Getting Clients, Keeping Clients — and Keeping Your Good Name, Too? Some Key Issues in Addressing Conflicts When Taking on New Clients and Matters

Irwin H. Warren & Jay R. Minga

American Bar Association Section of Litigation

Section Annual Conference – April 15, 2016

Getting Clients, Keeping Clients — and Keeping Your Good Name, Too?:
Some Key Issues in Addressing Conflicts When Taking on New Clients and Matters

By Irwin H. Warren & Jay R. Minga[1]

"Firing one's counsel is rarely a satisfactory solution,"[2] for either the client or the attorney. Neither is dropping a client.[3] In the interest of helping counsel identify and avoid ethical quandaries arising from client engagements, this article explores several (though certainly not all) of the key issues (and some recent caselaw) surrounding conflicts that can arise when taking on new clients and matters, examined through the ABA Model Rules as "a framework for the ethical practice of law."[4] In particular, when an attorney considers taking on an engagement, at least three ethical considerations immediately come into play: (1) whether there is a conflict of interest with a current client; (2) whether a duty owed to a former client weighs against the new engagement; and correspondingly, (3) whether she already has done, or now can do, something about a conflict situation to still undertake a representation – i.e., does she already have and/or can she obtain informed consent. This paper focuses on Model Rule 1.7, as it concerns conflicts of interest as to current clients, and Model Rule 1.9, as it concerns duties owed to former clients.

---

[1] Irwin H. Warren is Co-Chair of the ABA Section of Litigation's Ethics & Professionalism Committee and a partner in Weil, Gotshal & Manges LLP in New York City. Jay R. Minga is an associate at Weil, Gotshal & Manges LLP. This paper is presented for the Section of Litigation, Section Annual Conference; Ritz-Carlton / Four Seasons, Chicago; Friday, April 15, 2016.

[2] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 390: Conflicts of Interest in the Corporate Family Context (1995) (Fox, Lawrence J., dissenting) (noting that "firing one's counsel is rarely a satisfactory solution" and that clients should not be "placed in a Hobson's choice of waiving the conflict or firing their lawyers" because counsel took "on a new, more lucrative engagement" from which it was ethically precluded) [hereinafter ABA Formal Op. 95-390].

[3] *See generally*, Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics, Formal Op. 5: Unforeseeable Concurrent Client Conflicts (2005) [hereinafter ABCNY Formal Op. 2005-5].

[4] ABA Model Rules of Prof'l Conduct: Scope cmt. 16 (Am. Bar Ass'n 1983) (amended 2013) [hereinafter Model Rules]. Such an examination using the Model Rules, while useful, is necessarily limited. *See id.* cmts. 20 ("The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."), 16 ("The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer . . . .").

Model Rule 1.7: Conflicts of Interest with Current Clients

Conflicts of interest with current clients fall within the purview of Model Rule 1.7. Under that Rule, unless four conditions are met, a lawyer may not represent a new client (and must decline or withdraw from representation of an existing client) in either of two situations: (1) if the representation would be directly adverse to another client; or (2) if the representation would pose a significant risk of materially limiting the representation of one or more clients, whether due to a lawyer's responsibilities generally or due to a lawyer's personal interests. Model Rule 1.7 defines either of these two situations as a concurrent conflict of interest. Informed consent of the client is necessary for ethical representation in either of these situations. In short (and absent consent), a lawyer may not concurrently represent clients in matters where they are directly adverse, even if the matters are wholly unrelated and even immaterial to the clients. Thus, as an example, representing Green Co. in a small real estate litigation against Smith may later preclude a lawyer from taking on a matter adverse to Green Co. in a major transaction negotiation on behalf of long-time client Jones.

According to Comment 6 to Model Rule 1.7, "Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent." Without such consent, the Comment states, a lawyer cannot take on the role of an advocate against someone that the lawyer represents in another matter, "even when the matters are wholly unrelated."[5] The Comment highlights the risk that a client facing a directly adverse representation from his or her counsel will feel a sense of betrayal likely to damage the client-lawyer relationship and impair the lawyer's ability to effectively represent that client. Similarly,

[5] *But compare, e.g.*, Model Rule 1.7 cmt. 6 *with* Tex. Disciplinary Rules of Prof'l Conduct (1989), r. 1.6(b)(1), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. (Vernon Supp. 1995) (State Bar Rules art X § 9)) (emphasis added) [hereinafter Tex. Rules], discussed below.

the Comment observes that the client of such adverse representation may have concerns that the attorney will less effectively pursue the client's case.[6]

Despite the existence of either of the two forms of concurrent conflict, Model Rule 1.7 instructs that a representation is nevertheless allowable when four conditions are met: first, the lawyer reasonably believes he will be able to give competent and diligent representation; second, law does not prohibit the representation; third, the representation is not to assert a claim by one client against another client in the same proceeding; and fourth, each client affected gives informed consent, which the client and attorney confirm in writing. If these conditions are met, a representation may go forward. Significantly, under the Model Rule, "simultaneous representation in unrelated matters of clients whose interest are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients."[7]

Divergent Jurisdictional Variations on Model Rule 1.7's Prohibition Against Directly Adverse Representations

It is important to remember that the Model Rules are just that: models. Each State has its own ethics rules, and such rules frequently diverge from the Model Rules. Treatment of current client conflicts is no exception. Jurisdictions exhibit significant variations from Model Rule 1.7 in how they define and address a current conflict of interest. In particular, certain jurisdictions have modified Model Rule 1.7's baseline provision proscribing an attorney from taking on a representation that is "directly adverse" to an existing client. Such variants generally go in one of

[6] *See also, e.g., Int'l Bus. Machines Corp. v. Levin*, 579 F.2d 271, 280 (3d Cir. 1978) ("We think . . . that it is likely that some 'adverse effect' on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another legal matter.").
[7] Model Rule 1.7 cmt. 6.

two directions. Some broaden the circumstances in which the prohibition against concurrent conflicts of interest applies; others narrow Model Rule 1.7's prohibition. A few examples illustrate these variations.

New York's "Differing Interests" Standard: A Concurrent Conflicts Prohibition Broader than "Direct Adversity"

New York has adopted a version of Model Rule 1.7's prohibition on concurrent conflicts that is broader than the ban on "direct adversity" that Model Rule 1.7 would impose. Rule 1.7 of the New York Rules of Professional Conduct provides that (absent consent), a representation is impermissible if "the representation will involve the lawyer in representing *differing interests*."[8] In this regard, New York adheres to the provision previously set out in the old New York Code of Professional Responsibility's Disciplinary Rule ("DR") 5-105. It may be difficult to define the extent to which New York's choice of a "differing interests" standard expands the breadth of Model Rule 1.7's "direct adversity." But instances in which representations involve "differing interests" among clients could be expected to arise more frequently than those instances in which representations might strictly involve "direct adversity" to a current client. The broader language in New York's standard provides an additional incentive for attorneys, when they wish to take on a new engagement, to examine with particular care the facts concerning the relationship between the prospective clients and the lawyer's current clients, identify any relevant conflicts, and get consent.[9] "On the other hand, [under the New York Rules, as with the Model Rules,] simultaneous representation in unrelated matters of clients whose interests are only economically

[8] N.Y. Rules of Prof'l Conduct, r. 1.7(a)(1) (N.Y. App. Div. 2009) (amended 2015), (adopted and published at 22 N.Y.C.R.R. Part 1200.7(a)(1)) [hereinafter N.Y. Rules].
[9] N.Y. Rule 1.7 cmt. 6 ("The duty to avoid the representation of differing interest prohibits, among other things, undertaking a representation adverse to a current client without that client's informed consent.").

adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients."[10]

Narrower Texas and D.C. Variations on Model Rule 1.7 Allow Some Direct Adversity

Several jurisdictions have taken the opposite course from New York and the ABA. These jurisdictions have narrowed, instead of expanded, Model Rule 1.7's proscriptions, and permit attorneys to take on some representations that pose direct adversity to current clients. Some jurisdictions, for instance, prohibit concurrent representation of clients with adverse interests only if, for example, the new matter giving rise to direct adversity is substantially related to the prior matter; or if the direct adversity is material; or if the directly adverse representation will have or be likely to have an adverse effect. Arguably, these differences draw the focus of the prohibition against concurrent conflicts of interest away from a per se adherence to the duty of undivided loyalty,[11] and more toward a more practical assessment of the conflict's likely impact, based on the nature and similarities (if any) of the matters. Two examples of such narrowed Model Rule 1.7 jurisdictions are the State of Texas and the District of Columbia.

Texas significantly limits the proscription against concurrent adverse representations in its counterpart to this portion of Model Rule 1.7. Texas provides, in Rule 1.6(b)(1), that attorneys may not take on a representation of a person that "*involves a substantially related matter* in which that person's interest are *materially and* directly adverse to the interests of another client

---

[10] *Id.*

[11] *Compare IBM*, 579 F.2d at 280 ("The propriety of [suing a current client] must be measured not so much against the similarities in litigation as against the duty of undivided loyalty which an attorney owes to each of his clients." (quoting *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976)).

of the lawyer or the lawyer's firm."[12] Thus, under Texas's Rule, direct adversity alone is not enough to preclude the engagement. Instead, preclusion requires that (1) the conflicting representations involve a substantially related matter; (2) the adversity is direct; (3) and that such direct adversity is also material. It should be noted that Texas Rule 1.06 addresses "advers[ity] to *the interests of* another client," whereas Model Rule 1.7 omits any distinction between "interests" and "client" and speaks only of "advers[ity] to another client." The additional phrase would seem to further focus on whether there is likely to be actual impact on an existing client, much as the substantial relationship and materiality factors do.

The District of Columbia likewise varies from Model Rule 1.7's prohibition on "direct adversity" so as to narrow its scope. Under D.C. Rule 1.7, a lawyer is precluded from representing a client if that representation "will be or is likely to be adversely affected by representation of another client," or will or is likely to adversely affect another client's representation.[13] Several distinctions from Model Rule 1.7 thus appear. For one, Model Rule 1.7's language of "advers[ity] to a[] client" is supplanted under the D.C. Rule by the language of focusing on whether a "representation" or "representation of a[] client" (as opposed to the client him-/her-/itself) would be "adversely affected." The D.C. formulation further focuses on whether there "will be" or is a likelihood of a client's representation by the lawyer being "adversely affected." Whether the representation is directly adverse is not dispositive under this formulation, so long as a directly adverse representation would not or would not likely adversely affect another client's representation, or would not or would not likely be adversely affected by another client's representation. Thus, unlike in Model Rule 1.7, a directly adverse representation should be permitted as long as the client's representation will neither suffer nor produce an adverse

[12] Tex. Rule 1.06.
[13] D.C. Rules of Prof'l Conduct, r. 1.7(b)(2), (3) [hereinafter D.C. Rules].

effect on another client's representation, or if such an adverse effect is unlikely. D.C. Rule 1.7 thus is more permissive when it comes to taking on a client than Model Rule 1.7, and D.C. Rule 1.7's proscription is narrower.

