Conflicts of Interest under ABA Model Rules 1.7, 1.9, 1.10, 1.11
1.12 and 1.18

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Summary

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A. Policies and Interests Underlying the Conflicts Rules

1. Loyalty. Being adverse to a client is disloyal. ABA Model Rules 1.7(a)(1), 1.10.

2. Effectiveness. Having divided interests or multiple loyalties diminishes effectiveness. ABA Model Rules 1.7(a)(2), 1.7(b)(3).

3. Unfair advantage. Knowledge about a client or the client’s case while being adverse to that client gives the lawyer an unfair advantage and compromises confidentiality. ABA Model Rules 1.6, 1.9(a) & (c).

4. Choice of lawyers. The ethics rules aim to give clients the widest choice of lawyers to select from. If a lawyer who serves a client once is thereafter forever prohibited from being adverse to that client then other potential clients may have fewer lawyers to choose from. ABA Model Rules 1.9(a), 1.18.

5. Encouraging government lawyers to focus on the government’s interests and their post-government career. A government lawyer cannot, absent a waiver, work on a matter that they handled in government even if they are not adverse to the government. A government lawyer cannot start a matter in government and then work on the same or a substantially related matter later in private practice even where the former government lawyer is advocating on behalf of a client that is aligned with the government or the government’s position. ABA Model Rule 1.10(a).
6. Encouraging lawyers to go into government service and to serve as arbitrators and mediators. That being said, interpreting the conflict rules to mean that a government lawyer could not go to a firm or entity which has or had a matter that the lawyer worked on would make it harder for government lawyers to pursue later careers in private practice. This would discourage lawyers from entering government service in the first place. ABA Model Rules 1.11, 1.12.

7. Allowing lawyers to move freely from job to job. The ABA and many states allow for lateral screening when moving between firms. The ethics rules have long forbidden non-compete provisions for lawyers. ABA Model Rules 1.10(a)(2), 5.6(a).

B. The Basic Conflicts Rules

1. Rule 1.7 – Conflicts Involving Current Clients.

A lawyer cannot be directly adverse to a current client even on an unrelated matter, absent a waiver. This is the basic loyalty rule. Conflicts involving representing adverse parties before a tribunal are per se non-waivable.

In addition, a lawyer cannot take a matter where there is a significant risk that the lawyer’s zealously and diligence would be materially limited by the lawyer’s duties to other clients, third parties or the lawyer’s own personal interests. This is the basic effectiveness rule.

2. Rule 1.9 – Conflicts Involving Former Clients.

This rule governs conflicts involving (a) a current representation that is (b) adverse to (c) a former client. This rule is more permissive than the rule governing current clients. A lawyer can be adverse to a former client on an unrelated matter. A lawyer is prohibited, absent a waiver, from being adverse to a former client only with respect to new matters that are substantially related to the matter that the lawyer handled for the former client. This is the basic rule that prevents lawyers from having an unfair advantage in a representation.


Subject to various exceptions and waiver, a conflict that prevents one lawyer in a firm or in-house law department from handling a matter prevents all other lawyers in that firm or in-house law department from handling such matter.


Former government officials moving to private practice cannot take a representation in connection with a matter in which they participated personally and substantially while in government. Note that this rule does not require adversity to the government in the new
matter. The conflict is not imputed to the firm or in-house law department as a whole, though, if the former government official is timely screened. The rule is subject to waiver under the ABA Model Rules but not under the D.C. Rules of Professional Conduct. Compare ABA Model Rule 1.11 (a)(2) with Comment [3] to D.C. Rule 1.11. This rule encourages lawyers to go into government service by allowing screening for conflicts created by government service. Otherwise, imputation would discourage firms from hiring government lawyers. The term “matter” is defined so as not to apply to rulemakings, or promulgating policies of general applicability.

A lawyer in government service cannot negotiate for employment with a lawyer, law firm or other entity where the potential employer has a current matter before the government in which the government lawyer is participating personally and substantially. Note that the Rules will also cover a lawyer who hires or attempts to hire a government lawyer under these circumstances. ABA Model Rule 8.4(a) prohibits lawyers (here, the hiring lawyer) from knowingly assisting or inducing another lawyer (the government lawyer) to violate any ethics rule.

5. Rule 1.12 – Special Rule for Former Judges, Mediators and Arbitrators.

A lawyer who has served as a judge, arbitrator or mediator in a matter cannot thereafter represent a party in that matter absent consent. The firm that employs the former judge, arbitrator or neutral can handle the matter with a screen. Judges, mediators and arbitrators cannot negotiate for employment for employment with any lawyer or entity which has a current matter before them. ABA Model Rule 8.4(a) subjects the hiring lawyer to ethical sanction.

6. Rule 1.18 – Duties to Prospective Client.

A prospective client is a client who interviews a lawyer for a matter but does not hire the lawyer. The lawyer cannot thereafter represent an adverse party in the same matter but the lawyer’s firm can do so provided that the all those who participated in the interview process are screened. This rule could be very useful in the government contracting area but only if prospective client interviews are handled carefully – by limiting participants and not disseminating information from the interview process beyond the participants.

