supra notes 103-118 and accompanying text. In addition to the text of amended Rule 1.11, amended Rule 1.10 (d) makes it clear that imputed disqualification of lawyers associated in a firm with a former government agent is governed solely by amended Rule 1.11 and not by amended Rule 1.10(a). The latter Rule governs the imputing of disqualifications from individual lawyers disqualified under amended Rules 1.9 and 1.7.}

One also might use the legislative history of amended Rule 1.11 to argue that Rule 1.9(a) should no longer regulate former...
government agents. The Commission originally planned to present to
the House of Delegates at the ABA’s annual meeting in August, 2001
an amendment to Rule 1.11(a) significantly different than the
amendment presented to and adopted by the House of Delegates in
February, 2002. The Commission’s penultimate proposed amendment
explicitly incorporated Rule 1.9(a) into Rule 1.11(a).129 Moreover, the
"Reporter’s Explanation of Changes" for that amendment provided,
"[T]he Commission decided that representation adverse to a former
government client is better determined under Rule 1.9 than under
1.11(a) because Rule 1.9 includes not only the very matter in which
a former government lawyer participated but also matters that are
substantially related."130 The radical change from the Commission’s
penultimate proposal for Rule 1.11(a) to the amendment finally
proposed to and adopted by the House of Delegates might be the
strongest evidence that the Commission finally concluded that Rule
1.9(a) should not apply to former government agents.131

129 AUGUST 2001 REPORT, supra note 5, at 103. That proposed amendment
provided in part:
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 Rules 1.9(a) and (b), except that matter is
defined as in paragraph (e) of this Rule;
(2) is subject to Rule 1.9(c); and
(3) 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.

Id.

130 Id. at 107 (emphasis added). The Reporter’s Explanation also provided:
In order not to unduly restrict the mobility of former government
lawyers, however, the Commission decided to limit the
disqualifications under Rules 1.9(a) and (b) to matters as defined in
paragraph (e) of this Rule [1.11(e) defining ‘matter’ in the Rule as
actually amended], i.e., excluding legislation, rule-making and other
policy determinations.

Id.

131 I am not aware of any explanation given by the Commission for the
specific change from the penultimate to the final proposed amendment. The
If the Commission and the ABA wanted to end the debate on the relationship between Rules 1.9(a) and 1.11, they have not done enough given the long history and vigor of the controversy. The last-minute, unexplained switching of sides by the Commission on this issue might prompt the belief that the debate is easily revived. Faith in understandings of legislative history hardly seem sufficient to quell the debate. Moreover, the significance of the eleven words added to Comment [3] to amended Rule 1.11 might not be appreciated because the Comment fails to provide any historical context. Most importantly, the Commission failed to delete from Comment [1] to Rule 1.9 the following statement of when Rule 1.9 applies: "So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction." I could not think of a better example of Rule 1.9(a) being applied to a former government agent. The example is even more troubling because of the following directive added to Comment [1] to Rule 1.9: "Current and former government lawyers must comply with this Rule [1.9] to the extent required by Rule 1.11." The Commission might have intended the latter statement to refer only to the incorporation of Rule 1.9(c) into amended Rule 1.11(a)(1) or to the incorporation of Rule 1.9 into amended Rule 1.11(d)(2). The juxtaposition of the example and the closing directive, however, will only confuse those subject to the new Rules.

States considering adopting the amended Model Rules should consider more effective methods than the current text of the amended Rules to put to rest questions about the relationship between Rules 1.9(a) and 1.11(a). The text of Rule 1.11(a) could explicitly disclaim the application of Rule 1.9(a) to circumstances governed by Rule 1.11(a). While such a disclaimer might be an unusual rule format,
the amended Rules already approximate such a format in amended Rule 1.10, the general rule concerning imputed conflicts of interests. Rule 1.10(d) disavows the applicability of Rule 1.10(a) to lawyers in a firm with former or current government lawyers.\textsuperscript{136} At the very least, the Comments to Rules 1.9 and 1.11 should contain such explicit disclaimers.\textsuperscript{137}

Unfortunately, the relationship between Rules 1.9(a) and 1.11 is not the only issue for which greater clarity in the amended Rules would help. I turn now to questions raised by the addition of Comment [10] to amended Rule 1.11.