Model Rule 1.9: Duties to Former Clients

Duties owed to *former* clients present a second consideration when determining whether to undertake a new representation. The duties owed to former clients appear in Model Rule 1.9, which states: "[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."[14] Further, Model Rule 1.9(c) provides:

> 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.[15]

[14] Model Rule 1.9(a) (emphasis added).

[15] Model Rule 1.9(c). We note that, and again absent "informed consent, confirmed in writing," an attorney is prohibited from representation of a person in the same or substantially related matters in which a firm with which the lawyer previously associated, formerly represented a client when the former client's interests are materially adverse to those of the person and when the lawyer acquired material confidential information about the former client. Model Rule 1.9(b). However, the issues that arise from lawyers changing firms – in particular, "lateral hiring," etc. – are beyond the scope of this paper.

The principal distinction between Model Rules 1.7 and 1.9 is stark. Model Rule 1.7 presents "direct adversity" as a threshold prohibition (regardless of the relationship, if any, between the matters being handled for two current clients, or the materiality of such adversity). Model Rule 1.9, in contrast, permits direct adversity to a former client unless the matter for the new client is the same as or substantially related to that of the former client, and the adversity is material. In addition, and even putting aside whether the new potential client's matter is the same or substantially related to one for a former client, the inquiry under Model Rule 1.9 also considers whether the attorney, in the prior representation, obtained confidential information relating to the new matter.

Obtaining Consent to a Current or Future Conflicts of Interest

Model Rules 1.7 and 1.9 both permit exceptions to their proscriptions. In particular, adverse representation may (though it may not always) be permitted, as to both current and/or future representations, where there has been "informed consent, confirmed in writing."

Informed Consent

Model Rule 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." The Comments explain that obtaining client consent involves consulting with clients.[16] Thus, for example, informed consent to a current conflict or potential future conflict requires that the attorney make each affected client aware of the circumstances and ways

[16] *See* Model Rule 1.7 cmt. 2.

a conflict could materially and reasonably foreseeably adversely affect the interests of a client.[17] The information required will vary according to the nature of the conflict (current or future), the parties involved, and other factors. For example, when the representation involves multiple clients in a single matter, an attorney must advise clients of the common representation's potential impacts on loyalty, confidentiality, the attorney-client privilege, and more generally, its advantages, and risks.[18]

Comment 7 to Model Rule 1.7 notes that directly adverse conflicts also occur in transactional matters, as well as litigation.[19] As an example, the Comment instructs that, even for "another, unrelated matter," an attorney may not undertake a representation for the seller in a transaction where the attorney would represent the buyer in other, unrelated matters, "without the informed consent of each client."

Note, too, that not all conflicts can be consented to – such as representation of both sides in a litigation.[20] Also, some situations may make the disclosures necessary for consent impossible. For example, a lawyer may not be permitted even to ask for consent, if one client refuses to consent to the disclosure needed for the other client to make an informed decision.[21]

---

[17] *Id.* cmt. 18. *Cf.* D.C. Rules 1.7(b)(2), (3) *supra.* As the Second Circuit Court of Appeals has stated, "Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned." *Cinema 5, Ltd.*, 528 F.2d at 1368.

[18] Model Rule 1.7 cmt. 18. *See, e.g.*, *Zador Corp. N.V. v. Kwan*, 31 Cal. App. 4th 1285 (1995) (reversing disqualification because former client seeking disqualification had known of the pre-existing client-attorney relationship between his co-defendant and counsel, and the former client signed a written consent form that warned that a conflict could arise between the former client and his co-defendant; and that if a conflict arose, counsel would continue representing the co-defendant, and that the former client consented to such a conflicted representation).

[19] Model Rule 1.7 cmt. 7.

[20] *See* Model Rule 1.7(b)(3).

[21] Model Rule 1.7 cmt. 19.

All that said, while in the end informed consent is necessary for the permissibility of a representation that presents a conflict, courts and relevant ethics bodies recognize, and respect, the important freedom of a party to "waive his right to conflict-free counsel in order to retain the attorney of his choice."[22]

Confirmation in Writing

As defined under the Model Rules, the requirement that informed consent be "confirmed in writing" can mean either: (1) that the informed consent is provided in writing by the person consenting; *or* (2) a writing that the attorney promptly sends to the consenting person in confirmation of an informed consent communicated to the attorney orally.[23] The Model Rules also provide that if obtaining or transmitting a writing at the time of giving informed consent is not feasible, then the attorney is required to obtain or transmit such a confirmation in writing within a reasonable period of time after the informed consent. The writing protects both the prospective client by making clear what it was consenting to (or not); and it protects the lawyer against what might be an unfortunate failure of a client to recall that it gave a consent.

The Comment further warns, however, that the requirement of a writing does not stand in for the need in the majority of cases for the lawyer to have a conversation with the client, to review risks or advantages of a representation that carries a conflict of interest, to discuss reasonably accessible alternatives, and to provide the client with reasonable opportunity to raise questions or concerns. "[T]he writing is required in order to impress upon clients the seriousness

[22] *United States v. Schwarz*, 283 F.3d 76, 95 (2d Cir. 2002).
[23] Model Rule 1.0(b).

of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing."[24]

Consent to Future Conflicts

The caution the Comment expresses over the need for adequate explanation is also reflected in the comments regarding "Consent to Future Conflict[s]."[25] Comment 22 to Model Rule 1.7 makes the point that the effectiveness of waivers of conflicts that may arise sometime in the future may well hinge on the extent that a client reasonably understands the potential consequences of the waiver. Consequently, the waiver's effectiveness turns on such factors as the sophistication, prior experience and understanding of the client itself, and whether it is represented by other counsel (including, most obviously, in-house counsel) in giving the consent, as well as the adequacy of any explanation of the reasonably foreseeable types of future representations that could arise and the attendant risks. Therefore, an agreement in which a client provides a consent to a conflict type with which the client is previously familiar will routinely be considered effective, according to the Comment.[26] On the other hand, the Comment states that an open-ended consent agreement that fails to adequately identify the types of conflict that later come into issue may not necessarily be effective, depending on the facts and circumstances.

Formal Ethics Opinions Permit Advance Consents

Opinions by governing ethics bodies routinely state that consents in advance *are* allowable or expressly supported by the relevant rules. For example, ABA Formal Opinion 93-372 concluded that advance consents were allowable; and that Opinion was withdrawn by ABA

[24] Model Rule 1.7 cmt. 20.
[25] *Id.* cmt. 22.
[26] *Id.*

Formal Opinion 05-436 to recognize that the Model Rules revised in February 2002 permit consent to an even broader range of future conflicts than the pre-amendment rules and support the validity and enforceability of an "open-ended" informed consent for experienced users of legal services.[27] Likewise, the New York State Bar Association Committee on Professional Ethics, in Opinion 826, concluded that advance consents are permissible, but advised attorneys to consider that the extent of necessary disclosure and the scope of a waiver may vary with the client's level of sophistication.[28] Broadly speaking, many formal opinions reflect that not only have the practice and structure of the profession undergone remarkable changes since the ABA's Canons of Professional Ethics were first promulgated over a century ago, but that even the Canons recognized the propriety of allowing clients to waive conflicts in advance when they view such representation as being in their interest after full disclosure.[29]

The New York City Bar Association likewise has recognized repeatedly that attorneys may ethically request and obtain advance consents from clients. In Formal Opinion 2006-1, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics (ABCNY) stated that a law firm could ethically request an advance consent if it properly

---

[27] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 436: Informed Consent to Future Conflicts of Interest; Withdrawal of Formal Opinion 93-372 (2005) [hereinafter ABA Formal Op. 05-436] (withdrawing Formal Op. 372: Waiver of Future Conflicts of Interest (1993) [hereinafter ABA Formal Op. 93-372]).

[28] NYSBA Comm. on Prof'l Ethics, Op. 826 (2008). *See also* New York Cty. Lawyers' Ass'n, Ethics Op. 724 (1998) ("The validity of the waiver will depend on the adequacy of disclosure given to the client or prospective client under the circumstances, taking into account the sophistication and capacity of the person or entity giving consent.").

[29] *See, e.g.*, ABA Formal Op. 93-372, *in* ABA, Formal and Informal Ethics Opinions 1983-1998 167, 167-68 (ABA 2000), *withdrawn by* ABA Formal Op. 05-436; D.C. Legal Ethics Comm., Ethics Op. 309: Advance Waivers of Conflicts of Interest (2001) ("One alternative is to let clients waive such conflicts if they view such waivers as being in their interest. This approach has been recognized as proper at least since the promulgation of the ABA Canons of Ethics in 1908." (citing ABA, Opinions on Professional Ethics 22 (1967) (citing ABA Canons of Professional Ethics, Canon 6))).

discloses, and "the client is in a position to understand, the relevant implications, advantages, and risks, so that the client may make an informed decision."[30] Advance consent under the Opinion also includes an "objective" component, requiring that a disinterested attorney would find that the law firm would be competent to represent the interests of each affected client. Further, the ABCNY opinion stated that so-called "blanket" or "open-ended" advance consents are permissible for sophisticated users, and, when "limited to transactional matters that are not starkly disputed" and client confidentiality would be safeguarded, can even extend to matters substantially related to the firm's representation of a sophisticated client.

The D.C. Ethics Committee similarly has expressly concluded in a formal opinion that "[a]dvance waivers of conflict are not prohibited by the [D.C.] Rules of Professional Conduct."[31] The D.C. formal opinion emphasizes providing clients with full disclosure of the nature and existence of possible conflicts and their consequences, such that a client can reach a fully informed decision. However, the D.C. Committee further notes that "[o]rdinarily this will require that *either* (1) the consent is specific as to types of potentially adverse representations and types of adverse clients . . . *or* (2) the waiving client has available in-house or other current counsel independent of the lawyer soliciting the waiver."[32] Unlike the ABCNY's opinion, the D.C. Opinion indicates that advance waivers would not be available under the D.C. Rules where two matters are substantially related to one another. [33]

[30] Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics, Formal Op. 1 (2006) [hereinafter ABCNY Formal Op. 2006-1].
[31] D.C. Legal Ethics Comm., Ethics Op. 309: Advance Waivers of Conflicts of Interest (2001).
[32] *Id.*
[33] *Id.*

Who Are the Relevant Clients?

