

WHY WORRY ABOUT CONFLICTS IF I GET A WAIVER LETTER?

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WHY WORRY ABOUT CONFLICTS IF I GET A WAIVER LETTER?

1. AN OVERVIEW OF CONFLICT ISSUES AND MULTIJURISDICTIONAL PRACTICE

Lawyers all know you can't represent adverse parties in the lawsuit. Transactional lawyers, however, understand that there are many situations where potential conflicts may arise which can be waived. The bigger the law firm, the more need there is for waiver letter, because often clients which are not normally "adverse" may end up in different deals where there is a potential for conflicts.

Even for transactional lawyers in smaller firms, however, avoiding conflicts is a daily concern, for often multiple individuals come to smaller forms to form business entities to do transactions. In addition, often a valued client of the firm brings in other clients who may, in turn, end up having in the future some potential conflict with the firm's original client.

Further, even if a lawyer knows all the conflict of interest rules in that lawyer's own state, multijurisdictional practice rules must be considered in conjunction with the conflict rules when the transaction is interstate, the lawyer's practice is interstate, or the client is not from the lawyer's home state.

The purpose of this paper is to consider and illustrate some potential traps for the unwary.

2. THE TUGS AND PULLS

The tension that exists for every lawyer is the one that exists between one's duty to the client, one's duty to the profession, and one's duties to other existing clients and

former clients.² In any law firm of almost any size, potential conflicts of interest arise almost daily. Many law firms have had to construct elaborate electronic systems to keep track of all potential conflicts. If a potential conflict is identified, firms have created structures to leave a paper (or electronic) trail of how these are resolved.³

The key provisions of the Model Rules of Professional Conduct are Rules 1.6⁴ on client confidentiality, Rules 1.7⁵ and 1.8⁶ on conflicts involving current clients, and Rule

² For a discussion of the Rules of Professional Conduct and decisional law, see Lawrence J. Fox and Susan R. Martyn, "Red Flags: A Lawyers Handbook on Legal Ethics," ALI-ABA (2005). The book "Conflict of Interest in the Professions," By Michael Davis, Andrew Stark (Oxford University Press US, 2001), contains an extensive discussion of conflict issues and focuses on a risk-benefit approach. Also see Leonard E. Gross' article, "Are Differences Among the Attorney Conflict of Interest Rules Consistent with Principles of Behavioral Economics?" Georgetown Journal of Legal Ethics (Winter 2006).

³ As early as 1993, Richard Zitrin, in his article "Risky Business . . . Representing Multiple Interests," Calif. State Bar Ethics Hotliner Vol I, No. 11 (Winter 1992-1993), wrote that the "everyday practice of most firms, large and small, is replete with potential conflicts of interest."

⁴ Model Rule 1.6 states:

Rule 1.6 Confidentiality Of Information

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

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

⁵ Model Rule 1.7 states:

Rule 1.7 Conflict Of Interest: Current Clients

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

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

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

⁶ Model Rule 1.8 states:

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

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

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

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

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

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

1.9⁷ on duties to former clients. All of these must be read through the prism of Rule 1.10,⁸ which details how the imputation-of-knowledge principle infects all lawyers

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

⁷ Model Rule 1.9 states:

Rule 1.9 Duties To Former Clients

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

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

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

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

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

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

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

⁸ Rule 1.10 states:

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

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

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

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

in a firm, regardless of their actual knowledge of a particular matter, and regardless of their actual knowledge about the client for whom the potential conflict arises.

Real estate lawyers who represent business entities must advance the interests of the company and its stakeholders while carefully threading their way through a thicket of state and federal statutes, international laws,⁹ and state and local professional rules.

Much has been written about the state and federal statutory and regulatory attempts to make those who serve companies' legal needs into "whistle-blowers" or informers about corporate activities. Those issues, however, are beyond the scope of this paper.¹⁰ In addition, there are many internet resources on ethics that may provide a source for research and links to a number of useful sites.¹¹

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

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

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

⁹ For example, in addition to treaties and other matters that affect international transactions, there is the Financial Action Task Force (FATF), an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. FATF seeks to generate legislative and regulatory changes to combat international money laundering.

¹⁰ For more on these points, see, for example: D. DeMott, "THE DISCRETE ROLES OF GENERAL COUNSEL," 74 *Fordham L. Rev.* 955 (2005); Jill Barclift, "CORPORATE RESPONSIBILITY: ENSURING INDEPENDENT JUDGMENT OF THE GENERAL COUNSEL--A LOOK AT STOCK OPTIONS Z," 81 *North Dakota Law Review* 1 (2005); Frederick M. Gonzalez, "FOURTH ANNUAL DIRECTORS' INSTITUTE ON CORPORATE GOVERNANCE -- THE CULTURAL, ETHICAL, AND LEGAL CHALLENGES IN LAWYERING FOR A GLOBAL ORGANIZATION: THE ROLE OF THE GENERAL COUNSEL," Practising Law Institute PLI Order No. 9158 September, 2006; Lewis D. Lowenfels, Alan R. Bromberg, Michael J. Sullivan, "ATTORNEYS AS GATEKEEPERS: SEC ACTIONS AGAINST LAWYERS IN THE AGE OF SARBANES-OXLEY," 37 *University of Toledo Law Review* Summer 877 (2006); Jason Thompson, "THE PARADOXICAL NATURE OF THE SARBANES-OXLEY ACT AS IT RELATES TO THE PRACTITIONER REPRESENTING A MULTINATIONAL CORPORATION," 15 *Journal of Transnational Law and Policy* 265 (2006); Anita Indira Anand, "AN ANALYSIS OF ENABLING VS. MANDATORY CORPORATE GOVERNANCE: STRUCTURES POST-SARBANES-OXLEY," 31 *Delaware Journal of Corporate Law* 229 (2006).

¹¹ See, for example the following sites (all accessed in October, 2006): The ABA Center for Professional Responsibility, <http://www.abanet.org/cpr/links.html>; The Thomas Cooley Law School ethics site, http://www.cooley.edu/ethics/other_sites_of_interest.htm; the Cornell Law School Professionalism web links page, <http://www3.lawschool.cornell.edu/faculty-pages/wendel/ethlinks.htm>; the Georgetown Law Library legal ethics link page, http://www.ll.georgetown.edu/guides/legal_ethics.cfm, and the Santa Clara University business ethics links page, <http://scu.edu/ethics/links/links.cfm?cat=BUSI>.

The focus of this paper is the apparent inconsistent theories that support (a) the imputation-of-knowledge principles of Rule 1.10 for attorneys within a single firm, regardless of their actual knowledge, and (b) the rules concerning former clients and lawyers moving between firms, when actual knowledge then becomes a key factor.