**B. Uncertainty Added by Comment [10] to Amended Rule 1.11**

As described above, the amendment to the text of Rule 1.11 did not alter the definition of *matter* with respect to which participation

\begin{verbatim}
(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);
   (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; and
   (3) is not subject to Rule 1.9(a) when the lawyer is representing a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee.
\end{verbatim}

\textsuperscript{136} The text of amended Rule 1.10(d) provides, "The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." \textit{Model Rules of Prof'l Conduct R. 1.10} (amended 2002). A similar disclaimer might be added to amended Rule 1.9, such as the following:

\textsuperscript{137} The Comments to the amended Rules do contain some disclaimers. For example, Comment [2] to amended Rule 1.11 states: "Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule." \textit{Model Rules of Prof'l Conduct R. 1.11 cmt. 2} (amended 2002).
as a government agent could give rise to an impermissible conflict of interest in subsequent representations.\textsuperscript{138} The amendment to Rule 1.11, however, added Comment [10], which provides the opportunity for an understanding of \textit{matter} much broader than the "same issue of fact/same parties" model presented by the text of Rule 1.11 and the presumed codification of Formal Opinion 342 in that text.\textsuperscript{139} Comment [10] provides: "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."\textsuperscript{140} Neither Comment [10] nor the text of amended Rule 1.11 give any hint of what "another form" might include, how the criteria identified in the Comment should relate to one another, or even if all of the criteria should be considered in every circumstance. This ambiguity in Comment [10] subverts the role of Comments to serve as guides to interpretation and to illustrate the meaning and purpose of a rule.\textsuperscript{141} Although the elimination of all

\footnotesize
\begin{enumerate}
\item See \textit{supra} notes 25-27 and accompanying text.
\item See \textit{supra} notes 28-44 and accompanying text for a discussion of the model described by Formal Opinion 342. See also Formal Op. 97-409, \textit{supra} note 14, at 467 n.5 (noting that "courts have generally looked to see whether two or more arguably related matters involve the same parties and the same facts"); \textit{Id.} at 468, n.6 (stating, "In order to qualify as the 'same matter' under Rule 1.11, both the old and new representations must involve 'a discrete and isolatable transaction or set of transactions between identifiable parties.'"'); HAZARD \& HODES, \textit{supra} note 10, § 15.5, at 15-16. (explaining that rule making or the setting of generally applicable government policy would not be included in the Rule 1.11 definition of "matter," because in such circumstances "there is little opportunity to favor or disfavor private parties as yet unknown").
\item MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 10 (amended 2002).
\item See \textit{supra} note 114 for a discussion of the role of the Comments as described in the Model Rules.
\end{enumerate}

Before the amendment to Rule 1.11 and the addition of Comment [10], Commentators identified ambiguity in the definition of \textit{matter} as used in the text of Rule 1.11. See, e.g., Christopher N. Camponovo, \textit{Indecent Proposal: Abraham Sofaer, Libya and the Appearance of Impropriety}, 21 J. LEG. PROF. 23, 37 (1997) (noting the lack of a clear interpretation of the "nexus" required between one's work as a government attorney and as a private employee); cf. WOLFRAM, \textit{supra} note 8, at 471 (describing the use of the term \textit{matter} in physics and ethics codes as sharing the same lack of precision despite universal use).
Ambiguity in the Rules is impossible, the ambiguity in Comment [10] should not be viewed as typical and therefore harmless. The ambiguity must be recognized as a source of discretion. Accordingly, states considering adoption of amended Rule 1.11 should carefully consider the lack of direction provided by Comment [10] and the likelihood it will lead to disparate readings of matter rather than uniformity in the application of Rule 1.11.