Comment 2 to Model Rule 1.7 highlights a significant first inquiry in seeking to apply the foregoing ethics framework when considering whether to take on a new client – or a new matter for an existing client: "Who are the relevant clients?" This question can be more complicated – and the answer less clear – than it might appear at first blush.

Comment 2 to Model Rule 1.7 provides a four-step method for "[r]esolution of a conflict of interest problem under this Rule" – and the first step is to "clearly identify the client or clients." Identifying clients for whom an attorney or law firm either has worked or is currently working theoretically is a relatively straightforward task, assuming the lawyer has adequate computer-checking capability *and* has accurately inputted all client information. (Entering only a single client when there are multiple clients in an engagement, or misspelling names, are obvious mistakes that may be fraught with peril.) So, too, checking to see whether the prospective client is or has been adverse to the lawyer in any current or past matters. However, analyzing a list of all relevant clients (e.g., prospective clients and adversaries in the proposed engagement) currently or previously represented may quickly become complicated when further determinations need to be made regarding what duties are owed to whom and from whom consent may be needed (or already has been obtained). Simply identifying and distinguishing whether someone is a current, as opposed to, a former client is one such complication. Which organizational persons, affiliates, or constituents, if any, are owed duties is another. Lastly, identifying all clients who, in relevant manner, are potentially affected (including directly adversely, or materially, or by possessing "differing interests," or if the matters are substantially related, depending on the jurisdiction), are other, often problematic considerations.

Who Is a Current Client?

As noted, very different obligations and proscriptions appear in Model Rule 1.7, regarding conflicts with *current* clients, and Model Rule 1.9, regarding duties owed to *former* clients. That distinction highlights the need to consider, identify, and distinguish between those clients who an attorney ought to consider current, as opposed to former, clients. Note: on one level, one would think that the test is – or should be – an objective one: i.e., what would a reasonable lawyer (or court, or grievance panel) conclude? But, such an objective distinction may well depend on the fact and reasonableness of the subjective perception of the "*client*." The fact that an attorney, who has done work for a person in the past, is not doing work for that person at a particular later moment in time, may not necessarily render that person a former client. Consider, as a most obvious example, representation of Smith Company selling a subsidiary: when does it become a "former client"? At the closing? At the end of a contractual six-month post-closing adjustment period? At some other point in time? Even more problematic, where there has been a client-attorney relationship over some duration, with the attorney doing work for the client episodically – and particularly in repetitive or recurring kinds of work – a "client" may deem him-, her-, or itself a client, even when the attorney is not working for the "client." The decisions in *IBM v. Levin*[34] and, nearly 40 years later, *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co.*,[35] in which current client-attorney relationships and attendant duties were found, despite the absence of any current assignments from client to lawyer for not insignificant periods of time, are instructive.

IBM v. Levin

[34] 579 F.2d 271.
[35] 244 Cal. App. 4th 590 (2016), *as modified on denial of reh'g* (Feb. 26, 2016).

In *IBM v. Levin*, the CBM law firm undertook to represent plaintiffs against IBM. The firm was disqualified because the court found that CBM had a current client relationship with IBM, despite having rendered legal services for IBM only on an occasional fee-for-service basis; and that the firm had failed to obtain (or more precisely, had failed to prove that it had obtained) effective consent to a dual, directly adverse, but unrelated representation, by failing to fully disclose the facts surrounding the representation of its other client in litigation against IBM.[36] The CBM law firm had previously worked for a corporation and an associated individual named Levin for several years, including over the course of several disputes with IBM involving IBM's installation of equipment for the corporation.[37] When Levin terminated his relationship with that corporation, the CBM law firm did as well. However, the CBM law firm continued to represent Levin sporadically in various matters unrelated to the corporate former client. Subsequently, Levin hired the CBM law firm to assist in the incorporation of a new corporation on Levin's behalf; and several CBM law firm partners became directors or officers of the new corporation. The new corporation later pursued a private antitrust action against IBM. IBM's disqualification motion was granted; the Third Circuit affirmed.[38]

In the interim period prior to the pursuit of the antitrust action, during which the CBM law firm had done only sporadic assignments for Levin, IBM sought the legal services of a CBM law firm partner for sporadic unrelated labor and employment law assignments.[39] The CBM partner received several such IBM assignments without any issue until his law firm was considering filing the antitrust suit, at which point the CBM law firm partner stated that he held a brief conversation with IBM legal staff and obtained consent to continue his occasioned

[36] 579 F.2d at 283.
[37] *Id.* at 275-76.
[38] *Id.* at 283.
[39] *Id.* at 275-76.

assignments for IBM despite the imminent antitrust lawsuit the CBM law firm intended to file on behalf of Levin.[40] The CBM law firm then obtained Levin's consent to the firm's work on such IBM labor matters and filed the antitrust complaint a week after the partner completed his most recent assignment for IBM.[41]

Well into the lawsuit, IBM sought to disqualify Levin's counsel (the CBM law firm) on the basis that the firm had represented both the Levin plaintiffs and IBM during the litigation, in violation of the then-adopted Model Code of Professional Responsibility, as amended in New Jersey.[42] Although the employment/labor matters partner from the CBM law firm had no particular assignment from IBM at the time the antitrust action was filed, and his services had been on a fee-for-service basis rather than a retainer, the court held that the pattern of services before and after the filing of the complaint established a continuous client-attorney relationship with IBM. Moreover, IBM's in-house counsel disclaimed recalling any such request for or having given consent to the conflict; and there was no writing memorializing the same.[43]

The district court decision, which the Third Circuit affirmed, found that the CBM law firm was required at a minimum to disclose fully to IBM the facts of its representation of the Levin plaintiffs and to obtain IBM's consent to the adverse antitrust suit representation of Levin. Because the law firm had failed to establish that it had fully disclosed the circumstances of its representation in seeking consent, or that it had such consent, the Third Circuit declined to find error in the trial court's disqualification order.[44]

---

[40] *Id.* at 276-77.
[41] *Id.* at 277.
[42] *Id.* at 279.
[43] *Id.* at 281-82.
[44] *Id.* at 283.

Sheppard Mullin v. J-M Manufacturing

Sheppard Mullin v. J-M Manufacturing presents another case where a current client-attorney relationship was found to exist regardless of whether there was a current assignment. In this case, despite five months having passed since completion of the last of a sporadic but multi-year course of assignments for one client, Sheppard Mullin was found to have a current conflict with that client – and was disqualified for failing to fully disclose its conflicts to that client and to a new prospective client when it took on a litigation defense adverse to that original client.[45] Moreover, the law firm's post-disqualification request for payment of fees owed (whether under its engagement letter or in *quantum meruit*) was rejected – and the firm was ordered to refund millions of dollars of previously paid legal fees. Indeed, the court so ruled notwithstanding a broad consent in advance to adverse representations from both clients.[46]

The facts may be summarized as follows. An employment/labor law partner at Sheppard Mullin did occasional labor/employment work over the course of many years for South Tahoe Public Utility District and had obtained a broad advance consent to adverse representation, including in litigation.[47] Sheppard Mullin had done no work for South Tahoe, however, for five

[45] 244 Cal. App. 4th at 609.
[46] *Id.* at 609-10, 619.
[47] The conflict waiver provision stated:

> Conflicts with Other Clients. Sheppard, Mullin, Richter & Hampton LLP has many attorneys and multiple offices. We may currently or in the future represent one or more other clients in matters involving [South Tahoe]. We undertake this engagement on the condition that we may represent another client in a matter in which we do not represent [South Tahoe], even if the interests of the other client are adverse to those of [South Tahoe] (including appearance on behalf of another client adverse to [South Tahoe] in litigation or arbitration) and can also, if necessary, examine or cross-examine [South Tahoe] personnel on behalf of that other

months when J-M Manufacturing approached Sheppard Mullin and asked the firm to defend J-M in an already-pending *qui tam* action in which South Tahoe was one of some 200 intervenor plaintiffs.[48] Before accepting the engagement, Sheppard Mullin ran a conflicts check that revealed that South Tahoe, an adverse party in the litigation, was in the firm's computer list of clients. An Assistant General Counsel at Sheppard Mullin reviewed the conflicts check, found that South Tahoe had agreed to a broad advance conflict waiver, and noted that no work had been done for South Tahoe in the prior five months. Sheppard Mullin concluded that South Tahoe was a former client and that the *qui tam* action was not substantially related to the labor matter. Sheppard Mullin then agreed to represent J-M; did not advise J-M of what Sheppard Mullin concluded was its prior client relationship with South Tahoe; and obtained J-M's broad consent to adverse representation in future matters that were not substantially related.[49] Sheppard

---

> client in such proceedings or in other proceedings to which [South Tahoe] is not a party *provided* the other matter is not substantially related to our representation of [South Tahoe] and in the course of representing [South Tahoe] we have not obtained confidential information of [South Tahoe] material to representation of the other client. [South Tahoe]'s consent to this arrangement is required because of its possible adverse effects on performance of our duties as attorneys to remain loyal and available to those other clients and to render legal services with vigor and competence. Also, if an attorney does not continue an engagement or must withdraw therefrom, the client may incur delay, prejudice or additional cost such as acquainting new counsel with the matter.

Exhibit A at 5-6, *United States ex rel. Hendrix v. J-M Mfg. Co.*, No. 5:06-00055-GW-PJW (C.D. Cal. May 9, 2011), ECF. 400-1.

[48] 244 Cal. App. 4th at 598.

[49] *See id.* at 599 ("We may *currently or in the future represent one or more other clients* (*including current, former, and future clients*) *in matters involving* [*J–M*]. We undertake this engagement on the condition that we may represent another client in a matter in which *we do not represent* [J–M], even if the interests of the other client are adverse to [J–M] (including appearance on behalf of another client adverse to [J–M] in litigation or arbitration) and can also, if necessary, examine or cross-examine [J–M] personnel on behalf of that other client in such proceedings or in other proceedings to which [J–M] is not a party *provided* the other matter is not substantially related to our representation of [J–M] and in the course of representing [J–M]

Mullin drafted an engagement letter, which J-M's representative signed without discussion of the conflict-waiver provision and under assurances that there were no existing conflicts.

