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Ethically Representing Clients With Adverse Interests: Assessing When Legal Adverseness Requires Disqualification

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ETHICALLY REPRESENTING CLIENTS WITH ADVERSE INTERESTS:
ASSESSING WHEN LEGAL ADVERSENESS REQUIRES DISQUALIFICATION

June 28, 2022

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Agenda

1. Relevant Rules and How to Identify a Conflict
2. Potential Conflicts of Interest and Conflict Resolution
3. Lateral Moves
4. Adversity With Former Clients
5. Personal Conflicts of Interest
6. Over Extensive Outside Counsel Guidelines
7. Hot Potato Rule

I. Relevant Rules and How to Identify a Conflict

The Rules of Professional Conduct

- Establish ethical standards for members and are designed to protect the public.

- Together with statutes and general principles relating to other fiduciary relationships, they help define the fiduciary duty owed by a lawyer to his or her client.

What is a conflict of interest?

- Conflicts vary but embrace "all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his [or her] own interests."

- When representation is "rendered less effective" or action potentially prejudicial.

- Or, when the attorney assumes a position potentially "adverse or antagonistic to his or her client."

Tips for Identifying Conflicts

- Think not of conflicts of interest, but of "potential conflicts"… (*See* "Risky Business, Representing Multiple Interests," Richard Zitrin)
- Think beyond conflicts…
  - Think in terms of potential "impaired loyalty"…
- Think of any "reasonable foreseeable adverse" interests…
  - Query: is there any way my representation or loyalty to a client may be impaired?

Identifying Conflicts – Potential Impaired Loyalty

- Potential conflicts do not necessarily warrant automatic disqualification, but they do provide context for planning out effective representation.

- A potential conflict means there is a *reasonable likelihood* the conflict may arise.

Basic Conflict of Interest Authority – Model Rule (MR) 1.8, 1.7

- Conflicts of interest derive from the old adage that an attorney "cannot serve two masters." An attorney's duty of loyalty prohibits him or her from putting another's interests above that of the client.
- Model Rules are intended to reflect and safeguard this principle.

Transactions with a client – MR 1.8 provides:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Adverse actions or representation to a client – MR 1.7 states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

The Disclosure Rules under MR are intentionally broad and apply in:

- Joint or concurrent representation cases.
- Where an attorney seeks to represent a single client in a matter with multiple clients; or
- Where an attorney seeks to represent clients with adverse interests in separate matters.

II. Potential Conflicts and Conflict Resolution

Examples of Potential Conflicts (joint clients)

- Any representation of more than one client in a matter in which the interests of the clients actually conflict.
- Where one client's loss translates into another client's potential gain.
- In any action where the attorney's duty of loyalty to a client is potentially divided.

Examples of Potential Conflicts (business transactions)

- "The position of an attorney who acts for both parties to the knowledge of each, in the preparation of papers needed to effect their purpose, and gives to each the advice necessary for his protection, is recognized by law as a proper one." (Thornton on Attorneys at Law, Section 175, p. 312.)

- This rule applies to representing:

    a) partners in drawing organizational documents and/or agreements for the dissolution of entities;
    b) a grantor and a grantee in the sale of real property;
    c) a seller and a purchaser in the sale of personal property;
    d) a lessor and a lessee in the drawing of a lease; and
    e) a lender and the borrower during a loan transaction.

"[***i]n each of these instances***** there is the possibility of conflict, if not an actual conflict, in the interests of the persons represented, but it cannot be said as a matter of law that an attorney is prohibited from acting for both parties in such cases with the knowledge and consent of both."

Examples of Potential Conflicts (business transactions) (cont.)

- "Parties whose interests are aligned choose joint representation for a variety of legitimate reasons . . . [and where] the parties consent to joint representation after being fully informed of the [risk of conflicts of interest], the court must not interfere with their choice of counsel absent '**ethical considerations that affect the fundamental principles of our judicial process**.'"
- Right to counsel of one's choosing must yield to consideration of ethics…
  - **In situations where an attorney represents multiple parties on the same side of a suit, but with conflicting interests in property.**
  - **When representing an owner bringing a derivative suit against a corporation and the other owner, no conflict exists as there is no relationship between the attorney and the corporation, despite a derivative suit being brought in the name of the corporation.**

The purpose of this rule . . .