The federal Ethics in Government Act (EIGA) provides a clue in understanding the purpose and possible effects of including Comment [10] in the amendment of Rule 1.11. Commentators often have tied the definition of matter in Rule 1.11 to EIGA, and the Reporter for the Commission admitted that EIGA provided a foundation for Comment [10]. The "Reporter's Explanation of Changes" for amended Rule 1.11 states: "This new Comment clarifies that two particular matters may constitute the same matter . . . .", depending on the circumstances. The language is drawn from but is not identical to the definition of 'matter' as it is used in the federal conflicts of interest statute. Cf. 5 C.F.R. 2637.201(c)(4).


The same particular matter must be involved. The requirement of a "particular matter involving a specific party" applies both at the time
regulation cited by the Reporter is part of a set of regulations designed to implement section 207(a) of EIGA. Section 207(a) restricts certain representations by former officers, employees, and elected officials of the executive branch after they leave government service. Id. Similar to the Government employee acts in an official capacity and at the time in question after Government service. The same particular matter may continue in another form or in part. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.

Id. (emphasis omitted).

146 18 U.S.C. §§ 207(a)(1) and (a)(2) provide:

(a) Restrictions on all officers and employees of the executive branch and certain other agencies.

(1) Permanent restrictions on representation on particular matters - Any person who is an officer or employee (including any special Government employee) of the executive branch of the United States (including any independent agency of the United States), or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter--

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
(B) in which the person participated personally and substantially as such officer or employee, and
(C) which involved a specific party or specific parties at the time of such participation
shall be punished as provided in section 216 of this title.

(2) Two-year restrictions concerning particular matters under official responsibility.--Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia,
Rule 1.11, those EIGA restrictions apply to representations in connection with particular matters, which involved a "specific party or parties." Moreover, the regulations which implement EIGA provide that the matters of concern under section 207 (a) of EIGA typically are "specific proceeding[s] affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties." So, in many respects, Rule 1.11 and EIGA share the same concerns.

The regulations implementing EIGA, however, make clear that even if the specific party that is the focus of the matter addressed as a government agent is not the focus of the matter addressed in the representation subsequent to government service, both matters might be considered to be the same particular matter for section 207(a).

on behalf of any other person (except the United States or the District of Columbia), in connection with a particular matter--
(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States or the District of Columbia, and
(C) which involved a specific party or specific parties at the time it was so pending shall be punished as provided in section 216 of this title.


The Director of the Office of Government Ethics, in consultation with the Attorney General and the Office of Personnel Management, prepared the regulations to which the Reporter referred. 5 C.F.R. § 2637.101(a), (b). The purposes of the regulations include: "[t]o give content to the restrictions on post employment activity established by [18 U.S.C. § 207] for administrative enforcement with respect to former officers and employees of the executive branch . . . . and to provide guidance to individuals who must conform to the law." 5 C.F.R. § 2627.101(a) (2002).

See 18 U.S.C. § 207 (2000). The definition of "particular matter" in EIGA is very similar to the definition of matter in Rule 1.11. EIGA provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." Id. § 207(i)(3). See supra note 13 for the definition of matter in Rule 1.11.

5 C.F.R. § 2637.201(c)(1) (2002).
an example of a "same particular matter [that] may continue in another form" under EIGA, the regulations provide the following:

A government employee reviewed and approved certain wiretap applications. The prosecution of a person overheard during the wiretap, although not originally targeted, must be regarded as part of the same particular matter as the initial wiretap application. The reason is that the validity of the wiretap may be put in issue and many of the facts giving rise to the wiretap application would be involved.149

This example is set forth in the regulation to which the "Reporter's Explanation of Changes for Rule 1.11" refers as indicative of the scope of Comment [10].150 Both matters in the example are specific proceedings affecting the legal rights of specific parties, but neither the proceeding nor the party who is the object of the proceeding are the same in each matter. Basic facts, as suggested in Comment [10], seem to be all that make the two matters the same matter.151 When basic facts alone become the acceptable criterion for equating matters under Rule 1.11, the line between the scope of matter under Rule 1.11 and the scope of same or substantially related matter under Rule 1.9(a) starts to blur.152 This blurring effect of Comment [10] seems inconsistent with amended Rule 1.11 which the ABA suggested was intended to solidify the line between Rule 1.9(a) and Rule 1.11.153