Within three weeks of the execution of the J-M engagement letter, South Tahoe came back to the Sheppard Mullin partner, seeking additional representation on labor matters; and the employment/labor partner took the new assignment. Subsequently, Sheppard Mullin (presumably not treating South Tahoe as a new client): did not tell South Tahoe about the J-M matter; relied on South Tahoe's broad consent to future adversity as permitting the work for J-M; and did not tell J-M about the South Tahoe matter, relying on J-M's broad advance waiver. The partner, over the following 14 months, would bill a total of 12 hours of work in employment matters for South Tahoe, while the firm represented J-M against South Tahoe for an overlapping period, including litigating motions, managing discovery, reviewing documents, and running an internal investigation in the *qui tam* matter, accumulating legal fees approaching $3.8 million.

South Tahoe subsequently brought and won a disqualification motion in the *qui tam* action for Sheppard Mullin's failure to fully inform South Tahoe of, and get consent to, the conflict with J-M.[50] After Sheppard Mullin's disqualification, J-M asserted that J-M was not required to pay Sheppard Mullin any of the outstanding fees unpaid at the time of disqualification and demanded that Sheppard Mullin reimburse all fees that J-M had already paid in relation to the *qui tam* action. The dispute went to arbitration: Sheppard Mullin prevailed in the proceeding, and the state court confirmed the award. The appellate court reversed: it found

---

we have not obtained confidential information of [J–M] material to representation of the other client. *By consenting to this arrangement, [J–M] is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations*." (quoting conflict waiver provision of engagement letter) (emphasis in opinion)).

[50] *See United States ex rel. Hendrix v. J-M Mfg. Co.*, No. 5:06-00055-GW-PJW (C.D. Cal. July 14, 2011), ECF No. 456 (granting motion to disqualify).

the J-M engagement letter to be in contravention of California law and public policy, as embodied in California's Rule 3-310 of Professional Conduct, which, like Rule 1.7, "bars simultaneous representation of adverse clients."[51] The court concluded that South Tahoe had been a current client; and that such representation had to be disclosed to J-M before taking on the *qui tam* matter and getting consent. But the court also said that assuming that South Tahoe had not been a current client at the time of the engagement letter, Sheppard Mullin had failed to obtain informed consent from either J-M or its other client, South Tahoe, when it resumed work for South Tahoe. The court held that Sheppard Mullin's violation of Rule 3-310 precluded it from receiving any compensation from its work in the *qui tam* action and required a return of already-paid fees.

Who Is The Client in an Organizational Entity?

Another vexing question is who qualifies as the client when the client is an organization. Is the client simply the entity that approaches an attorney?[52] Would clients include the affiliates (parent/subsidiary/sibling-entities) of an organizational client?[53] Would majority or sole shareholders count?

---

[51] ***Sheppard Mullin*****,** 244 Cal. App. 4th at 597. *See id.* at 601 n.2 (quoting Cal. St. Bar Rules of Prof'l Conduct, r. 3-310(C)(3): Avoiding the Representation of Adverse Interests (Jan. 1, 2015) [hereinafter Cal. Rules]) ("[California] Rule 3-310(C)(3) states, 'A member shall not, without the informed written consent of each client. . . . [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.'").

[52] *See, e.g.*, Andrew B. Serwin & Jessica N. Pandika, *Who Is the Client? Confidentiality When Representing Organizations*, GPSOLO (July/August 2007) (warning that in representing organizations it may be difficult to identify the interests of the client distinctly from those of its agents).

[53] *See* Model Rule 1.13 cmt. 34 (allowing for "circumstances . . . such that the affiliate should also be considered a client of the lawyer").

Language in Model Rule 1.13 and the Comment to Rule 1.7, as well as basic provisions of law defining organizational entities, have led some to quite reasonably draw a distinction between representation of an organizational entity that engages the attorney, on the one hand, and its constituent affiliates (such as corporate subsidiaries and parents), on the other. Separate legal organizations (e.g., subsidiary corporations) are deliberately established precisely to take advantage of such status. Model Rule 1.13, Comment 1 recognizes that "[a]n organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client." Model Rule 1.13 further provides that an attorney who represents an organization *may, in addition*, represent "its directors, officers, employees, members, shareholders or other constituents, *subject to* the provisions of Rule 1.7."[54] Such language appears to draw a line between an organizational client and non-client affiliates.

Likewise, and even more clearly addressing corporate entity structures, Comment 34 to Model Rule 1.7 refers to Model Rule 1.13 and instructs that an attorney representing a corporation or another organization does not, by virtue of that representation, inherently represent "any constituent or affiliated organization, such as a parent or subsidiary." Further, according to Model Rule 1.7's Comment, such representation of one entity does not prevent an attorney from taking on a representation adverse to an affiliate of the entity in an unrelated matter unless circumstances dictate that the affiliate also be considered the attorney's client, or the organizational client and the attorney have an "understanding" that the attorney will avoid representations adverse to the affiliates, or the attorney's responsibilities to the organizational client or the new client likely will materially limit the attorney's representation. These Rules and

[54] Model Rule 1.13(g) (emphasis added).

Comments provide for distinguishing between the organizational client entity as client, and its organizational affiliate entities as non-clients, under what has been called the "entity theory."[55]

Because, under the entity theory, an affiliate of the organizational client is a non-client, it should be permissible to take on a new client representation that is adverse to such a "non-client" affiliated entity on a matter unrelated to the organizational client's representation. However, court decisions have shown that such "entity theory," albeit consistent with the entities' separate legal status and derived from the guidance in Model Rule 1.13 and the Comment to Rule 1.7, can be a trap for the unwary.[56]

Mylan v. K&E

Mylan, Inc. v. Kirkland & Ellis LLP, is illustrative of the pitfalls of the entity theory. The court there rejected the law firm's reliance on the entity theory, notwithstanding that the clients had deliberately used separate entity structures for both legal and business objectives.

---

[55] *See* Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics, Formal Op. 3 (2007) ("[Former New York Code of Professional Responsibility Disciplinary Rule] 5-109 and Model Rule 1.13 provide that a law firm retained by an organization represents the organization and not its constituents. Sometimes referred to as the 'entity theory[.]'") [hereinafter ABCNY Formal Op. 2007-3]. The language of Former Disciplinary Rule 5-109 mirrors that of the Comment to Model Rule 1.7.

[56] *See, e.g.*, *Mylan, Inc. v. Kirkland & Ellis LLP*, No. 2:15-cv-00581-JFC-LPL, at 46 n.60 (W.D. Pa. June 9, 2015) [hereinafter *Mylan v. K&E*] (Report & Recommendation on Plaintiffs' Motion for Preliminary Injunction) (recommending disqualification of law firm from adverse representation accepted on basis of the entity theory and quoting Model Rule 1.7 cmt. 34 ("the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless . . . *there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates*")); ABCNY Formal Op. 2007-3 (discussing "several 'bright-line' tests that have been considered in analyzing corporate-family conflicts, . . . [but] conclud[ing] that a more nuanced and fact-specific approach is necessary," and warning that "the entity theory has never been interpreted so expansively as to create a rule that a law firm represents only its current corporate client, and none of the client's affiliates"). *Cf.* ABA Formal Op. 95-390 ("as a matter of prudence and good practice a lawyer who contemplates undertaking a representation adverse to a corporate affiliate of a client will be well advised to discuss the matter with the client before undertaking the representation").

In that litigation, two corporate organizational clients of K&E, sought to enjoin the law firm from representing a competitor, Teva Pharmaceuticals, in Teva's attempted hostile takeover of those clients' parent (and consequently, the entire corporate family). The magistrate judge recommended that K&E be preliminarily enjoined from representing Teva in that non-litigation but still-adverse posture, on the ground that the law firm had a conflict of interest and had failed to obtain an effective waiver or consent in advance. The court rejected the firm's position that representation in the hostile takeover of the parent company was permitted because it was not directly adverse to the corporate entities who were the clients (the subsidiaries), and that it thus was at most indirectly adverse to them.

The magistrate judge rejected the law firm's defense that any adversity to the corporate organizational clients was indirect. Rather, she concluded that the corporate parent resisted the acquisition—and that the corporate organizational clients also resisted through that corporate parent. Citing Pennsylvania's version of Model Rule 1.7, the magistrate judge emphasized that such Rule would have prohibited the law firm from representing another client in a hostile takeover of the corporate organizational clients themselves; and she rejected the argument that an internal corporate reorganization by the clients that created the corporate parent just prior to the takeover bid (and K&E's engagement for same by Teva), introduced a degree of separation that rendered inapplicable the prohibition of simultaneous direct adverse representation. The magistrate judge also found that the law firm's two clients were the parent's main asset: thus, she reasoned, those clients were the real target of the hostile takeover bid.

GSI v. BabyCenter[57]

The decision in *GSI Commerce Solutions., Inc. v. BabyCenter, L.L.C.*, similarly cautions against placing too much reliance on the entity theory. BabyCenter, a wholly owned subsidiary of Johnson & Johnson, won a motion to disqualify GSI's counsel, which was also counsel to Johnson & Johnson, for failing to obtain consent to a concurrent conflict, on the basis that BabyCenter and Johnson & Johnson were essentially the same client despite their separate corporate entity status. The Second Circuit affirmed. It agreed that representation adverse to a corporate affiliate of a client can, under certain circumstances, raise a conflict under the attorney's duty of loyalty: a "corporate affiliate conflict."[58] And it identified two general factors that courts focus on in determining if a corporate affiliate conflict exists: (1) the extent of operational commonality between the affiliates, and (2) the extent to which one affiliate is financially dependent on the other.[59] As to the second factor, the Second Circuit observed that courts have contemplated the degree to which an unfavorable result would generate "substantial and measurable loss" to either the client or its affiliate, or the ownership structure of the corporate entities.[60] And it cautioned that even wholly owned status would not alone suffice for a corporate affiliate conflict where the subsidiary was not operationally integrated with the corporate parent.[61] In *GSI*, though, the Circuit found such substantial operational commonality in the record that the district court's treatment of the two entities as one client was "easily within its ample discretion."[62]

---

[57] *GSI Commerce Solutions., Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204 (2d Cir. 2010).
[58] 618 F.3d at 210.
[59] *Id.* at 210-11 (collecting cases).
[60] *Id.* at 211.
[61] *Id.* (citing ABA Formal Op. 95-390 at 1001:261–62).
[62] *Id.*

The Circuit Court cited three elements of BabyCenter's operational commonality for its decision. First, BabyCenter heavily relied on Johnson & Johnson for overhead, administrative, and back-office operations. Second, and perhaps quite telling, the entities shared the same in-house legal team that had been involved from its inception, including negotiation of the agreement underlying the dispute. And lastly, BabyCenter was a wholly owned subsidiary of Johnson & Johnson with some overlapping management control. Based on these factors, the court found the relationship between BabyCenter and Johnson & Johnson to be "exceedingly close," and to provide sufficient basis to find that the law firm's decision to represent GSI in the matter "reasonably diminishe[d] the level of confidence and trust in counsel held by" Johnson & Johnson.[63] This corporate affiliate conflict merited disqualification unless Johnson & Johnson gave consent, which the court found was lacking – an issue examined below.