3. CONFLICTS OF INTEREST: WHAT YOU DO AND DON'T PUT IN WRITING MIGHT HURT YOU

Whether one looks at the current ABA Model Rules or the 1983 Model Rules, the basic parameters of conflicts of interest are relatively similar. Lawyers cannot represent opposite sides in the same matter. Lawyers can represent others against former clients under certain restrictions, generally related to client confidences and whether the underlying facts are similar to the previous representation. A lawyer's personal interests may result in disqualification and a lawyer's family relationship with a lawyer on the other side of the table may also result in disqualification. Various imputation-of-knowledge rules apply to law firms, and some matters "infect" the entire law firm so that no one in the firm can take on the representation, while other matters can be quarantined so that the "infected lawyer" does not prevent the rest of the firm from handling the matter. A conflict may even arise in the absence of an express lawyer-client relationship (such as when a lawyer participates in a "beauty pageant" for selection of counsel and the discussion at the selection process discloses confidences, but the lawyer is not chosen by the prospective client).

All of these areas break down into three main topics; there are (a) those conflicts that cannot be waived under any circumstance;¹² (b) those conflicts that can be waived;

¹² See, for example, the discussion in Comments 14-16 to ABA Model Rule 1.7.

and (c) things that might be perceived to be conflicts but are not. On those conflicts that can be waived, the ABA Model Rule requires waivers to be “confirmed in writing”¹³ (*i.e.* the lawyer sends the letter explaining what has been agreed to orally), as long as the client has given “informed consent,” which is defined as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risk of and reasonably available alternatives to the proposed course of conduct.”¹⁴

There are literally hundreds of law review articles and publications on conflicts of interest. Some of the more recent ones that are worth taking a look at are set forth below in a footnote.¹⁵ The first article one might look at, however, was written by the Reporter for the ALI Lawyer Restatement, Professor Charles W. Wolfram, “Ethics 2000 And Conflicts Of Interest: The More Things Change” 70 *Tenn. L. Rev.* 27 (2002), which contains a broad overview of how the ABA Model Rules continued and, in some cases, altered the conflict of interest rules.

¹³ “Confirmed in writing” is defined by ABA Model Rule 1.0(b): “ ‘Confirmed in writing,’ when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.”

¹⁴ ABA Model Rule 1.0(e).

¹⁵ *See, e.g.* Shapiro, Susan P., “Bushwhacking The Ethical High Road: Conflict Of Interest In The Practice Of Law And Real Life,” 28 *Law & Soc. Inquiry* 87 (2003); Shapiro, Susan P., “If It Ain’t Broke . . . An Empirical Perspective On Ethics 2000, Screening, And The Conflict-Of-Interest Rules ,” 2003 *U. Ill. L. Rev.* 1299; Morgan, Amanda Kay Morgan “Screening Out Conflict-Of-Interests Issues Involving Former Clients: Effectuating Client Choice And Lawyer Autonomy While Protecting Client Confidences,” 28 *J. Legal Prof.* 197 (2004); and Jones, Alexander W., “Defenses To Disqualification: Fact Situations That Allow An Attorney To Avoid Disqualification For A Conflict Of Interest,” 27 *J. Legal Prof.* 195 (2003).

An interesting article that examines how law firm compensation systems could affect the creation of conflicts of interest is Bernstein, Edward, A., “Structural Conflicts Of Interest: How A Law Firm’s Compensation System Affects Its Ability To Serve Clients,” 2003 *U. Ill. L. Rev.* 1261

The ABA's Center for Professional Responsibility keeps an index of all ethics opinions by the Standing Committee on Ethics and Professional Responsibility. Among the many topics on conflicts about which the Standing Committee has written are opinions on:

- The client as adverse witness in an unrelated matter (Formal Opinion 92-367);
- Conflicts involving corporate representation (Formal Opinion 95-390);
- Conflicts relating to employment negotiations with firm representing the client's adversary (Formal Opinion 96-400);
- Conflicts when one must examine a client as an adverse witness in another matter (Formal Opinion 92-367);
- Conflicts when a former in-house lawyer is involved against the firm,(Formal Opinion 99-415);
- Waivers of future conflicts (Formal Opinion 05-436);
- Conflicts involving joint defense agreements (Formal Opinion 95-395);
- Positional Conflicts (Formal Opinion 93-377);
- Conflicts that arise when there is representation adverse to an individual member of an entity client (Formal Opinion 92-365); and
- Conflicts related to temporary lawyers (Formal Opinion 88-356).

Waivers of existing, potential, and future¹⁶ conflicts are dealt with not only in the ABA Model Rules but also in the ALI Restatement of the Law Governing Lawyers, section 122. On consentable waiver issues involving current and former clients, the test

¹⁶ See Comment 22 to ABA Model Rule 1.7 on consents involving future conflicts. Also see Model Rule 1.18 on duties to a prospective client.

relates to (among other considerations) whether there is a substantial relationship between the matters.¹⁷

One criticism of the Model Rule's conflict provisions is that, while these rules are perfectly understandable and defensible if a law firm exists in a single city with a single office, the underlying basis of the rules (particularly the imputation-of-knowledge provisions of Rule 1.10) becomes more tenuous when a law firm has multiple offices in multiple states. The issue may not be purely a legal one (for screening or lack of screening can occur even within a single office), but rather it may be more of a practical difference, for a criticism has been that while a client may not understand how a law firm can "screen" or protect confidential information within an office, it may well be possible to "screen" lawyers, files, and knowledge when there are far-flung offices.

When the current Model Rules were being considered, the issue of whether the "screening" can occur without each client's informed consent was discussed. The ABA House of Delegates rejected attempts to allow firms to take on direct conflicts of interest without the client's informed consent. The argument that carried the day was that clients expect unalloyed loyalty from the firm as a whole, and that any attempt to allow firms to decide on their own which potential conflicts can be handled without client consent would undermine both the confidentiality principles as well as the duty that law firms owe to each and every client.

The imputation-of-knowledge principles (under Rule 1.10), as inviolable as there are within a law firm, they revealed to have exceptions when lawyers move between firms. There are also exceptions when former government officers, public officials, and

¹⁷ See Rule 1.9. Also *cf. Haagen-Dazs Co. v. Perche No! Gelato, Inc.*, 639 F. Supp. 282 (N.D. Cal. 1986).

judges move to private practice (see Model Rules 1.11 and 1.12). The result is that potential conflicts with existing clients within a firm always require informed consent (under rules 1.7-1.9), but informed consent is always not required when a firm hires a lateral lawyer, a former government officials or judge. For former government officials and judges, for example, client consent is required only if the hired attorney “participated personally and substantially”¹⁸

In other words, there can be “screening” without the clients’ consent for former government lawyers and judges if there is no personal participation, but there cannot be involuntary screening within a law firm for a lawyer in Miami who is dealing with Client A and the firm’s lawyer in Seattle who is dealing with Client B. The differences between the results demonstrate that the fiction of imputation-of-knowledge under Rule 1.10 is just that — a fiction — that is readily abandoned to encourage job openings for lateral hires and for former government officials and judges. It may be that this result is entirely justified by both economics¹⁹ and public policy, but it calls into question whether there may be other exceptions made in the future to the imputation provisions of Rule 1.10.