Finally, one last issue about the scope of EIGA should raise questions about adopting Comment [10], which links Rule 1.11 to EIGA. EIGA was adopted to deter representations by former government agents that raise even the appearance of impropriety.154

149 5 C.F.R. § 2637.201(c)(4)(2002) (Example 2) (emphasis added).
150 FEBRUARY 2002 REPORT, supra note 2, at Ex. 1.
151 MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 10 (amended 2002). Not all courts applying section 207 of EIGA find only basic facts to be a sufficient link between matters. See, e.g., EEOC v. Exxon Corp., 202 F.3d 755, 757 (5th Cir. 2000) (adopting the test from United States v. Medico Indus., Inc., 784 F.2d 840,843 (7th Cir. 1986), which requires the same specific parties, the same subject matter, and substantially overlapping facts).
152 See supra notes 42-98 for a discussion of the ties between the scope of "same and substantially related matter[s]" and facts relevant to current and former representations.
153 See supra notes 122-31 and accompanying text.
154 For cases describing EIGA's concern with avoiding even the "appearance
The Model Rules, however, attempted to eliminate the appearance of impropriety as a standard for determining when one representation is sufficiently related to another to create an impermissible conflict of interest. The appearance of impropriety standard has been criticized due to its lack of specificity and hence the inherently subjective nature of the application of the standard. Accordingly, before adopting Comment [10] to amended Rule 1.11, states should carefully consider how far the Comment's language derived from EIGA extends the definition of matter under Rule 1.11.

III. CONCLUSION

The ABA and the Commission should be commended for their "herculean effort[s]" to review and improve the Model Rules of impropriety," see EEOC, 202 F.3d at 759; In re Rest. Dev. of Puerto Rico, Inc., 128 B.R. 498, 500 (D. P.R. 1991); United States v. Dorfman, 542 F. Supp. 402, 410 (N.D. Ill. 1982).

155 See ANNOTATED MODEL RULES OF PROF'L CONDUCT 177 (4th ed. 1999) (stating: "Model Rule 1.11 eliminated the 'appearance of impropriety' test altogether[,]" but also citing a number of cases in which the courts continued to employ the test).

156 Prior to the recent amendment of the Rule 1.9, Comment [5] provided: This rubric [the appearance of impropriety] has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging.

MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 5 (2001). Amended Rule 1.9 no longer includes Comment [5] as quoted above. The Model Rule 1.9 Reporter's Explanation of Changes explains that the Commission deleted the Comment because the Comment was considered "no longer helpful to the analysis of questions arising under this Rule." AUGUST 2001 REPORT, supra note 5, at 94. The Commission also explained, however, that "[n]o change in substance is intended." Id. See also, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 121 cmt. c(iv) (2000) (dismissing the "appearance of impropriety" standard as prohibiting "situations that might appear improper to an uniformed observer or even an interested party").

157 The Chair of the Commission on Evaluation of the Rules of Professional Conduct used this characterization to describe the Commission's work.
Professional Conduct. The valor of that effort, however, should not cloud its utility. Before adopting the Rules amended by the ABA in February 2002, states should carefully consider what the ABA could have done as well as what it did do. There was a need to clarify whether both Rule 1.9(a) and Rule 1.11 applied to representations of current clients by lawyers who formerly served as government officers or employees. While the ABA eliminated some portions of the Model Rules which fostered confusion about the relationship between Rule 1.9(a) and Rule 1.11, states hoping to end the controversy must do more. The Rules or the Comments to the Rules should explicitly address the relationship between Rule 1.9(a) and Rule 1.11. Moreover, states should not adopt ambiguous Comments to the Rules, such as Comment [10] to amended Rule 1.11, which confound rather than clarify.

AUGUST 2001 REPORT, supra note 5, at 1.