This rule is designed not only to prevent the dishonest practitioner from fraudulent conduct, but also to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

III. Conflicts Arising Out of Lateral Moves

Competing Concerns: Disclosure

I. Confidentiality

II. Avoidance of Conflicts

Competing Concerns: Substance

I. Client assurance that loyalty is not compromised

II. Permit reasonable choice of counsel

III. Not unreasonably hamper lawyer mobility

Competing Concerns: Substance

COMMENT [4] TO ABA MODEL RULE 1.10: Lawyers Moving Between Firms

"[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. **First,** the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. **Second,** the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. **Third**, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel."

Competing Concerns: Substance

COMMENT [4A] TO ABA MODEL RULE 1.10: Lawyers Moving Between Firms

"[4A] The principles of imputed disqualification are modified when lawyers have been associated in a firm and then end their association. The nature of contemporary law practice and the organization of law firms have made the fiction that the law firm is the same as a single lawyer unrealistic in certain situations. In crafting a rule to govern imputed conflicts, there are several competing considerations. First, the former client must be reasonably assured that the client's confidentiality interests are not compromised. Second, the principles of imputed disqualification should not be so broadly cast as to preclude others from having reasonable choice of counsel. Third, the principles of imputed disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after leaving a firm. In this connection, it should be recognized that today most lawyers practice in firms, that many limit their practice to, or otherwise concentrate in, one area of law, and that many move from one association to another multiple times in their careers. If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests is appropriate in balancing the competing interests."

What can be disclosed?

I. Lawyer is permitted to reveal information relating to the representation of a client to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm

II. BUT only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client

III. AND reasonable efforts to must be made to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, the information.

ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.6 Confidentiality of Information

What can be disclosed (cont.)

I. Limited information permitted to be disclosed without client consent to check conflicts when considering new association:

   A. the identity of the persons and entities involved in a matter;
   B. a brief summary of the general issues involved; and
   C. information about whether the matter has terminated

II. But only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

COMMENTS TO ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.6

What can be disclosed (cont.)

I. Exceptions:
   A. Information subject to attorney-client privilege.
   B. Information which would otherwise prejudice client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

II. When information can be disclosed:
   A. After substantive discussions regarding the new relationship have occurred.

COMMENTS TO ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.6

What can be disclosed (cont.)

BUT FIDUCIARY AND CONTRACTUAL OBLIGATIONS MAY APPLY

- All lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with these fiduciary duties – *see* Rule 1.10(e) (requiring law firms to check for conflicts of interest).

COMMENTS TO NEW YORK RULE OF PROFESSIONAL CONDUCT 1.6 [18D]

What can be disclosed (cont.)

Reasonable measures should be used to minimize the risk of any improper, unauthorized or inadvertent disclosures, such as

(1) disclosing client information in stages initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages;

(2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or

(3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.

COMMENTS TO NEW YORK RULE OF PROFESSIONAL CONDUCT 1.6 [18F]

ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.6 – Confidentiality of Information

Client-Lawyer Relationship

a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary.

* * *

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comments to ABA Model Rule of Professional Conduct 1.6

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted **to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.** Moreover, the disclosure of any information **is prohibited if** it would **compromise the attorney-client privilege or otherwise prejudice the client** (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge**). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct** when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) **may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest**. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

N.Y. RULE OF PROFESSIONAL CONDUCT 1.6 – Confidentiality of Information

While New York Rule 1.6 does not contain sub-paragraph (b) (7) of ABA Rules, it does contain detailed comments addressing the issue:

Lateral Moves, Law Firm Mergers, and Confidentiality

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms though lateral hiring or merger, **disclosure of limited information** may be necessary **to resolve conflicts of interest** pursuant to Rule 1.10 and **to address financial, staffing, operational, and other practical issues**. **However, Rule 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6.**