4. EXAMPLES OF CONFLICT AND SCREENING ISSUES

One way to look at the potential problems in the theoretical underpinnings of the conflict/screening rules is to consider some hypothetical situations and what the Rules allow, permit, mandate or compel.

a. Example #1

i. THE EXAMPLE

¹⁸ Rule 1.11(a)(2) and Rule 1.12(a).

¹⁹ Recall that the Preamble of the Model Rules recognizes and the tension a lawyer faces between “the lawyer's own interest in remaining an ethical person while earning a satisfactory living.” Preamble, Section 9, quoted in full in footnote 34, below

Lawyer A and Lawyer B are solo practitioners. They decide to rent space in the same building. They each maintain their own staff and own file space.

A and B often enlist the other as co-counsel in cases.

A new lawsuit arises in which A's long-standing client X will be adverse to B's longstanding client, Y.

Lawyer B has never done work for A's client X, and Lawyer A has never done work for B's client Y.

Are there any problems for either A or B?

ii. COMMENT ON EXAMPLE #1

Under the Model Rules, as long as A has not previously represented B's client (and vice versa), then there appears to be no restriction at all. A and B can represent adverse parties in this litigation and can engage each other as co-counsel in other matters involving other clients as long as they each maintain the confidentiality of their own client's communications and files, and as long as the personal relationship between Lawyers A and B do not prevent each from fully representing the interests of their respective clients.²⁰

²⁰ Comments 10-12 to Rule 1.7 deal with personal interests of lawyers that may affect representation, but these do not appear to deal with the situation set forth in this example. These Comments state:

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow

b. **Example #2**

i. THE EXAMPLE

As in Example #1, Lawyer A and Lawyer B are solo practitioners, except now Lawyer A owns the building in which Lawyer B rents space.

Lawyer A not only rents space to B, but Lawyer A also charges B for office facilities and employees that B uses.

Lawyer A has a receptionist who answers the phone “Law Offices,” takes messages, and directs the caller to the appropriate attorney.

related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Lawyer A also has a file room with locking file cabinets;

*Lawyer B rents space in the file room and rents
four locking file cabinets for her client files.*

*As in Example #1, A and B often enlist the other as co-
counsel in cases.*

*A new lawsuit arises in which A's long-standing client X
will be adverse to B's longstanding client Y. As in
Example #1, Lawyer B has never done work for A's
client X, and Lawyer A has never done work for
B's client Y.*

Are there any problems for either A or B?

ii. COMMENT ON EXAMPLE #2

The result appears to be same here as under Example #1. As long as A and B maintain separate practices and maintain client confidences, there appears to be no restriction. A and B can represent adverse parties in this litigation and can engage each other as co-counsel in other matters involving other clients.

c. Example #3

i. THE EXAMPLE

*Lawyer C is purely a tax lawyer; Lawyer D is purely a real
estate practitioner. Lawyers C & D form a
partnership.*

Although they have a partnership to share expenses, the partnership documents state that income is dependent upon the billings of each. If Lawyer C bills nothing, Lawyer C still owes the overhead expenses to the partnership out-of-pocket but gets no income from the partnership. Likewise, if Lawyer D bills a million dollars for the year, Lawyer D pays her share of overhead and keeps the rest of the million dollars, sharing none of it with Lawyer C.

Because their practices are so different, Lawyer C keeps her files in a separate file room from Lawyer D.

Lawyer's C's secretary is the only one who accesses Lawyer C's files; Lawyer D's secretary is the only one who accesses Lawyer D's files. The files are never "shared."

In fact, if Lawyer D has a client who needs tax advice, Lawyer D brings in her partner, Lawyer C, and Lawyer C opens a separate file on this matter and bills the client (on firm letterhead) separately from Lawyer D.

A new matter arises in which a tax client of Lawyer C will be adverse to a real estate client of Lawyer D.

Lawyer C has never done work previously for this client of Lawyer D (and vice versa).

Can Lawyer C continue to represent her client and Lawyer D continue to represent her client in this new matter?

ii. COMMENT ON EXAMPLE #3

Although the situation here is practically and functionally the same as if C and D maintained separate solo practices (as in the case of Lawyers A and B under Examples #1 and #2), the Rules require a completely different result.

Because of the legal structure of the partnership, there is no possible way that either lawyer can handle the matter if the two clients are going to be directly adverse in the same matter. This is because of the imputation-of-knowledge and confidences principles of Rule 1.10(a)²¹ and because the conflict of interest is non-waivable under Rule 1.7(b)(3).²²

On the other hand, if Lawyer D's real estate client was going to be represented by Lawyer Q in this transaction or litigation, and even if Lawyer D will continue to represent the real estate client on other non-related matters, then it is possible that the firm could represent Lawyer C's tax client situation, but only if both clients give informed consent confirmed in writing. In this instance, it is feasible to get the real estate client's truly informed consent, because the real estate client now has Lawyer Q to give advice on whether to consent and the impact of such a consent. The difficult question is how

²¹ The language of Model Rule 1.10 is set forth in footnote 8 ,above.

²² The language of Model Rule 1.7 is set forth in footnote 5, above.

“informed” the consent from Lawyer C’s tax client will be, for in this situation Lawyer C seeks to continue to represent the tax client. Will Lawyer C be able to fully and impartially disclose all possible issues so that her client can give “informed consent”? Further, will Lawyer C inform the tax client that Lawyer D will be “screened off” from all of the tax client’s files and will Lawyer C get the client’s informed consent on this issue? Can the client become convinced that true screening will occur and that the client’s confidences in all instances will be protected from Lawyer D (and Lawyer D’s long-standing real estate client)?

d. **Example #4**

i. THE EXAMPLE

The situation is exactly the same as in Example #3, except that Lawyer C practices in one city in the state and Lawyer D practices in a different city in the same state.

Lawyers C and D have a partnership, but in this situation, it is perfectly apparent that the files are kept separately.

Lawyers C and D, although they are in a partnership, maintain entirely different computer systems and completely different bookkeeping systems; they simply “square up” their partnership books every

quarter. As in the previous example, Lawyer C has never done work for D's client (and vice versa).

A new matter arises in which a long-standing tax client of Lawyer C will be adverse to a long-standing real estate client of Lawyer D. Can either Lawyer C or Lawyer D take on the representation?

ii. COMMENT ON EXAMPLE #4

As in Example #3, the Rules create an absolute bar to the lawyers representing both clients in the same transaction. This is due solely to the fact that C and D have a partnership. The combination of the imputation-of-knowledge rules²³ and the non-waivable conflict rules concerning “clients” of the firm²⁴ prevents the lawyers from getting effective waivers from both clients.

e. Example #5

i. THE EXAMPLE

The situation is exactly the same as in Example #4.

Lawyers C and D are in a partnership, but each practices in a different city with different computers and different accounting systems.

Lawyer C, the tax lawyer, decides that the situation is not working out. Lawyer C leaves the partnership and

²³ The language of Model Rule 1.10 is set forth in footnote 8 ,above.