What Further Conflict Checking for a Client with Adverse Interests May Be Required?

Considering whether any of the parties to the prospective matter might be a current or former client may not end the matter. Counsel should consider whether a further conflict check is needed, in an effort to ensure that no conflicts with the lawyer's other clients are implicated. In that regard, counsel should consider running conflict checks for, among other things: (1) corporate affiliates, (2) other client stakeholders, such as (depending on the nature of the matter) potential indemnitors, third-party defendants, licensees, or even, in the unusual case, customers and suppliers, and (3) potential recipients of discovery requests.

[63] *Id.* at 212.

Affiliates

Some situations are simpler than others. Take, for instance, a run-of-the-mill two-party transaction. In theory, it should be relatively simple to check for conflicts as to those parties (client and adversary). But as is apparent from *Mylan* and *BabyCenter*, corporate affiliates provide a potential host of other entities against which checks should be run.

Given the need to check for such potential conflicts throughout corporate structures and groupings, it would be useful to have corporate clients provide lists of subsidiaries and affiliates against which the attorney can run conflict checks. Many corporate clients already automatically do so in their "outside counsel guidelines" – which counsel should carefully review before taking on that client. In addition, software now exists that identifies affiliates of many public, and even privately owned, entities. Acquiring such software may well be a prudent investment, depending on the nature of one's practice.

Other Stakeholders Such as Licensees, Customers, and Suppliers

A conflicts check may potentially need to go further – though not all types of conflicts can be foreseen or all relevant persons identified. In some circumstances, stakeholders such as licensees, major customers and suppliers of parties to certain transactions or litigation, might also implicate a concurrent conflict of interest (or even a risk of disclosure of former client confidences). Thus, checking for such stakeholders may be advisable to the extent reasonably feasible. The decision in *Celgard, LLC v. LG Chem America, Inc.* presents an example.

Celgard, LLC v. LG Chem America, Inc. [64]

In a nonprecedential order in *Celgard v. LG Chem America*, the Court of Appeals for the Federal Circuit disqualified Jones Day from representing a plaintiff patent holder (Celgard) in litigation against an alleged infringer (LG) who was also the principal supplier of the allegedly infringing product to Apple, another law firm client "in several ongoing unrelated commercial litigation matters."[65] There, another firm had represented Celgard in the trial court and had obtained an injunction against LG selling the alleged infringing product. Jones Day was brought in to represent Celgard when LG appealed.

Apple then sought leave to intervene from the Federal Circuit and to move to disqualify the law firm from representing Celgard. Although the court found that the law firm's representations for Apple were in "unrelated" commercial matters, it also found that Apple had a sufficiently cognizable interest in the *Celgard v. LG Chem* dispute of which the law firm had been aware; that the law firm's representation was adverse to Apple (even though the law firm had agreed with Celgard to limit the scope of its representation to adversity to the supplier); and that the circumstances went beyond permissible economic adversity. The court also concluded that through the injunction, Celgard sought negotiating leverage with Apple to replace LG as a supplier. The Court reasoned that it was the "total context, and not whether a party is named in a lawsuit, that controls whether the adversity is sufficient to warrant disqualification."[66] It then concluded that Apple was protected by the duty of loyalty.

---

[64] Nos. 2014-1675 *et al.* (Fed. Cir. Dec. 10, 2014) (nonprecedential order).
[65] *Id.* at 3.
[66] *Id.* at 4 (citing *Freedom Wireless, Inc. v. Bos. Commc'ns Grp., Inc.*, Nos. 2006-1020 *et al.*, 2006 WL 8071423, at *2 (Fed. Cir. Mar. 20, 2006)).

Note, however, that the court said that it was limiting its holding to the facts before it, and it expressly declined to read its holding as imposing any requirement on law firms to run conflict checks "up or down the supply chain."[67] Nevertheless, the decision suggests caution and thinking ahead (and broadly) when conducting a conflict check.

Potential Recipients of Discovery Subpoenas

In some jurisdictions, conflict checks for litigation engagements should include those from whom the lawyer reasonably foresees that it will seek discovery. For example, the State Bar of California Standing Committee on Professional Responsibility and Conduct, in Formal Opinion No. 2011-182, has indicated that a concurrent client conflict of interest arises when counsel discovers at the outset of a representation that it must serve a subpoena for discovery on another current client. The discovery subpoena, the Committee stated, entails an "adverse action" manifesting a conflict of interest. Taking on representation for the client who will seek to serve such a discovery subpoena, according to this opinion, will require the attorney to obtain informed written consent from each affected client, with disclosure of the pertinent circumstances, and both "the actual and reasonably foreseeable adverse consequences to the client providing consent."[68]

Consents to Conflicts: The Basic Framework of Consents, When They Are Permitted, Who and What Consents Cover, What "Informed" Means for Consent & Public Policy Animating the Substantive Enforcement of the Ethics Rules

[67] *Id.* at 4-5.
[68] State Bar of California, Comm. on Prof'l Responsibility & Conduct, Formal Op. 182, at 6 (2011). Perhaps recognizing the limits of foresight in the real world, the Opinion notably "does not address Attorney's obligation should a conflict arise *after* representation has been accepted." *Id.* (emphasis added).

Having explored who are clients and having run conflict checks, an attorney may need to consider what she can do to resolve or avoid conflicts. In particular, what need one do to get consent? This section briefly reviews the applicable Model Rules. It then looks at consent in the context of organizational representation: who is covered by consent; and for what matters consent is effective? The section then examines what qualifies as "informed" consent.

The Basic Framework of Consents

This article has already briefly noted the Model Rules' framework for "informed consents, confirmed in writing." This framework provides definitions for informed consent under Model Rule 1.0, and discusses the availability and efficacy of informed consent for current and former clients under Model Rules 1.7 and 1.9.

Informed Consent, Confirmed in Writing, to Potential Future Conflicts

To briefly recap, under the Model Rules, "informed consent" is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[69] For current clients and directly adverse representations, consent should be obtained from each client even for unrelated matters. Communication makes a client aware of how a conflict could foreseeably adversely affect the client's interests.[70] Single matters with multiple clients merit specific disclosures.[71] The duty of loyalty and need for zealous representation animate the requirement of informed consent.[72] But while what constitutes being informed always depends on context, difficulties or even proscriptions in disclosing information

[69] Model Rule 1.0(e).
[70] Model Rule 1.7 cmt. 18.
[71] *Id.* cmt. 18.
[72] *Id.* cmt. 6. These concerns cover litigation and transactional representations. *Id.* cmt. 7.

(e.g., due to current or prospective client confidentiality) can impair the ability to obtain informed consent.[73]

The Model Rules require that informed consent be confirmed in writing: either a document executed by the consenting client; or a writing sent as confirmation by the attorney to the client who consented orally, promptly after the informed consent is received.[74] The writing is not intended to replace a conversation with the client to review any risks (such as existing conflicts implicating the proposed representation) or advantages, reasonably available alternatives, and a client's opportunity to voice concerns or to obtain independent advice about consenting from another lawyer. The writing is meant to impress upon clients the seriousness of the decision and to avoid disputes or ambiguities – or even lapses of memory (or disclaimers) by the client who consents to a conflict – later on.[75]

A caveat about the "writing": many corporate clients have pre-printed (and often voluminous) "outside counsel guidelines." These frequently include provisions dealing with what the client considers to be a conflict (e.g., as to subsidiaries or affiliates); and when and how consent to current or future conflicts may (or must) be obtained – and some disclaim having given any such consents at all. It is important for counsel to identify any such provisions and to make clear whether any consents have been given (notwithstanding the guidelines), and to then make sure the engagement/consent letter controls. A "battle of the forms" obviously needs to be avoided.

[73] *Id.* cmt. 19.
[74] Model Rule 1.0(b), 1.7 cmt. 20.
[75] Model Rule 1.7 cmt. 20.

The Model Rules' commentary on adequate explanation for advance consent to future conflicts was also discussed briefly above.[76] The effectiveness of consents depends on the adequacy of a client's understanding. Advance consent is permissible for those familiar with the types of representation for which the consent is sought: especially for sophisticated clients (e.g., a company with experienced in-house counsel), even an open-ended consent can be effective.

When Is Informed Consent Permitted?

Under the Model Rules, and with some variation according to jurisdiction, informed consent has its limits. There are a few such situations that counsel should keep in mind to help ensure that the subject conflicted representation can be consented to.

Comments 14 through 17 to Model Rule 1.7 cover three types of "Prohibited Representations," relating to the three subprovisions of Model Rule 1.7(b)(1)-(3) that are "nonconsentable"[77]: (1) in circumstances in which the lawyer cannot reasonably conclude that she can provide competent and diligent representation;[78] (2) representations that are forbidden by applicable law – e.g., multi-defendant representation in capital cases in some states;[79] and (3) representations "when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal."[80]

Comments 18 and 19 focus on the "informed" component of "informed consent" as a potential barrier. These Comments highlight a client's need for awareness of "the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have

[76] *See id.* cmt. 22.
[77] *Id.* cmt. 14.
[78] *Id.* cmt. 15 (citing Model Rules 1.1 (competence) & 1.3 (diligence)).
[79] *Id.* cmt. 16.
[80] *Id.* cmt. 17.

adverse effects on the interests of that client."[81] Comment 19 observes that if this need for awareness cannot be met, such as when one client withholds permission to disclose the needed information to the other, then "informed" consent is inherently not possible.