[18B] **Disclosure without client consent** in the context of a possible lateral move or law firm merger is ordinarily permitted regarding **basic information** such as: (i) the **identities of clients** or other parties involved in a matter; (ii) **a brief summary of the status and nature of a particular matter**, including **the general issues involved**; (iii) information that is **publicly available**; (iv) the lawyer's **total book of business**; (v) **the financial terms of each lawyer-client relationsh**ip; and (vi) information about **aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments)**. Such information is generally not "confidential information" within the meaning of Rule 1.6.

Comments to N.Y. Rule of Professional Conduct 1.6

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily *not* permitted, however, if information is protected by Rule 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (e.g., an unannounced corporate takeover, an undisclosed possible divorce, or a criminal investigation into the client's conduct).

[18D] When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with these fiduciary duties – *see* Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

* * *

[18F] Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages; initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.

N.Y. RULE OF PROFESSIONAL CONDUCT 1.10 – Obligation to Check Conflicts

I. (e) (3) Law firm has affirmative obligation to check conflicts against current and previous engagements upon hiring of new lawyer

II. Failure to do maintain records to do so or implement conflict check violation of rules and, if such failure is a "substantial factor" in causing a violation of Rule 1.10, both law firm and lawyer responsible.

Comments to N.Y. Rule of Professional Conduct 1.10 – Obligation to Check Conflicts

[9H] Rule 1.10(e) requires a law firm to avoid conflicts of interest by checking proposed engagements against current and previous engagements. When lawyers move from one firm to another firm as lateral hires, or when two law firms merge, the lateral lawyers' conflicts and the merging firms' conflicts arising under Rule 1.9(a) and (b) will be imputed to the hiring or newly merged firms under Rule 1.10(a). To fulfill the duty to check for conflicts *before* hiring laterals or before merging firms, the hiring or merging should ordinarily obtain such information as **(i) the identity of each client that the lateral lawyers or merging firms currently represent; (ii) the identity of each client that the lateral lawyers or merging firms, within a reasonable period in the past, either formerly represented within the meaning of Rule 1.9(a), or about whom the lateral lawyers or the lawyers in the merging firms acquired material confidential information within the meaning of Rule 1.9(b); (iii) the identity of other parties to the matters in which the lateral lawyers or merging firms represented those clients; and (iv) the general nature of each such matter.** The hiring or merging firms may also request aggregate financial data for all clients or from groups of clients (such as past billings, pending receivables, timeliness of payment, and probable future billings) to determine whether the employment or merger is economically justified.

Comments to N.Y. Rule of Professional Conduct 1.10 – Obligation to Check Conflicts

[9I] Whether lawyers may disclose information in response to such requests depends on the nature of the information. Some of this information is ordinarily not confidential (*e.g.*, the names of clients and adversaries in publicly disclosed matters, the general nature of such matters, and *aggregate* information about legal fees from all clients or from groups of clients), but other information is ordinarily confidential (*e.g.*, non-public criminal or matrimonial representations, or client-specific payment information). The lateral lawyers or merging firms should carefully assess the nature of the information being requested to determine whether it is confidential before asking lawyers to disclose it. Some measures to assist attorneys in abiding by confidentiality requirements in the lateral and merger context are discussed in Comments [18A]-[18F] to Rule 1.6.

ABA Formal Opinion 455 (2009)

- Permits limited disclosure of client information necessary to avoid conflicts when lawyer switches firms
  - Conflicts of interest that would likely frustrate a contemplated move can be discovered even before disclosure of client-specific information is necessary.
    - Where "moving lawyer's current firm and the prospective new firm are adverse in numerous existing matters or regularly represent commonly antagonistic groups (e.g., landlords and tenants or management and unions), then discussions regarding a potential move probably would proceed no further."
    - "In other cases, simply comparing client lists or the general nature of the practices of the moving lawyer and the prospective new firm will often reveal the absence or presence of potential conflicts without the need for additional disclosure; initial disclosures of conflicts information thus can often be limited to names of clients or areas of practice."