²⁴ The language of Model Rule 1.7 is set forth in footnote 5, above.

joins a big law firm. Lawyer C brings all her tax clients with her.

A week after joining the big law firm, a matter comes up that will pit Lawyer C's tax client against Lawyer D's real estate client. As in the previous examples, Lawyer C had not previously done work for this particular real estate client of Lawyer D, and Lawyer D had never done an work for this particular tax client of Lawyer C.

Can Lawyer C represent her client against Lawyer D's client, or can Lawyer D compel Lawyer C to withdraw?

ii. COMMENT ON EXAMPLE #5

Although functionally the *actual* knowledge that Lawyer C has about Lawyer D's client (and vice versa) is no different under examples #4 or #5 (in both situations, neither lawyer actually knows anything about the other's client), the Model Rules make a distinction when a lawyer moves firms.

Once Lawyer C leaves the C/D partnership taking the tax client with her, the real estate client of Lawyer D is now a "former client" of Lawyer C (and Lawyer C's current tax client is now a former client of Lawyer D). Under Model Rule 1.9(a),²⁵ as long as the matters are not the "the same or a substantially related matter," then not only can

²⁵ The language of Model Rule 1.9 is set forth in footnote 7, above.

Lawyers C and D represent former clients who are directly adverse to one another, but no client consent is required.

f. **Example #6**

i. **THE EXAMPLE**

Lawyer E is a partner in a big law firm. Lawyer E's practice is limited to real estate transactions; Lawyer E never deals with litigation. Lawyer E's main client is Developer, Inc. Lawyer E is the only lawyer in the firm with whom Developer, Inc. deals; no other lawyer in the big law firm works on any matters for Developer, Inc.

One of the main clients of the big law firm is Conglomerate, Inc., an insurance company that is always involved in insurance claims and subrogation suits. Lawyer E never works on any files involving Conglomerate Inc.

Lawyer E decides to leave the big law firm and to set up a partnership with Lawyer F, a litigator. Developer, Inc. follows Lawyer E to her new law firm.

A week after Lawyer E leaves the big law firm for her new partnership, a dispute arises between Developer,

Inc. and Conglomerate, Inc. that will require litigation between them.

Can Lawyer E's new firm represent Developer, Inc. against Conglomerate, Inc.? Can Lawyer E assist in the litigation?

ii. COMMENT ON EXAMPLE #6

As long as Lawyer E was in the big law firm, neither she nor the firm could represent Developer, Inc. against Conglomerate, Inc.; this is an unwaivable conflict of interest under the Model Rules.

Yet, once Lawyer E leaves the big law firm, then not only is Conglomerate, Inc. a former client, but the Model Rules give Lawyer E an additional benefit. Under Model Rule 1.9(b),²⁶ as long as Lawyer E has not personally “acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter” — in other words, as Lawyer E knew nothing about Conglomerate, Inc. while working at the big law firm — Lawyer E can represent Developer, Inc. and no consent is required.

g. Example #7

i. THE EXAMPLE

Law Clerk F is one of three law clerks who works for Judge G.

Judge G divides his cases among her law clerks. A major suit has been ongoing between Landlord, Inc. and

²⁶ The text of Model Rule 1.9 is set forth in full in footnote 7, above.

Tenant, Inc.; Law Clerk F has not worked on that case.

The Bigg Law Firm, which represents Landlord, Inc., wants to hire Law Clerk F; at the time Law Clerk F is hired, the law suit will not have come to trial.

Is there any problem with The Bigg Law Firm hiring Law Clerk F?

ii. COMMENT ON EXAMPLE #7

Model Rule 1.11²⁷ deals with former government employees, but Model Rule 1.12²⁸ is the one applicable to law clerks as well as to judges and third party neutrals. The

²⁷ Model Rule 1.11 provides:

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

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

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

test, however, is essentially the same as with lawyers who move between firms. There is no need to screen or notify the client if the law clerk was not personally involved in the case. In fact, under Rule 1.12, apparently the law clerk can leave the judge on day one and start work on the case on day two as long as the law clerk was not personally

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

²⁸ Mode Rule 1.11 provides:

Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

involved in the case. Of course, Rule 1.12 does not deal with statutes²⁹ or rules³⁰ that may require the judge to recuse herself in such instances.

²⁹ See, e.g., 28 U.S.C. Section 455 which requires that a “justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

But it appears that motions to recuse are not favored by judges in such instances.

See, for example, U.S. v. Ruff (unreported in F.Supp.2d), 2006 WL 208870 (Jan 25, 2006, N.D. Iowa), where the court refused a motion to recuse even though the prosecutor in the case was a former law clerk of the presiding judge. The court quoted with approval from *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir.1983):

[A] law clerk has little incentive to influence a judge in an effort to curry favor with a former employer. Conversely, a law clerk has a financial incentive to benefit a future employer. Given this financial incentive, if ever a law clerk were of a mind to influence his judge, it would likely be for the benefit of a future rather than a former employer. Because precedent approves the isolation of a law clerk who has accepted future employment with counsel appearing before the court, it follows that isolating a law clerk should also be acceptable when the clerk's former employer appears before the court. [W]e [also] note that a law clerk has no incentive to violate a court's instruction that he isolate himself from the case and thereby subject himself to discharge. In this case, the district judge explained that, as a matter of course, he isolates law clerks from cases involving past or future employers. The obvious purpose of this procedure is to ensure that the appearance of partiality does not arise; as such, only a foolhardy law clerk would purposely circumvent the court's instruction by attempting to pass on information about a case.

Also see, for example, the opinion in *In Re Food Management Group, LLC* Case No. 04-22880, United States Bankruptcy Court, Eastern District of New York (Jan. 24, 2007, unreported, but available at http://www.nysb.uscourts.gov/opinions/mg/104370_923_opinion.pdf)

The court denied a recusal motion, stating:

“If a clerk has a possible conflict of interest, it is the clerk, not the judge who must be disqualified.” *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011, 1016 (11th Cir. 1986). Recusal of the Court has not been required where the law clerk is not working on the case. *Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486, 490 (2d Cir. 1986). Screening of a recused law clerk from involvement in the matter is sufficient whether the law clerk's recusal results from prior or future employment by the law clerk. *Byrne v. Nezhat*, 261 F.3d 1075, 1102 (11th Cir. 2001) (“Because precedent approves the isolation of a law clerk who has accepted future employment with counsel appearing before the court . . . it follows that isolating a law clerk should also be acceptable when the clerk's former employer appears before the court.”). Any argument that my other law clerk would be influenced by the knowledge that her co-clerk worked for one of the firms involved in this proceeding would be frivolous. *Bartel Dental Books Co.*, 786 F.2d at 490.”