C. How to Analyze a Conflict of Interest Scenario

1. Who is the client or clients? Is there a client?

In every engagement, a lawyer should always know who the lawyer’s client is and what entities or individuals involved in the matter are not clients. The lawyer must take care not to provide a basis for non-clients to claim that the lawyer was acting on their behalf. The requisites for the formation of an attorney-client relationship are outside of the purview of the ethics rules and are instead governed by contract principles. However, the reasonable belief of the individual or
entity asserting the existence of an attorney-client relationship will usually control. "A majority of state courts [addressing the issue] have held that the existence of an attorney-client relationship does not depend upon the execution of an express contract between the parties, but may, instead, be implied from the facts and circumstances, or from the parties' words or conduct. Many federal courts . . . have arrived at the same conclusion." Richard Flamm, Conflicts of Interest in the Practice of Law § 14.3 at 310-311 (Banks & Jordan 2015) (footnotes omitted). It is up to the lawyer to disclaim the existence of such a relationship in ambiguous situations and act accordingly.

Almost all of the conflict rules hinge upon the existence of a client representation. ABA Model Rule 1.7(a)(1) provides that a conflict exists if the representation of one client is adverse to the representation of another client. ABA Model Rule 1.7(b)(2) prohibits accepting a representation when that new representation will be adversely effected by an existing representation. ABA Model Rule 1.9(a) prohibits a lawyer from representation a client adverse to a former client when the two matters are substantially related.

The identity of the client is not always clear. If the client is a corporation, does the lawyer also represent the corporation's directors, officers and employees? Representation of an entity typically does not also mean that the lawyer represents the directors, officers and employees. ABA Model Rule 1.13; see also D.C. Bar Legal Ethics Opinion 269 Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation. If the corporation is a client, does the lawyer also represent the corporation's affiliates, subsidiaries, parents, etc.? There is no clear answer in the ethics rules. ABA Formal Ethics Opinion 95-390; see also Ronald D. Rotunda, Conflicts Problems When Representing Members of Corporate Families, 72 Notre Dame L. Rev. 655 (1997); Comments [21] to [27] to D.C. Rule 1.7; Restatement of the Law (Third), The Law Governing Lawyers § 121 cmt. d (ALI 2000).

For government lawyers, the lawyer may represent the particular department or agency or may represent the Executive Branch, depending on the circumstances. ABA Model Rule 1.13, Comment [9]. The issue is not primarily a question of legal ethics but is more a question to be addressed and decided between the lawyer and the lawyer's government client. See ABA Formal Op. 97-405; D.C. Legal Ethics Opinion 268.

The issue of who is the client can often be resolved by agreement. A corporation can agree that a lawyer represents only the corporation and none of its affiliates, subsidiaries, joint ventures or parents. Such an agreement may not be binding, however, if the lawyer gives legal advice or otherwise acts as a lawyer for an entity. In that case, that entity is a client regardless of earlier agreements. A lawyer can also acquire "de facto" clients outside of the corporate family context by giving individuals or entities legal advice or acting for them in a representative capacity. Statements disclaiming an attorney-client relationship must be accompanied by conduct consistent with that disclaimer.

Engagement letters and outside counsel billing guidelines often conflict on the issue of whether the lawyer represents other members of a client's corporate family. Unless those conflicts are
explicitly resolved, the statements in the engagement letter limiting the client to one entity and not related entities may be ineffective.

2. **Is there adversity?**

Most of the conflict rules require that a lawyer be adverse to a client for a conflict to exist. ABA Model Rules 1.7(a)(1), 1.9(a). Absent adversity, there is no conflict under these rules. Note that the conflict rules that apply to former government officials do not require the presence of adversity. A lawyer now in private practice may still violate the conflict rules involving former government officials even if the government is not a party to the matter and even if the position being taken by the lawyer is consistent with the position taken by in the matter by the government.

3. **Is the client to whom the lawyer is now adverse a current client or a former client?**

The rules regarding current client conflicts (ABA Model Rule 1.7(a)(1)) prohibit a lawyer from taking a position adverse to a current client even if the lawyer does so in a matter entirely unrelated to the work that the lawyer is doing for that client. The rule for former client is more permissive allowing the lawyer to be adverse to a former client except on matters which are the same or substantially related to the work done by the lawyer for the former client.

If a lawyer handles one matter for a client and completes that matter, the client is typically considered a former client once the matter is finished. If the lawyer handles multiple matters for a client, the client may be considered a current client even if the lawyer has no pending assignment. Comment [9] to D.C. Rule 1.3. These are “sleeper clients.” The only way to avoid “sleeper clients” is for the lawyer to tell clients (preferably in writing) when a matter is complete that the most recent engagement is concluded and that the attorney-client relationship has ended.

In addition, the court will often reject attempts by a lawyer to convert a current client into a former client by abruptly terminating a representation. Under the “hot potato” doctrine, a court will disregard the termination and view the now-abandoned client as if it were still a current client. See generally Richard E. Flamm, Lawyer Disqualification § 23.4 (2d. ed. 2014).