ABA Formal Opinion 455 (2009)

- Where determination of "conflict of interest requires fact-intensive analysis of information" such as "whether there is a 'substantial relationship' between two matters for purposes of Rule 1.9. In such cases, the firm may be able to resolve the question based on information available from sources other than the moving lawyer." If not, the moving lawyer must either seek prior client consent, be screened from the current representation pursuant to Rule 1.10(a)(2), forgo the move, or persuade the prospective firm to undertake an alternative method of detecting and resolving the conflicts of interest issue consistent with the stated exceptions to Rule 1.6.
- "An alternative suggested by some commentators is retention by the moving lawyer, the prospective new firm, or both, of an independent or intermediary lawyer to receive and analyze conflicts information in confidence...The intermediary lawyer then may advise one or both, without disclosing any facts to the other, of the intermediary lawyer's conclusion on the resolution of, or the inability to resolve, any conflicts of interest that may have been detected."

ABA Formal Opinion 455 (2009)

- Use of conflicts information by the receiving lawyer or firm should be limited to the detection and resolution of conflicts of interest, and dissemination of conflicts information should be restricted to those persons assigned to or involved in the conflicts analysis with respect to a particular lawyer.
- Timing: "Conflicts information should not be disclosed until reasonably necessary" and "negotiations between the moving lawyer and the prospective new firm should have moved beyond the initial phase and progressed to the stage where a conflicts analysis is reasonably necessary, which typically will not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association."
- "In another context, ABA Formal Op. 96-40028 explored at length the issue of when a lawyer considering potential employment with an adverse firm or party must consult with and seek consent of the involved client. The analysis there concluded that participation in substantive discussions by the moving lawyer and the prospective employer best identified the point at which such consideration needed to occur."

ABA Formal Opinion 489 (2019)

"The exception to this requirement [of confidentiality] is for a departing lawyer to retain names and contact information for clients for whom the departing lawyer worked while at the firm, in order to determine conflicts of interests at the departing lawyer's new firm and comply with other applicable ethical or legal requirements."

ABA MODEL RULE OF PROFESSIONAL CONDUCT
1.9 – Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; 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.

Comments to ABA Model Rule of Professional Conduct Rule 1.9

Lawyers Moving Between Firms

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

Comments to ABA Model Rule of Professional Conduct Rule 1.9 (Cont.)

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

Comments to ABA Model Rule of Professional Conduct Rule 1.9 (Cont.)

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.10 – Imputation of Conflicts of Interest

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.10 – Imputation of Conflicts of Interest (Cont.)

BUT SCREENING MAY BE IMPLEMENTED:

(a) (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) **the disqualified lawyer is timely screened** from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) **written notice is promptly given to any affected former client** to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) **certifications of compliance with these Rules and with the screening procedures are provided** to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.10 – Imputation of Conflicts of Interest (Cont.)

Or waiver may be possible:

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

N.Y. RULE OF PROFESSIONAL CONDUCT 1.10 – Imputation of Conflicts of Interest

NY and many other states have not adopted ABA Model Rule 1.10(a) with respect to screening of laterals as a substitute for client consent or to overcome client objection. Each state must be checked for its own rules. NY, for example, does have limited exceptions with respect to attorneys who have moved:

> (b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.
>
> (c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.
>
> (d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

Comments to N.Y. Rule of Professional Conduct 1.10 – Imputation of Conflicts of Interest

[5] Paragraph (b) permits a law firm, under certain circumstances, to represent a client with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, under Rule 1.7 the law firm may not represent a client with interests adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client, and (ii) the firm or any lawyer currently in the firm has information protected by Rule 1.6 and Rule 1.9(c) that is material to the matter.

[5A] In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter.

[5B] Rule 1.10(c) permits a law firm to represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or the firm with which the lawyer was previously associated, represented a client whose interests are materially adverse to that client, provided the newly associated lawyer did not acquire any confidential information of the previously represented client that is material to the current matter.