³⁰ Neither the black-letter rule of Canon 3 (“A Judge Shall Perform The Duties Of Judicial Office Impartially And Diligently”) of the Model Code of Judicial Conduct or the comments to the Canon seem to expressly deal with law clerks in connection with recusal issue. On the other hand, the Federal Judicial Center has publications for law clerks that does deal with the topic of law clerks who seek employment outside the court system. See “Maintaining the Public Trust: Ethics for Judicial Law Clerks,” Federal Judicial Center (2002), and Sylvan A. Sobel, “Law Clerk Handbook: A Handbook for Law Clerks to

5. IS THERE AN UNDERLYING THEORY ON THE CONFLICTS RULES?

As the examples above demonstrate, there are two mutually inconsistent theories at work on the conflict rules. One is that knowledge of any lawyer in a firm infects all the other lawyers in the firm, thereby creating an unwaivable conflict of interest if two clients become adverse to one another in the same proceeding. Thus, no matter how physically and geographically separated a law firm's offices are, the imputed knowledge rule applies uniformly. Actual knowledge is simply irrelevant.

On the other hand, when lawyers move from firm to firm, or when a judge or law clerk leave government employment, the rules completely ignore imputation-of-knowledge principles and focus instead on whether the affected lawyer was actually involved in the matter previously, possesses substantial knowledge about the situation, or had obtained client confidences.

The multiple exceptions applicable to lawyers who move from firm to firm mean that the imputation-of-knowledge rule, while it may be appropriate as a matter of policy, is a tenuous fiction when one considers the fact that many law firms operate in silos, where sections may operate as almost independent fiefdoms (after all, how many major law firms really have lawyers who transfer between sections?), and where lawyers in different sections in geographically disbursed offices may have little if any knowledge of particular matters pending in another section of another office in another state.

Federal Judges," Federal Judicial Center (2007). The National Center for State Courts also maintains a web page with links to ethics guides for court employees.

See: <http://www.ncsconline.org/wc/courttopics/ResourceGuide.asp?topic=EthEmp>

The purpose of this paper is not to comment on the appropriateness of the imputation-of-knowledge policy, for the purpose is salutary — a client should be told if a law firm in which it has confided confidences is considering taking a position adverse to the client. That is why informed consent of the client, confirmed in writing, is required in waivable conflict situations.³¹

Rather, the purpose of this discussion is to note that there may come a time when the underlying theory of the imputation-of-knowledge rule may be subject to reexamination. If a client need not be notified at all when a lateral is hired from another firm — if the lateral can be “screened off” without the client’s knowledge or consent as long as the lateral had no significant knowledge or participation in the matter for the adverse party prior to being hired, even if the lateral’s former firm has been involved in a no-holds-barred scorched-earth litigation strategy for the adverse party — then there may come a time when the screening rules and imputation rules are re-examined to see if they might be subject to alteration in situations involving geographically disbursed offices.³²

6. ARE THE “RULES OF ETHICS” REALLY ETHICAL?

If two different theories apply to screening for conflicts — one which applies when there are two clients of the same firm, and one which applies when there are former

³¹ See the discussion at page 6 of this paper and the text of Model Rule 7 at footnote 5, above.

³² As a practical matter, in large law firms occupying multiple floors of skyscrapers in major metropolitan areas, lawyers on different floors of the same office may have as little contact with the lawyers three floors apart as do lawyers in the same firm but located in different states. Yet, as a practical matter, one may be able to more easily understand why the imputation-of-knowledge rules should be enforced among the lawyers in a single office in a single city as compared to the situation with lawyers in widely geographically disbursed offices. The issue here is analogous to those raised in the Comments to Example #3, above, involving Lawyer Q and the screening issue. While it may be difficult, as a practical matter, to ever convince a client that an effective “screen” can be erected (with the client’s consent) within a single office when two existing client interests are involved whose interests are adverse (assuming a valid waiver can be obtained). Screens are nonetheless permitted in certain instances *without* the client’s consent when a lateral is hired. See the discussion in Examples #5 and #6.

clients or when lawyers move among firms — one might ask whether the Model Rules are really one of “ethics” or are merely one of minimum standards that must take into account business realities (the need for lawyers to find employment) balanced against client confidences.

“Ethics” is the term that is commonly applied to lectures about the ABA’s Rules of Professional Responsibility and its predecessor, the Code of Professional Conduct. These 1983 Model Rules and the 2002 Ethics Model Rules, however, do not use the word “ethics” at all, other than in two portions of the Preamble and Scope. The Scope section indicates that the rules “simply provide a framework for the ethical practice of law.”³³ The Preamble admits that the “ethics” with which the rules supposedly deal must take into account a lawyer’s desire to earn “a satisfactory living.”³⁴

The changes over the years in the ABA’s approach to ethics is beyond the scope of this paper, other than to note the absence of the word “ethics” in today’s Model Rules as compared to the original ABA formulation from 1908, which was expressly called the “Canon of Ethics.” In fact, the 1908 ABA Canon of Ethics stated that the “future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be maintained unless the conduct and motives of the members of our profession are such as to merit the approval of all just men.”³⁵

³³ ABA Model Rule, Scope Section 16, provides in part: “The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.”

³⁴ Model Rule Preamble, Section 9 (emphasis supplied) states, in pertinent part: “In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person *while earning a satisfactory living.*” The full text of Section 9 is contained in footnote, 35 below.

³⁵ Contrast the language of the 1908 Canon, quote above, with the language of section 9 of the current Preamble to the Model Rules. Section 9 reads, in its entirety:

Some critics use the pejorative term “amoral technicians”³⁶ to describe lawyers, claiming that the Model Rules provide “a highly simplified moral universe which offers easy guideposts for action that allow lawyers to sidestep wrenching ethical dilemmas, and with the luxury of acting on behalf of clients free from the risk of moral censure.”³⁷ Another has commented that a lawyer “sees his more degrading activities as licensed by a fundamental amorality lying beneath conventional morality.”³⁸

It is beyond the scope of this article to deal with ethics as an abstract ideal; rather, as the previous Examples illustrate, when the Model Rules balance the desire of a lawyer to earn “a satisfactory living”³⁹ with other ethical considerations, one may wonder how firmly the ethical “framework”⁴⁰ of the Model Rules is constructed.

“[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”

³⁶See Richard Wasserstrom, “Lawyers as Professionals: Some Moral Issues,” 5 Hum. Rts. 1, 6 (1975). 1638. Also see Allan C. Hutchinson, “Legal Ethics for a Fragmented Society: Between Professional and Personal, in *The Civil Litigation Process: Cases And Materials*” 157 (Janet Walker gen. ed., 6th ed. 2005), using the phrase “amoral technician” and quoted by Trevor C.W. Farrow in “The Negotiator-As-Professional: Understanding The Competing Interests Of A Representative Negotiator,” 7 Pepperdine Dispute Resolution Journal 373 (2007) at footnote 64. Also cf. Stephen Pepper, “The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities,” 1986 Am. B. Found. Research J. 613, 614-615 (1986).

³⁷ Sharon Dolovich, “Ethical Lawyering and the Possibility of Integrity,” 70 Fordham L. Rev. 1629, 1638 (2002) (*citing* Deborah L. Rhode, *In The Interests Of Justice: Reforming The Legal Profession* 15 (Oxford University Press 2000)).