Finally, Comment 22 extends these principles to advance consent for future conflicts. "Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of [Model Rule 1.7(b)]" discussed above, and by Comments 14 through 19 to Model Rule 1.7.[82] A client's understanding of the advance consent, considering the client's legal services experience, whether the client has (e.g., in-house counsel), or knows it can get, other independent counsel to advise it as to giving the consent, whether the consent is for future unrelated (or not substantially related) conflicts, and adequate explanation provided by the attorney, would permit effective advance consent.[83] The client's understanding – and thus the advance consent's efficacy – may be fact-intensive and situationally dependent.

Various jurisdictions' ethics rules include their own informed consent frameworks, with varying effects. In California, for example, the official Discussion to California Rule of Professional Conduct 3-310 contains language similar to aspects of Model Rule 1.7 regarding nonconsentable conflicts despite informed consent: "There are some matters in which the conflicts are such that written consent may not suffice for non-disciplinary purposes."[84] As with

---

[81] *Id.* cmt. 18.
[82] *Id.* cmt. 22.
[83] *Id.*
[84] California Rules of Prof'l Conduct r. 3-310, Discussion (citing *Woods v. Superior Court*, 149 Cal. App. 3d 931 (1983) (disqualifying attorney for family-owned business from representing husband in marital dissolution action against wife for whom attorney had provided legal services); *Klemm v. Superior Court*, 75 Cal. App. 3d 893 (1977) (directing trial court to reconsider denial of motion for dual-representation of husband and wife in marital dissolution where no dispute appeared to exist); *Ishmael v. Millington*, 241 Cal. App. 2d 520 (1966) (reversing grant of summary judgment for attorney in malpractice action, where attorney

the Model Rules, in California, a client's subjective understanding and the efficacy of an open-ended advance consent may be highly situationally dependent. Potentially inconsistent and more problematical for counsel to anticipate, despite the best of efforts and good faith – treatment of open-ended advance consents may nevertheless perhaps be discretionary, where "the court retains the right to disqualify counsel, despite an advance blanket waiver, if continued representation would seriously compromise the integrity of the judicial process and the fairness of the particular proceeding."[85] One should always keep in mind that consent in advance requires foresight, but disqualification issues will be judged with hindsight – and hindsight is always 20-20.

Despite the discretion seemingly reserved to California courts for disqualification, other California ethics jurisprudence shows just how much respect an informed consent can be given. In the State Bar of California, Standing Committee on Professional Responsibility & Conduct's Formal Opinion 1989-115, the Committee concludes that it "is not ethically improper per se" "for an attorney to require a potential client to execute a blanket waiver of the client's right to disqualify the attorney in any other matter, based on a breach of the attorney's duty to maintain

---

undertook dual-representation in uncontested divorce, had represented husband and husband's business, and allegedly violated duty of care to wife by failing to advise, investigate, and disclose total community assets, claims that wife surrendered in exchange for a settlement one-tenth their value in *ex parte* proceeding brought by attorney on her behalf).

[85] State Bar of California, Comm. on Prof'l Responsibility & Conduct, Formal Op. 115 (1989) (citing Cal. Civ. Proc. Code § 128(a)(5) ("Every court shall have the power to do all of the following: . . . To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.") [hereinafter Cal. Formal Op. 1989-115]; and *Elliott v. McFarlane Unified Sch. Dist.*, 165 Cal. App. 3d 562, 567 (1985) (affirming denial of motion to disqualify where, until counsel drew parties' attention to a conflict in their legal positions, counsel had jointly represented pursuant to joint powers agreement, high school district and unified school district that were both sued in a mandamus proceeding by a teacher; under the joint powers agreement, either party could obtain separate legal counsel at own expense in event of a legal conflict arising that precluded joint representation; and unified school district retained separate counsel and then moved to disqualify)).

confidences and/or to avoid conflicts of interest." Such an agreement, the Committee finds, "is enforceable in appropriate circumstances," although the Committee does caution that such an agreement would create potential for "violations of the Rules of Professional Conduct which are non-waivable by the client." [86] To reach its conclusions, the Committee looked to *Maxwell v. Superior Court*.[87]

In *Maxwell*, the California Supreme Court reversed a trial court's disqualification of attorneys representing an indigent criminal defendant in a death penalty case. The client entered into a fee agreement whereby he retained his attorneys in exchange for media rights to his life story, including the pending criminal matter. The engagement letter explained in generalized terms the potential conflicts of interest, including that the attorneys' economic incentives could be at odds with the client's interests at trial, the extent that confidentiality would be waived, and the risks in such an arrangement.[88] Despite finding that the defendant knowingly and willingly agreed to the engagement letter, the trial court disqualified the lawyers because of the conflict of interest generated by the agreement. The California Supreme Court reversed, emphasizing the right to counsel of one's choice. As the State Bar of California, Standing Committee on Professional Responsibility and Conduct describes it, the Court reversed although "the prejudice to a defendant charged with a capital offense of having representation compromised by a conflict of interest is extreme."[89]

[86] Cal. Formal Op. 1989-115.
[87] 30 Cal. 3d 606 (1982) *overruled on other grounds by People v. Doolin*, 45 Cal. 4th 390, 421 n.22 (2009).
[88] *Maxwell*, 30 Cal. 3d at 621-22.
[89] Cal. Formal Op. 1989-115.

Who and What Does a Consent Cover?

Assuming consent is permitted, one must consider who and what is covered by it. Although, again, seemingly obvious questions, the issues have proved complicated in three contexts: (1) a consent provision's temporal definition – i.e., whether the consent's language contemplates future clients and future matters adverse to the current or prospective client; (2) defining the extent of corporate organizational representations and whether corporate affiliate conflicts are covered by consents; and (3) altering language in consent provisions that otherwise waives conflicts in matters that are not "substantially related."

Consent to Future Clients and Matters

One issue is whether a consent provision's language will later be found to cover particular representations (and what kinds) for clients and/or matters that did not yet exist at the time the consent was given. Such an issue arose in *Brigham Young University ("BYU") v. Pfizer*.[90] There, the question was whether BYU had consented to a law firm's adverse representation on behalf of unknown future clients and matters, or only as to those who were current clients and as to matters then-pending at the time of the consent.

In that case, a law firm had hired a partner who had experience representing BYU in legislative and regulatory matters involving religious freedom. Prior to allowing the newly hired partner to continue representing BYU, the law firm required BYU to sign an engagement letter with an advance consent provision permitting the firm to be adverse in patent and intellectual property matters:

[90] *Brigham Young Univ. v. Pfizer, Inc.*, 2:06-CV-890 TS BCW, 2010 WL 3855347 (D. Utah Sept. 29, 2010).

> As you may know, universities frequently hold patents in the products and inventions developed at such universities. *[The law firm] currently represents multiple pharmaceutical and other companies with respect to patent and intellectual property matters (collectively, the "Other Clients"), including litigation (the "Patent Matters").* [The law firm] is not currently representing any Other Clients in matters adverse to the University. Because of the scope of our patent practice, however, it is possible that [the law firm] will be asked in the future to represent one or more Other Clients in matters, including litigation, adverse to the University. Therefore, as a condition to [the law firm]'s undertaking to represent you in the BYU Matters, you agree that this firm may continue to represent Other Clients in the Patent Matters, including litigation, directly adverse to the University and hereby waive any conflict of interest relating to such representation of Other Clients.[91]

BYU executed the engagement letter; and the new partner continued to represent BYU.

Thereafter, the law firm was contacted by Pfizer, which had not been a client when the engagement letter was signed. Pfizer asked the firm to represent it in an ongoing intellectual property lawsuit against BYU that would run concurrently with the new partner's work for BYU. Examining the advance consent provision in the BYU engagement letter, the law firm determined that it could represent Pfizer against BYU. BYU then moved to disqualify the law firm. A magistrate judge granted the motion because the law firm was not "currently represent[ing] Pfizer the day the engagement letter was signed."[92] The district court overruled the law firm's objection.

The district court found that the magistrate judge had properly stated that when evaluating consents, courts should:

> look primarily to the language and construction of the waiver to determine its validity. For a consent to be interpreted as validly waiving the client's right to exclusive representation, "[l]anguage in a contract of release . . . would have to be positive, unequivocal and inconsistent with any other

[91] *Id.* at *3 (emphasis added).
[92] *Id.*

> interpretation." Where the terms of a waiver are not explicit, the client should not be held to the terms of the document.[93]

The court then determined that the magistrate judge had correctly found the term "Other Clients" to be defined in the waiver provision as only "companies that [the law firm] currently represents 'with respect to patents and intellectual property matters.'" Accordingly, the court held, the magistrate judge had properly concluded that waiver "only applie[d] to clients that [the law firm] was representing with respect to patent and intellectual property matters as of the date of the agreement," as this was "the plain language of the engagement letter."[94]

Consent Covering Corporate Affiliates & Subsidiaries

Attorneys, clients, and courts have also found difficulty in determining whether a consent permits the adverse representation of a corporate client's affiliate. There is no doubt that consents to corporate affiliate conflicts are permissible and even encouraged. The ABA has recommended that "[t]he best solution to the problems that may arise by reason of clients' corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer's clients, or are to be so treated for conflicts purposes."[95] Likewise, the ABCNY has advised that "corporate-family conflicts may be averted by . . . an engagement letter . . . that delineates which affiliates, if any, of a corporate client the law firm represents . . . ."[96] Nonetheless, putting such guidance into practice can be perilous. Two previously discussed decisions show just how such consents to corporate affiliate conflicts can be problematic.

---

[93] *Id.* at *2 (citation omitted).
[94] *Id.* at *3.
[95] ABA Formal Op. 95-390.
[96] ABCNY Formal Op. 2007-3.

GSI v. BabyCenter

As discussed above, in *BabyCenter*, counsel faced a motion from its client, Johnson & Johnson, to disqualify it from representing GSI in an action against Johnson & Johnson's wholly owned subsidiary, BabyCenter. The court found that counsel faced a corporate affiliate conflict that would merit disqualification if counsel had not previously obtained Johnson & Johnson's consent.[97] Here, counsel had previously included consent provisions in an engagement letter with Johnson & Johnson, and had amended those provisions in a subsequent engagement letter. The question was whether counsel had thereby obtained advance consent from Johnson & Johnson permitting the representation of GSI adversely to BabyCenter. The court concluded that counsel had not.

The Second Circuit acknowledged that "a law firm may ordinarily accept representation involving a corporate affiliate conflict if the client expressly consents."[98] As to the terms of the consent provisions before it, however, the court found that counsel had failed to obtain Johnson & Johnson's consent to the corporate affiliate conflict that it now faced. Rather, the court determined that by the specific terms contained in the consent provisions, Johnson & Johnson had strictly consented only to adverse representations in matters pertaining to patent litigation, and only those patent litigation matters brought by Kimberly-Clark or a generic drug manufacturer. The representation of GSI did not match this description.