Hypothetical 1

Newly associated attorney moves from a small firm which operated with informality and discussions among all attorneys on all matters which the firm handled. Can the attorney meet the exception?

Obtaining Client Consent and Waivers

I. Rules do not directly address when the acquiring firm or the departing lawyer can reach out to the disclosed clients for any purpose, including to inquire about conflict waivers or to ascertain if the client will follow the proposed lateral.

II. But note: Rule 1.6 prohibits lawyers and law firms from revealing or using client confidential information "to the disadvantage of a client or for the advantage of the lawyer or a third person" absent an exception to the duty of confidentiality and Comment [18A] to New York Rule 1.6 (lawyers and law firms must not disclose confidential information "for their own advantage or for the advantage of third parties" absent an applicable exception). Query whether such inquiries are being made to further the client's interest or to rather to further the interests of the lawyer or the acquiring firm.

III. Fiduciary duty rules and contractual provisions may prohibit communications with clients regarding the proposed move prior to notice of withdrawal to existing firm.

IV. The acquiring firm not permitted to do anything with respect to potential clients that the lateral could not do.

IV. Adversity With Former Clients

Hypothetical 2

Two years ago, you represented a single member LLC in a contract dispute. You dealt with Cindy Client on all important matters, including responding to discovery, preparing her for her deposition, submitting invoices, etc. That litigation ended with a settlement at mediation. Yesterday you received a phone call from a prospective client who was involved in a bad car crash. Cindy was driving the car that drove through the red light and hit the prospective client.

May you represent the prospective client in a claim against Cindy?

Answer

Rule 1.7 (Conflict of Interest: General Rule)

Rule 1.8 (Conflict of Interest: Prohibited Transactions)

Rule 1.9 (Conflict of Interest: Former Client)

Rule 1.9 Comment 3

Rule 1.6 (Confidentiality of Information)

Informed Consent

- "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure of all "actual and reasonable foreseeable adverse consequences of the conflict." (See *People v. Baylis* (2006) 139 Cal. App. 4th 1054, 1065-1066, citing *Cal. Bar*, Opinion No. 1998-152 (1998) at p. 5.)
- Concerning a potential conflict, an attorney must disclose: (1) all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the representation; (2) potential conflicts; and (3) the possibility or desirability of seeking independent legal advice. (*Klemm v. Sup. Ct.* (1977) 75 Cal.App.3d 893, 901 [citing *Lysick v. Walcom* (1968) 258 Cal.App.2d 136 and *Arden v. State Bar* (1959) 52 Cal.2d 310].)
  - Failing to provide adequate disclosures subjects the attorney to civil liability to the client, potential charges of unethical and unprofessional conduct, and may subject the transaction to attack as having been procured through misrepresentation. (*Id.*)

Disclosure of Actual and/or Reasonably Foreseeable Adverse Consequences:

- The attorney should reasonably disclose, in writing, the perceivable adverse consequences of waiving any conflicts arising out of the attorney's representation, including:
  - the nature of the conflict of interest,
  - the purpose of the disclosure,
  - the legal and other benefits and detriment resulting from consenting to representation despite the conflict, and
  - any other facts that could have any important "bearing" on the client's decision. (See *State Bar*, Opinion No. 2011–182, citing *Los Angeles County Bar Association*, Opinion No. 456).

Disclosures (Cont.)

- An attorney should disclose in writing facts necessary to enable his or her client to make free and "intelligent decisions" regarding the subject matter of the representation. (*See Ishmael v. Millington* (1966) 241 Cal. App. 2d 520, 528-529)

Some Conflicts Cannot Be Waived

- Why? The attorney has a duty "in every peril to himself or herself to preserve the secrets of his or her client." (See *State Bar*, Opinion No. 1993–132)

- Effective informed written consent, therefore, may be either impossible or insufficient. (*Id*.)