³⁸Nancy Lewis, “Lawyers' Liability To Third Parties: The Ideology Of Advocacy Reframed,” 66 Oregon Law Rev. 901 at 813 (1987), quoting William H. Simon, “The Ideology of Advocacy: Procedural Justice and Professional Ethics,” 1978 Wisconsin Law Review 29.

³⁹ Model Rule Preamble, Section 9, quoted in full in footnote, 35, above.

⁴⁰ ABA Model Rule, Scope Section 16, quoted at footnote 33, above.

Part of the reason for the imputation-of-knowledge rules is to protect client confidences, for clients have no way of knowing how broadly their confidential communications are dispersed within a firm. There appears to be, however, no single unified theory that appears to apply to conflicts. There is one set of rules (imputation-of-knowledge) that applies to clients within a law firm, and there is a second set that applies to former clients, to lawyers moving between law firms, and to judges, law clerks, and government employees seeking law firm employment; this second set looks at actual knowledge.

Whether there should be a single rule or whether two sets of rules should continue to co-exist is a policy decision. What can be anticipated, however, is that law firms will continue to grow. Right now, the smallest firms that are part of the national “Top 200” lists exceed 200 lawyers, with the biggest firms numbering in the thousands.⁴¹ Some have claimed to spot trends that seem to separate law firms that are between 200 to 500 lawyers from those that are larger than 500, with the larger ones growing ever more powerful and prosperous.⁴²

Lawyers and law firms are well aware that major clients need to be kept satisfied, and thus major clients not only are courted by firms but also are consulted about matters for which the Model Rules may not require consultation or formal waivers. The reason is obvious, for the loss of a major client can be devastating. As law firms get larger and larger, however, the impact of a single client on a firm’s bottom line may be diminished.

⁴¹ According to one report, there are 19 law firms with more than 1,000 partners. See: <http://www.ilrg.com/nlj250/>, last accessed 03/31/08.

⁴² See Leigh Jones, “Starting Pay at Top Firms Falls Farther Behind Partners”, The National Law Journal (Feb. 07), available at <http://www.law.com/jsp/llf/PubArticleFriendlyLLF.jsp?id=1170842572765>

In this environment, we should not be surprised if, at some point, a movement arises to add a series of rules or exceptions relating to the actual nature and knowledge of client confidences within law firms that have geographically disbursed offices so as to allow firms to create internal “screens” without prior client consent or knowledge.

Such a movement would have to deal with the need to protect actual client confidences, with the desire of the Bar to avoid rules that result in the appearance of impropriety, and with concerns about whether such rules would adversely impact unsophisticated clients.

This all comes back to the basic question: should the Model Rules be merely a “framework” for ethics to be balanced by the need of a lawyer to “earn a satisfactory living,” or should the Model Rules be something more? If the Model Rules are only a practical balancing test, however, then we should not be surprised if the public continues to believe that “legal ethics” is something different from “ethics” and something less than “ethical.”

7. SO, WHAT’S A LAWYER TO DO: NOSY LAWYER, NOISY WITHDRAWAL, OR NOISOME SILENCE?

ABA Model Rule 1.16 (“Declining or Terminating Representation”) suggests that a lawyer may withdraw from representing a client under certain circumstances, and the comments to ABA Model Rule 1.6 (“Confidentiality of Information”) indicate that the withdrawal can be “noisy” — that you can signal to the opposing side something more than the mere fact of withdrawal by some indication that puts the opposing side on notice to investigate further, such as a disavowal of work product.⁴³ ABA Formal Opinion 92-

⁴³For discussions of “noisy withdrawals,” see: C.R. Bowles, Jr., “Noisy Withdrawals: Urban Bankruptcy Legend of Invaluable Ethical Tool?” 20 Oct. Am. Bankr. Inst. J. 26 (2001); Daniel Pope and Helen Whatley Pope, “Ethics and Professionalism: Rule 1.6 and the Noisy Withdrawal,” 63 Def. Couns. J. 543 (1996); Michael R. Klein and Alan J. Otsfield, “Noisy Withdrawal,” 868 PLI/Corp. 529, Practising Law

366 attempted to illustrate the problem and provide a solution, but the ABA Committee's split 5-3 vote on the resolution did little to provide reassurance that the rules are clear.⁴⁴

What should you do if you want to make a noisy withdrawal and whom do you tell? Assuming that you won't get into trouble with the client (who may sue you for breaching a confidence), and assuming that you've got to say something, what do you say?

ABA Model Rule 1.16 allows a lawyer to withdraw if it can be accomplished without "material adverse effect on the interests of the client."⁴⁵ A noisy withdrawal, however, is clearly designed to alert somebody that something is afoot, so it can be anticipated that there will be an adverse effect on the client.

ABA Model Rule 1.16, however, also allows a withdrawal if the client is persisting "in a course of action involving the lawyer's services that the lawyer has reason to believe is criminal or fraudulent"⁴⁶ or if "the client has used the lawyer's

Institute Corporate Law and Practice Handbook Series, 26th Annual Institute on Securities Regulation, Nov. 1994.

⁴⁴Pope and Pope, *supra*, 63 Def. Counsel J. 543 at 544, contains this description:

"[The opinion concerned a hypothetical involving] a bank loan to a lawyer's client, which was based, in part, on an opinion letter given by the lawyer to the bank. The opinion letter was based on factual representations made by the president of the client to the lawyer. The president later confessed to his lawyer that his representations were false--and intentionally so. The president fired the lawyer, telling him in the process he intended to continue the fraud against the bank, he intended to conceal the misrepresentations from new counsel, and he intended to expand his company's loan with the bank.

In a 5-to-3 opinion, the committee held:

1. Under Rule 1.6, the lawyer is prohibited from disclosing the client's prior fraud or the client's intent to perpetuate a future fraud to anybody-- not the bank, not the client, not client's owners, not successor counsel.
2. Under Rules 1.2(d) and 1.16(a)(1), the lawyer must withdraw from any representation of the client.
3. Because in this case the mere withdrawal from the representation will not put the bank on notice that something is wrong, the lawyer also must advise the bank that the lawyer's previous opinion is withdrawn in order to comply with Rule 1.2(d).
4. The client's preemptive firing of its lawyer did not eliminate the lawyer's "noisy withdrawal" option under the comment to Rule 1.6.
5. But, if the client does not intend any future fraud, the lawyer cannot make a noisy withdrawal, cannot withdraw the opinion, or otherwise alert anyone to the previous fraud because of Rule 1.6.

The dissent in the opinion was largely with the third conclusion, on the ground that because the lawyer already had been discharged, there was no representation from which to make a noisy withdrawal."

⁴⁵ABA Model Rule 1.16(b)(1).

⁴⁶ABA Model Rule 1.16(b)(2).

services to perpetrate a crime or fraud”⁴⁷ or the client insists upon “taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,”⁴⁸ or when “other good cause of withdrawal exists.”⁴⁹ It is important to note, however, that the withdrawal under ABA Model Rule 1.16 is never mandatory; it is always discretionary.