---

[97] *See* 618 F.3d at 211 & n.1 (holding that district court's finding of a corporate affiliate conflict was not an abuse of discretion in light of "substantial operational commonal[i]ty" between the corporate entities, even though the factors leading to that conclusion "were not clearly outweighed by those that would support a different conclusion").

[98] 618 F.3d at 212 (citing ABA Formal Op. 95-390 at 1001:262 and ABCNY Formal Op. 2007–3, as well as Charles W. Wolfram, *Legal Ethics: Corporate-Family Conflicts*, 2 J. Inst. Study Legal Ethics, 295, 364 (1999) ("[D]iscrete agreements between a lawyer and corporate-family client can define the relationship in such a way as to limit . . . the type of conflict obligations that the lawyer is and is not undertaking.")).

Counsel also argued that, besides the consent provisions that the court analyzed above, in an addendum attached to the initial engagement letter and expressly incorporated into the subsequent amending engagement letter, Johnson & Johnson had actually provided a blanket advance consent to corporate affiliate conflicts with affiliates that were not separately retained to be counsel's clients. Under that language, Johnson & Johnson had agreed that counsel "represent[ed] only the client named in the engagement letter and not its affiliates, subsidiaries, partners, joint venturers, employees, directors, officers, shareholders, members, owners, agencies, departments, or divisions."[99] Moreover, counsel argued that the consent provisions that the court examined above failed to address its authorization as to corporate affiliate conflicts. Thus, according to counsel, the agreement did not imply a limit on representing GSI unless Johnson & Johnson's affiliate BabyCenter was separately a client at the time of the letter. Counsel was not able to persuade the court.

The court found that the specific language of the consent provisions had already expressly addressed conflicts arising out of representations of Johnson & Johnson and third parties (Kimberly-Clark and generic drug manufacturers) in patent litigation matters adverse to Johnson & Johnson's affiliates. The court noted that counsel had stated in the engagement letters that it understood Johnson & Johnson's consent would permit it to continue to represent Johnson & Johnson, even as it would be available to represent Kimberly-Clark or generic drug manufacturers in patent-related proceedings against Johnson & Johnson or affiliates. Implicitly acknowledging the tension between the narrow coverage of the consent provisions and the broad language of the addendum, the court then applied canons of contract construction to find that the

[99] *BabyCenter*, 618 F.3d at 206-07, 213.

more specifically worded consent provisions – rather than the broad and cautionary language of the addendum – would control the meaning of the engagement agreement.

The court also found that the addendum to the engagement letter could not be construed as an open-ended advance without posing ethical problems. The addendum provided that counsel represented only Johnson & Johnson, the named client, and none of the individuals and entities the addendum listed – i.e., "affiliates, subsidiaries, partners, joint venturers, employees, directors, officers, shareholders, members, owners, agencies, departments, or divisions." The court found this list was not consistent with the addendum functioning as an advance consent for corporate affiliate conflicts. In particular, the court noted that counsel could not serve as counsel in actions against "unincorporated *departments or divisions*" of Johnson & Johnson without violating its duty of loyalty to Johnson & Johnson. Ultimately, the court concluded that the language in the addendum was "simply . . . not plain enough or clear enough to support" an advance consent to the corporate affiliate conflict.[100]

Consent to Conflicts: Altering the Language of Standard Consent to Conflicts That Are Not "Substantially Related"

The language typically found in advance waivers of conflicts provides for consent to directly adverse representation in matters not "substantially related" to the subject matter of the engagement letter. Qualifying the consent to preclude only "substantially related" matters is designed to avoid after-the-fact hairsplitting as to whether there merely is "some" relationship making the consent inapplicable to a later conflict. A consent waiver that provides authorization for directly adverse representations so long as the matters are not "substantially related" grants a

[100] *Id.* at 214.

law firm considerably more flexibility in taking on a later adverse representation and makes a client effort to disqualify a law firm much harder to succeed.

Mylan v. K&E is illustrative of the perils to the law firm associated with altering this standard "substantially related" language. As discussed above, the magistrate judge found that K&E's representation of Teva in its takeover bid for the Mylan clients' corporate parent was directly adverse to the Mylan clients. Accordingly, without an effective advance consent, the magistrate judge determined that K&E's representation should be barred.

The law firm and the Mylan clients had negotiated over and had revised the standard language of K&E's engagement letter. In particular, the clients had requested, and K&E agreed to, the removal of the word "substantially" from the standard "substantially related" consent language.[101] Thus, the language in the "Conflicts of Interest" provision gave K&E permission to be adverse only as to conflicts that were "not related" at all – as opposed to "not substantially related" – to the legal and regulatory advisory and litigation work the firm did on the Mylan clients' behalf.[102]

---

[101] *Mylan v. K&E*, No. 2:15-cv-00581-JFC-LPL, at 11 (discussing review and negotiation of the conflicts of interest language). The full "pertinent language of the 'Conflicts of Interest' section of the Engagement Letter drafted by K&E provides":

> Accordingly, as an integral part of the Engagement, you agree that K&E LLP may, now or in the future, represent other entities or persons, including in litigation, arbitration or other dispute resolution procedure, adversely to you or any of your affiliates *on matters that are not related to* (i) the legal services that K&E LLP has rendered, is rendering or in the future will render to you under the Engagement and (ii) other legal services that K&E LLP has rendered, is rendering or in the future will render to you or any of your affiliates under a separate engagement (an "Allowed Adverse Representation").

Id. at 38 (emphasis added).

[102] *Id.* at 12-14 (discussing K&E's work on behalf of the Mylan clients).

The magistrate judge found that K&E's representation of Teva's hostile takeover attempt *was related* to the work K&E had done for the Mylan clients and, therefore, violated the engagement letter. She determined that the Teva representation was related to the Mylan clients' representation because K&E established a fiduciary relationship with the Mylan clients, obtained confidential proprietary information relevant to the hostile takeover, and represented the subsidiaries that comprised the principal targets of the hostile takeover effort.[103]

Note, however, that after assessing the circumstances of the takeover bid and the K&E's work for the Mylan clients, the court held that even under a consent precluding "*substantially* related" matters – the takeover representation would have been barred.[104]

What Makes Consent *Informed*?

Informed consent enables clients to obtain the counsel of their choosing despite conflicts, subject to certain limits. Becoming "informed" entails client communication – or at least knowledge of the availability of communication – as to how a conflict might foreseeably affect the client's interests adversely. Being "informed" depends on the context and nature of both a representation and the client; and the Rules require that informed consent be confirmed in writing. At bottom, informed consent may well depend on what is in the engagement letter. The cases of *Zador Corp. N.V. v. Kwan,*[105] *Mylan v. K&E,* and *Sheppard Mullin* show how the requirement of informed consent can play out under varying scenarios.

[103] *Id.* at 32-37, 40.
[104] *Id.* at 33 n. 41.
[105] 31 Cal. App. 4th 1285.

Zador Corp. N.V. v. Kwan

In *Zador*, a California appellate court reversed the trial court's disqualification of counsel, which had been based upon the "substantial relationship" test. The appellate court found that disqualification was not merited because the consent form was detailed and the former client seeking disqualification knew of the relationship between the law firm and another client.[106]

In that case, Heller, Ehrman, White & McAuliffe (Heller), provided joint representation to two clients, Zador Corp. and C.K. Kwan, the agent of the owners of Zador. Zador initially asked Heller, longstanding counsel to Zador's owners, to defend it against claims arising out of a real estate transaction. Kwan subsequently learned of the suit and sought indemnity because he had acted as Zador's agent in the deal. Heller and Kwan met with Zador's in-house counsel, and it was agreed Heller would represent Kwan and Zador. Kwan and Heller then met; and Heller provided Kwan with a waiver and consent form. Heller told Kwan that the waiver's language was standard and that clients were required to sign such a waiver when Heller represented multiple parties in a suit. That letter named Zador as a co-defendant in a suit and indicated that there was a risk of a conflict arising between the co-defendant parties. It explained that if there were a dispute between Kwan and the co-defendants, Heller could be disqualified from representing both of them without a written consent from each client, and that Heller would continue representing Zador, not Kwan, if a conflict arose. Thus, the waiver's language asked that Kwan agree not to assert such a conflict or to try to disqualify Heller from representing Zador if a conflict arose – and it encouraged Kwan to seek independent counsel about the meaning of the waiver or at any time later if Kwan signed the consent.[107]

[106] 31 Cal. App. 4th at 1301-03.
[107] *Id.* at 1289.

Kwan studied the waiver for approximately twenty minutes, then signed it. Kwan later met Heller on several occasions to discuss the matter. Heller interviewed Kwan, spoke with Kwan about his answer to the complaint, and on Kwan's behalf responded to interrogatories. During the drafting of interrogatories, a difference in positions between the two clients began to emerge. Kwan believed that the price paid by Zador for the property in the transaction had been reasonable, but the interrogatory response stated that the property value was far less. Kwan initially objected to the response, but then assented at the insistence of the attorneys.

Documents later reviewed by Heller indicated that Kwan may have received a payment from the parties on the other side of the transaction.[108] Heller's attorneys told Kwan that the information indicated a possible conflict of interests between Kwan and Zador and that Kwan needed to retain separate counsel. In their conversation, "Kwan agreed. Kwan also reaffirmed his consent to Heller's continued representation of Zador."[109] Heller confirmed this reaffirmation of the consent in a letter sent shortly thereafter, noting that it would continue representing Zador.

Eventually, while being deposed, Kwan admitted that he had profited from the property transaction.[110] Zador formally withdrew from its indemnity agreement with Kwan and demanded that Kwan refund the moneys it had paid for his separate defense.[111] Heller amended its cross-complaint to add claims against Kwan. Kwan moved to disqualify Heller. The trial court granted the motion, finding a substantial relationship existed; the appellate court reversed.