Evaluating Disclosures

- An evaluation of whether a full disclosure was made and the client made informed waiver is a fact-specific inquiry and based on numerous factors. (*See Visa USA Corp. v. First Data Corp.,* 241 F. Supp. 2 1100, 1105-1110 (ND Cal 2003).)
- Insufficient or inadequate disclosures could result in rescission or invalidation of any agreements, disgorgement, civil liability or professional discipline.
- But conversely, a detailed waiver can protect a transaction or agreement. (*See Zador Corp, supra* (1995) 31 Cal. App. 4th at 1301.)

Hypothetical 3

Your plaintiff's firm is growing, and you decide to hire a defense lawyer, Donald, who you have litigated against for a few years. He is presently opposing counsel in one of your large personal injury cases.

If Donald joins your firm, can he work on the case he had been defending if the former client does not agree?

Answer

Rule 1.9 (Conflict of Interest-Former Client)

Rule 1.10 (Imputed Disqualification: General Rule)

Rules 1.11 and 1.12 (Government lawyers and former judges)

Formal Advisory Opinion 05-9 (Temporary Attorneys)

ABA Model Rule 1.10 (Imputation of Conflicts of Interest: General Rule)

Hodge v. UFRA-Sexton, LP, 256 Ga. 136 (2014)

Hypothetical 4

Your plaintiff's firm is growing, and you decide to hire a defense lawyer, Donald, who you have litigated against for a few years. He is presently opposing counsel in one of your large personal injury cases.

If Donald joins your firm, can you continue to handle the case as counsel for the plaintiff if the opposing side objects?

Answer

Rule 1.10 (Imputed Disqualification: General Rule)

Rules 1.11 and 1.12 (Government lawyers and former judges)

Formal Advisory Opinion 05-9 (Temporary Attorneys)

ABA Model Rule 1.10 (Imputation of Conflicts of Interest: General Rule)

Hodge v. UFRA-Sexton, LP, 256 Ga. 136 (2014)

Hypothetical 5

Your plaintiff's firm is growing, and you decide to hire a defense lawyer, Donald, who you have litigated against for a few years. He is presently opposing counsel in one of your large personal injury cases.

If Donald joins your firm, can you continue to handle the case as counsel for the plaintiff if the opposing side objects?

Would the answer be different if Donald was a paralegal?

Answer

Rule 1.10 (Imputed Disqualification: General Rule)

Rules 1.11 and 1.12 (Government lawyers and former judges)

Formal Advisory Opinion 05-9 (Temporary Attorneys)

ABA Model Rule 1.10 (Imputation of Conflicts of Interest: General Rule)

Hodge v. UFRA-Sexton, LP, 256 Ga. 136 (2014)

Hypothetical 6

What if another lawyer from Donald's firm joined your firm? Would the answer be different?

Answer

Rule 1.9 (Conflicts-Former Clients) would allow this, assuming this new lawyer had no knowledge of the facts.

Comment 5: These rules…operate "to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict."

V. Personal Conflicts of Interest

Hypothetical 7

The lawyer represents a developer (Client A) and is buying adjacent property before the deal is public. Is there a conflict? What do you do?

Hypothetical 8

Attorney approaches another existing client (Client B) to present an opportunity in connection with the development (like ancillary development). Is there a conflict?

Further Examples of Conflicts under MR 1.8:

- Where the attorney acquires an ownership interest potentially adverse to a client in property or a business (See *Connor v. State Bar* (1990) 50 Cal.3rd 1047, 1056–1057; *Lee v. State Bar of California* (1970) 2 Cal. 3d 927, 941)
- Where the attorney receives an unbargained for advantage or gift. (*See Passante v. McWilliam* (1997) 53 Cal. App. 4th 1240, 1248)

VI. Over Extensive Outside Counsel Guidelines

Hypothetical 9

Your law firm represents Company X in a contract case and Company X has OCGs requiring consent to represent its competitors. Company Y, a competitor of Company X, approaches you and asks you to represent it in a federal investigation. Is there a conflict? What do you do?