Even the Model Rules, however, do not help much in what you may say. While on the one hand it indicates, in *comments* only, that you may “withdraw or disaffirm any opinion, document, affirmation, or the like,”⁵⁰ nothing in the black letter law permits this in the context of fraud or financial harm (remember, the proposal that would have permitted this was defeated by a 63% vote). Thus, while you can withdraw because of client fraud (ABA Model Rule 1.16), the Model Rules do not permit you to reveal any confidential information (ABA Model Rule 1.6). Moreover, the comments, but not the black letter of ABA Model Rule 1.6, indicate that whether “other law” requires disclosure prohibited by ABA Model Rule 1.6 is “beyond the scope of these Rules.”⁵¹ This is not much help in determining whether judicial decisions that allow nonclients to sue for fraud, negligent misrepresentation, or silence are “law” that can trump the duty of confidentiality.

⁴⁷ABA Model Rule 1.16(b)(3).

⁴⁸ABA Model Rule 1.16(b)(4).

⁴⁹ABA Model Rule 1.16(b)(7).

⁵⁰ABA Model Rule 1.6, Comment 14. This comment states:

“If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).”

⁵¹This language is found in ABA Model Rule 1.6, Comment 10, which reads:

“Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.”

Then, of course, there's the not-so-slight problem of insurance coverage. Will your malpractice insurer cover you if:

- your client sues you for revealing a confidence through a noisy withdrawal?
- a nonclient sues you for not engaging in a noisy withdrawal?

Thus, trying to do a noisy withdrawal in states that adopt the ABA Model Rules intact may be as difficult as Odysseus' task of steering between Scylla and Charybdis.⁵² No wonder that one commentator wrote, 16 years ago, the trouble with Rule 1.6 and the noisy withdrawal comment "is that some fools may not understand that Rule 1.6 does not mean what it seems to mean."⁵³

Only a few U.S. cases have used the term "noisy withdrawal,"⁵⁴ but none give lawyers an effective guidepost of what to do and how to act. One case laments the fact that because securities regulators had not promulgated a mandatory "noisy withdrawal" rule for securities lawyers, regulators and the public may have been misled.⁵⁵ Another merely noted that the lawyer had withdrawn in a criminal case, properly notifying the court that the withdrawal was being requested because of disagreements with the client.⁵⁶

⁵²As you recall, both were monsters of Greek legend between whom Odysseus had to steer in the Strait of Messina. Scylla, who ate several of Odysseus' seaman, had "the face and breast of a woman, but from her flanks grew six dog-heads and twelve dog-feet," and she had a serpentine tail. Charybdis, a daughter of Poseidon and Gaia, was turned into a monster by Zeus and lived in a cave opposite Scylla. [Quotation is translation from Apollodorus E7.20 21, as found at www.theoi.com/pontos/skylla.html.]

⁵³Geoffrey C. Hazard Jr., "Rectification of Client Fraud: Death and Revival of a Professional Norm," 33 Emory L.J. 271, 306 (1984), quoted by Pope and Pope, *supra*, 63 Def. Counsel J. at 543.

⁵⁴*See, e.g., In Re Teleglobe Communications*, 493 F.3d 345 (3rd Cir. 2007); *United States v. Chee*, 2007 WL 2288023 (D. Ariz. 8/9/07); *Securities and Exchange Commission v. Spiegel, Inc.*, 2003 WL 22176223 (D.C. N.D. IL. 9/15/03);

⁵⁵*Spiegel, Inc.*, see footnote 54 *supra*: "None of Spiegel's legal advisers withdrew-'noisily' or otherwise-from representing Spiegel. If the SEC's proposed withdrawal rule had then been in effect, the SEC would have been alerted to take action sooner, and investors would have received information they could have acted on to make informed investment decisions about Spiegel. In this case, the absence of a 'noisy withdrawal' requirement allowed Spiegel to keep investors and the SEC in the dark."

AUTHOR'S NOTE: It should be noted that most of the commentary about "noisy" withdrawals concern the proposed (but not adopted) SEC rule.

⁵⁶*Chee*; see footnote 54 *supra*. The court found that the lawyer had acted properly in the withdrawal as had other defense lawyers in the case. The trial court stated: ". I explained to Mr. Chee what I would have to do before I could allow him to represent himself and advised him that the problems he was having with his lawyers were his problems and not the lawyers' problems because 'this is now the third lawyer about whom you have said the same thing.'" *Id.*

While a Westlaw search reveals no other state or federal cases using the phrase “noisy withdrawal,”⁵⁷ in at least one case, *Scholes v. Stone, McGuire and Benjamin*, 786 F.Supp. 1385 (N.D. Ill.1992), a lawyer who withdrew from representation and informed some people, but not investors in a company, was unable to dismiss, at pleading stage, a claim by the investors that the lawyer should have engaged in a noisy withdrawal as to them.

While the facts are complex, in essence⁵⁸ Douglas (a lawyer) was engaged to assist a person being investigated for selling unregistered securities. Douglas found out not only that there were material misrepresentations and omissions in the offering materials, but also that her client was a convicted felon. Douglas prepared rescission materials for the offering that only indicated the securities were unregistered; they did not reference the prior misrepresentations or the fact that the offeror was a felon. All the investors rejected rescission. Further, Douglas also prepared an affidavit for the client that turned out to be false. Douglas knew the affidavit was being submitted to state officials investigating the stock transactions. When Douglas found out about problems with the affidavit, she notified some people, but not the plaintiffs. Further, while Douglas knew some things, at the same time the client was lying to her about a number of other matters.

⁵⁷ For some other cases on withdrawal during the course of litigation, see: *WSF v. Carter*, 35,581 (La.App. 2d Cir. 12/28/01), 803 So.2d 445, 448, withdrawal allowed when attorney found “certain criminal aspects” in his clients background – attorney not required to state details; *Jones v. Bhatt*, 50 Pa. D. & C. 544 (2001), attorney not allowed to withdraw where petition only asserted it would be in the client’s best interest; *Burke v. Cunha*, 2000 WL 1273397 (Mass. Super. 2000), withdrawal proper when attorney realized “the superficiality of his client’s claim”; *Lawyer Disciplinary Board v. Faber*, 488 S.E. 2d 460, 463 (W.V. 1997), lawyer suspended from practice for, among other things, in filing a motion to withdraw in which he went beyond mere allegations of reasons and gave an affidavit that his client “had engaged in a ‘flat-out-lie’” and revealed confidential information.

⁵⁸ For the purposes of this paper, the distinction between the two law firms involved here has not been kept sacrosanct, for the purpose of the discussion is to provide an illustration of potential allegations that might be made rather than an attempt to carefully parse the decision. Since the case was only at the pleading stage, no aspersions are intended (or should be implied) against the lawyers or the firms involved.

Douglas ended up advising the client that, because of his criminal problems, the client could not be associated with the entity and to “distance himself”⁵⁹ from it. Douglas recommended a second law firm (“SMB”) to assist in criminal defense matters for the client. The plaintiffs also contended (although SMB denied it), that SMB was asked to also assist in corporate and securities matters. There were allegations in the complaint that SMB assisted Douglas in preparing the rescission documents that omitted reference to both the client’s prior criminal history and the material misrepresentations in the offering materials.