Here, the appellate court ruled that Kwan's consent, not the substantial relationship test, controlled.[112] Further, it found that Heller had informed Kwan that it would represent him only if

---

[108] *Id.* at 1291.
[109] *Id.*
[110] *Id.* at 1292.
[111] *Id.*
[112] *Id.* at 1303.

he signed a detailed waiver; that Kwan took 20 minutes to inspect the waiver and signed it; Kwan signed onto a provision by which he consented to "*any adversity that may develop*"; and Kwan reaffimed his consent upon being told that he needed separate counsel. The appellate court ruled that it "believe[d] that 'any adversity' quite naturally include[d] litigation."[113]

Mylan v. K&E

As explained above, the magistrate judge in *Mylan* found K&E's representation of Teva in its takeover bid to be barred by the direct adversity to the Mylan clients in the absence of an effective waiver due to the "relatedness" of the representations. In the alternative, however, she also found that – even assuming the matters were unrelated and thus within the scope of a permitted representation – a lack of informed consent provided a separate basis for barring the Teva takeover representation.[114]

The magistrate judge preceded her informed consent analysis with a recitation of Rule 1.7(b)(4), permitting representation despite a current conflict if each affected client gives informed consent, and Rule 1.0(e)'s characterization of informed consent, emphasizing that informed consent arises "after the lawyer has communicated adequate information and explanation about the material risks."[115] She then noted that "the language of the agreement is a primary source for determining whether or not a particular client's consent is informed."[116]

---

[113] *Id.* at 1301.
[114] *Mylan v. K&E*, No. 2:15-cv-00581-JFC-LPL, at 40-46.
[115] *Id.* at 41 (quoting Pa. Rules of Prof'l Conduct, r. 1.0(e)).
[116] *Id.* at 41-42 (citing *Celgene Corp. v. KV Pharm. Co.*, No. 07-4819SDW, 2008 WL 2937415, at *4-5, *7-8, *10 (D.N.J. July 29, 2008) (unpublished decision) (disqualifying firm from representing generic drug manufacturer in patent litigation dispute where firm concurrently represented adverse party in securities litigation matter giving rise to current conflict: firm bore but failed to meet burden of proving that advanced consent met requirement of "truly informed consent," for which firm was required to show it had "actually consult[ed] with and inform[ed] the client."; ABA Formal Op. 95-390).

Perhaps somewhat inconsistent with pointing to the agreement as the primary source for making a determination whether consent was informed, the court then began its analysis by focusing on the practice of legal representation in the pharmaceutical industry, out of which the *Mylan* agreement arose.[117] The magistrate judge stated, "the commonly acknowledged intent of such prospective waivers in the context of the legal representation of pharmaceutical matters . . . is to enable competitor clients to retain the services of a limited, select group of counsel with particular qualifications . . . as to discrete (typically unrelated) products."[118] By contrast, she concluded, in the case before her, "the conflicting representation is not restricted to an unrelated discrete product but, . . . encompasses a hostile, opposed acquisition of the very products as to which K&E has received confidential and proprietary information and the very entities to which K&E has provided legal counsel."[119] Having set out this premise – i.e., that the K&E representation of Teva's takeover bid deviated from the norms of customary legal representation in the industry – the magistrate judge then turned to the agreement.

The magistrate judge observed that the language of the conflict of interest provision did not provide express notice that transactional representations might be among the types of representations to which the clients would have been consenting. That provision indicated that "litigation, arbitration or other dispute resolution" representations would be among those consented to, but transactional or acquisition representations were not mentioned.[120] The magistrate judge acknowledged that this list "does not exclude acquisitions" and was preceded by the term "including" – underscoring that the list was not exhaustive. Nevertheless, she pointed to "the standard industry usage and understanding of the intended scope of prospective waivers,"

[117] *Id.* at 42.
[118] *Id.*
[119] *Id.*
[120] *Id.*

further noted K&E's "high-profile" acquisition work (for Teva, among others) and concluded that the omission of any reference to K&E retaining a right to conflicting representation in transactional work was "significant."[121] The magistrate judge concluded: "If K&E intended to retain a right to act as an advocate against the Mylan Clients in such a fundamental way, it was incumbent upon it to make certain that the clients knew and agreed to such an arrangement."[122]

Sheppard Mullin v. J-M

Sheppard Mullin again serves as a cautionary example of how a court may find a failure to obtain informed consent. The appellate court there held that the firm violated California Rule 3-310, which (like Rule 1.7) requires informed consent, because the court found that "Sheppard Mullin did not disclose *any* information to J-M about a conflict with South Tahoe."[123]

The court found that given the circumstances of its representation of South Tahoe, Sheppard Mullin could not rely on the language of the advance consent to provide informed consent because it comprised a "boilerplate waiver that included no information about any specific potential or actual conflicts"[124] – and in particular "did not mention South Tahoe. Instead, it broadly waived all current and future conflicts with any client"[125]:

> *Conflicts with Other Clients.* Sheppard, Mullin[,] Richter & Hampton LLP has many attorneys and multiple offices. We may currently or in the future represent one or more other clients (including current, former, and future clients) in matters involving [J–M]. . . . By consenting to this arrangement, [J–M] is waiving

[121] *Id.* at 42-43.
[122] *Id.* at 43. The judge dismissed K&E's "extensive and continuing protestations regarding Plaintiff's knowledge of K&E's prior transactional experience and acquisition engagements, including on behalf of Teva, [as] fail[ing] to meaningfully address how K&E provided specific information sufficient to Plaintiff's informed consent to the Subject Representation." *Id.* n.55.
[123] 244 Cal. App. 4th at 610.
[124] *Id.*
[125] *Id.* at 613.

> our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations.[126]

The court found that this generalized language could not provide "'*informed* written consent' of actual conflicts to J-M," when Sheppard Mullin had been "silent about any conflict."[127] Rather, the court held that Sheppard Mullin had been required to disclose the South Tahoe conflict.

The court further indicated that, on the assumption that South Tahoe was not a current client of Sheppard Mullin because its last assignment for South Tahoe had ended five months before Sheppard Mullin's engagement agreement with J-M, Sheppard Mullin's acceptance of representation for South Tahoe three weeks after the agreement required Sheppard Mullin to disclose the existence of the current conflict.[128] However, Sheppard Mullin had not informed either client of the actual conflict, and therefore could not rely on a generalized waiver that failed to mention either party.[129]

Public Policy Enforcement of the Requirement that Informed Consent Be Confirmed in Writing

There is a real-world policy at work for the enforcement of the informed consent and confirmation-in-writing requirements—as opposed to the thinking of many that the only remedy for an ethics violation is a grievance. Some courts have looked to the substance of the ethics rules to determine whether the violation reflects a substantive public policy matter, as opposed to a mere technicality. Two cases illustrate this principle: *Sheppard Mullin* and *Law Offices of Peter H. Priest, PLLC v. Coch.*[130]

---

[126] *Id.*
[127] *Id.* at 610.
[128] *Id.*
[129] *Id.* at 610, 612-13.
[130] 780 S.E.2d 163 (N.C. Ct. App. 2015), *review denied*, 781 S.E.2d 479 (N.C. 2016), *and cert. dismissed*, 781 S.E.2d 479 (N.C. 2016).

Sheppard v. Mullin

As noted above, the appellate court concluded that Sheppard Mullin's advance consent provision lacked a clear explanation of the conflict at issue.[131] The court then found that "[t]he representation of both parties without informed written consent [was] contrary to California law and contravene[d] the public policy embodied in Rule 3–310."[132] The appellate court ruled that "the trial court erred by enforcing the contract between the parties and entering judgment on the arbitration award based on that contract;"[133] that Sheppard Mullin was not entitled to any of the fees it had received having failed to obtain the parties' informed written consent;[134] and that the firm had to reimburse J-M for the fees it had previously paid.[135]

Priest v. Coch

The outcome in *Sheppard Mullin* is harsh, but the decision in *Priest v. Coch* is harsher. *Priest* concerned an engagement letter and fee arrangement that the court found to constitute a business transaction with a client.[136] The attorney brought suit seeking payment of fees. Pursuant to the terms of his engagement letter, and consistent with the attorney's conversations with the client, the attorney had provided legal work in connection with a patent; and the fees would consist of a percentage of the proceeds, if any, from a future patent-related business transaction.

---

[131] 244 Cal. App. 4th at 610, 613.
[132] *Id.* at 597.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 620.
[136] *See Priest v. Coch*, 780 S.E.2d at 173 ("We . . . view the Agreement as a fundamental shift in the nature and objective of the representation, . . . 'not a standard transaction' in patent and trademark law and is thus more accurately viewed as a business transaction in which Priest and his firm exercised influence and control from a position of trust when dealing with their legally unsophisticated clients to obtain unusually favorable terms for their own compensation.").

The letter did memorialize that agreement. But, contrary to North Carolina ethics rules governing business transactions with a client, (i) the writing had not been signed by the client, and (ii) the attorney had failed to advise the client in writing of the desirability of seeking independent counsel.[137] As a matter of public policy, the court would not hold the client to the terms of the agreement,[138] and also denied the attorney recovery in *quantum meruit*,[139] even though the client admitted to understanding the terms of the business transaction.[140]

Conclusion

It is quite difficult to wrap up all of the above described rules, comments, ethics opinions, and judicial opinions into a small conclusory box with a neat bow. And the foregoing only addresses the tip of the iceberg, in terms of the relevant (and often inconsistent, if not irreconcilable) caselaw and ethics opinions that may inform the prudent lawyer in analyzing any particular situation. Suffice it to say that prudent law firms and their lawyers need to be familiar with the specific rules of any relevant jurisdictions concerning what is – or is not – a conflict precluding representation, with or without client consent. They also need to be careful (and candid with themselves) in identifying and documenting who is or is not a client, and who is or is not an adversary or another adversely positioned person, and whether there is already consent, in any particular engagement. And they need to be careful and clear in identifying, explaining to

[137] *Id.* at 170, 172-73 (quoting N.C. Rev. R. of Prof'l Conduct 1.8(a))). Note that the court here applied Rule 1.8 because it found the parties' agreement to have been a business transaction.
[138] *Id.* at 172-73.
[139] *Id.* at 174 ("Given that Priest failed to comply with the express requirements of Rule 1.8(a), and in light of the strong public policy considerations that Rule embodies, we decline to hold that Priest's failure to obtain his clients' written consent to the terms of the Agreement or advise them in writing of the desirability of seeking independent counsel were merely formal violations of our Rules of Professional Conduct.").
[140] *Id.* at 166 & n.3 ("Coch stated [in an email] that the sale proceeds 'will be split 4 ways as Peter Priest, the attorney who has filed for continuations and has kept this alive from a patent/legal perspective has ¼ of it, as we agreed some time ago.'").

clients, and documenting, the kinds of situations, if any, in which, at present or in the future, the lawyer can be adverse to the client.