Answer

There is no conflict. Release of that information could be harmful to Company Y. You could ask Company Y if you can disclose its identity to perform a conflict check, but due to the highly confidential nature of the investigation, Company Y is not likely to consent. You are required to turn down the representation of Company Y even though there is no Rule 1.7 conflict.

VII. Hot Potato Rule

Hypothetical 10

Lawyer Larry Lopez practices in a ten-lawyer firm organized as a professional corporation (PC). Lopez is one of the five shareholders in the PC. For the last year, Lopez represented Carey Colson, a defendant in a large commercial dispute.

One month before Lopez was to represent Colson in the arbitration of the dispute, the firm's managing shareholder asked to meet with Lopez. During the meeting, the manager informed Lopez that all of the other firm shareholders voted to terminate the firm's representation of Colson. When Lopez objected, he was told that if he did not agree to sign the letter terminating representation, he would receive his own termination letter from the firm. Despite his reservations and objections, Lopez signed the letter advising Colson that in a week the firm was terminating its representation of him. The letter stated that the firm was withdrawing because of irreconcilable differences.

Hypothetical 10 Cont.

On receipt of the letter, Colson immediately contacted Lopez. Lopez declined to discuss the termination. Lopez did agree to cooperate with new counsel.

Colson retained another lawyer who sought to continue the arbitration. However, the successor lawyer was forced to proceed with the arbitration because the request for continuance was denied.

The arbitration was a "disaster" for Colson. The arbitrators decided for Colson's adversary, ordering Colson to pay an arbitration award of $2 million. After the arbitration decision, Colson saw one of the arbitrators at the grocery store. The arbitrator stated that Colson's lawyer did not appear to be "up to speed."

Colson discussed the matter with Paul Payne, a successful plaintiff's lawyer who sues accountants for malpractice. On learning that the law firm dropped Colson "like a hot potato" shortly before the arbitration, Payne agrees to sue the "Lopez group."

Hypothetical 10 Cont.

Based on his experience in handling accounting malpractice cases, Payne knows that professional corporations often are undercapitalized. To improve the chances of recovery, Payne decides to sue the professional corporation, Lopez, and the other shareholders in the firm. Based on the facts presented, what is your assessment of Colson's claims against the PC's shareholders?

APPENDIX

There Are No Secrets Amongst Joint Clients

Where an attorney jointly represents clients in a business transaction, their communications with the attorney are privileged as to strangers – **not as to each other**.

Joint/Concurrent Representation: Potential Conflicts

- Disagreements between joint clients regarding underlying facts or strategy.
- Disagreements regarding financial obligations.
- Disagreements regarding whether to settle.

Joint/Concurrent Representation: Potential Conflicts (Cont.)

- Disagreements regarding whether to pursue or dismiss a case.
- Lack of the attorney-client privilege between joint clients.
- The duty to disclose to joint clients significant developments.

Proof & Exposure

- The burden of proof is always upon the attorney to show that the dealing was fair and just, and that the client was properly advised in writing (See *Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1153)
- Failing to provide proper disclosures exposes the attorney to civil liability (See *Lysick* v. *Walcom,* (1968) 258 Cal.App.2d 136, 147) and potential charges of unethical and unprofessional conduct. (See *Arden* v. *State Bar,* (1959) 52 Cal.2d 310.)

Excuses do not justify non-compliance

- Contentions of "reasonableness" and/or lack of "damage" do not obviate full compliance with Rule 3-300. (See *Fair, supra,* 195 Cal. App. 4th. at p. 1154)
- Arguments of a "technical-only violation" of the rules are unavailing. (See *Ritter, supra,* 40 Cal. 3d at 602)
- Proof of dishonesty is not required. (See *Connor v. State Bar* (1990) 50 Cal.3d at 1047, 1056 – 1057)

Good Faith Intent

- Nor does a belief that the client could consult or did consult with another attorney obviate the duty of full disclosure (*Id*. at page 1058)
- The good faith "intent" of counsel to offer "aid to the client" does not obviate the mandatory duties either. (See *Ames v. State Bar* (1973) 8 Cal.3d 910, 920)