Eventually, a new entity was formed and some of the lawyers’ other clients ended up as officers. When Douglas and her firm finally withdrew from representation, after finding out about further client deceit, they informed the independent officers to “disassociate themselves”⁶⁰ from the former client, but did not notify investors or regulators.

Douglas, her firm, and the second firm (SMB) were all sued by investors in the various entities. In refusing to dismiss the claims, the court noted:

- The law firm was not being sued for failing to “ ‘tattle’ on its client to third parties” but rather for being “an active participant in a fraudulent scheme.”⁶¹

Note that the allegations of the complaint were controlling here, given the procedural posture of the case. Apparently, if, as a factual matter, it was merely a question of refusing to “tattle,” the court would not have found a cause of action.

⁵⁹ *Scholes*, 786 F. Supp. at 1392.

⁶⁰ *Id.*

⁶¹ 786 F. Supp. at 1395.

- The court concludes that the investors had alleged enough facts “to establish an attorney–client relationship”⁶² and thus could state a claim for both malpractice and breach of fiduciary duty.

Again, note that the allegations of the complaint of an attorney-client relationship kept the case alive, even though apparently the law firm thought it was representing the organizer and the entities, not the passive investors.

- Even if there was no attorney-client relationship with the investors, nonetheless there was a relationship that mandated disclosure to investors of the fraud – this, in essence, is the noisy withdrawal assertion: “. . . SMB as lawyers for the . . . entities owed a duty to the plaintiff investors to disclose [the client’s] fraudulent conduct with respect to the . . . entities. As there was no express contract between SMB and the plaintiff investors, it logically follows that the duty was extracontractual.”⁶³ This relationship also allowed a claim of breach of fiduciary duty to be brought.
- The fact that the misrepresentations were made not by the lawyers but by the clients did not prevent the suit from going forward. While the lawyer corrected some things in some transmittals to some people, there was no notice to the investors, and regardless of whether the statements to the investors came from the client or from documents that the lawyers had a hand in drafting for the client to send, the lawyers “had a duty to inform.”⁶⁴
- The fact that no reliance was alleged by the plaintiffs was not a bar to the suit going forward, for given that there were allegations the law firm

⁶² 786 F. Supp. at 1396.

⁶³ 786 F. Supp. at 1398.

⁶⁴ 786 F. Supp. at 1400.

had “omitted material facts and that they had participated in the fraud * * *it is unnecessary to allege reliance by the class plaintiffs.”⁶⁵

○ SMB’s motion for sanctions against the plaintiffs, on the grounds that SMB was only criminal counsel for the individual client and did not represent the entities, was denied, for the allegations ‘are not so baseless, specious, or off the mark as to warrant the imposition of sanctions * * * [P]laintiffs have raised issues which relate to the very fluid and evolving areas of the law. Plaintiffs’ complaint is not so tenuous as to warrant the imposition of sanctions.”⁶⁶

As can be seen, broad ranging allegations in *Scholes* were enough to keep a lawyer and two separate law firms in a case where investors made claims against those representing a business and its organizer.

8. A SERIES OF HYPOTHETICALS

1. YOUR LONG-TIME CLIENT BRINGS TWO OTHER PEOPLE TO YOUR OFFICE TO FORM AN ENTITY TO DO A REAL ESTATE DEAL. YOU’RE GOING TO DO THE DEAL. IT’S A BIG ONE.

a. MAY YOU FORM THE ENTITY? MAY YOU REPRESENT THEM ALL AS OWNERS

*COMMENT: With the proper waivers, you may be able to represent them all as long as their interests are not directly adverse. See Rule 1.7.*⁶⁷

⁶⁵ 786 F. Supp. at 1401.

⁶⁶ 786 F. Supp. at 1402.

⁶⁷ (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

The problem is, how do get a “knowledgeable” waiver, and can you identify all the conflicts that might exist.

How “informed” is the consent?⁶⁸

b. WILL A SINGLE WAIVER LETTER SUFFICE?

COMMENT: The letter may have to be very long and very complete and go through all the possibilities of problems so that, if challenged later, a third party (or tribunal or court or jury) can see that the consent was knowledgeable and informed.

Things that might be included:

-
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

⁶⁸ Rule 1.0(E): e) "Informed consent" denotes 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.

ABA COMMENT: Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

- *Conflicts between those putting up more money than others or those with more ownership interest than others;*
- *State laws that may limit rights of those with less than a certain percentage ownership;*
- *“Squeeze-out” rules and how they might apply to minority shareholders*
- *Buy-back provisions that may appear fair on the face but which in fact favor one party over another (“golden handcuffs”)*
- *Article or buy-law rules that may favor one party over another (“golden parachutes”)*
- *What indemnity provisions mean for officers and directors and shareholders who are neither officers or directors*
- *Confidentiality issues*
- *Right of each to retain separate counsel*

c. AND, IF SO, CAN YOU KEEP “CONFIDENTIAL” WHAT ONE MEMBER OF THE GROUP TELLS YOU ABOUT OTHERS?

Probably not. That’s why it should be dealt with in the waiver letter.

ANOTHER PROBLEM WITH “CONFIDENTIALITY” – your letter may need to disclose that there are instances where you may be able to (or required to, depending on the state) breach a confidence. This is Rule 1.6,⁶⁹ but the provisions of 1.6 are NOT consistent in every state – some states do not have all the ABA Model Rule exceptions allowing confidentiality to be breached.

⁶⁹ ABA RULE 1.6:

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information

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

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

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

See ABA COMMENT TO RULE 1.6

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a

wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

d. CAN YOUR WAIVER LETTER VALIDLY WAIVE FUTURE CONFLICTS AND LET YOU REPRESENT YOUR LONG-TIME CLIENT IF A CONFLICT DEVELOPS?

*COMMENT: Waiver of future conflicts is theoretically possible, but that may depend on how complete your initial disclosure of conflicts and the detailed the waiver letter was. Rule 1.7 does not deal directly with future waivers, but the Comments to Rule 1.7 do.*⁷⁰

Some state bars do allow future waivers, within strict limitations.

See, for example, D.C. Bar Opinion 309 (2001):

Conclusions

Thus the modern view—held by the courts, the American Bar Association, local bar associations and the American Law Institute—is that advance waivers of conflicts of interest are permissible, within certain limits and subject to certain client protections. We conclude that the D.C. Rules are consistent with that view and that they permit advance waivers under Rules 1.7 and 1.9. See *United Sewerage Agency*, 646 F.2d at 1349-50. “Clients who are fully advised should be able to make choices of this kind if they wish to do so.” *Id.* at 1350.

Such waivers, however, are permissible only if the prerequisites of the D.C. Rules—namely “full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation”—are satisfied. See D.C. Rule 1.7(c). As noted above, the client must have “information reasonably sufficient to permit the client to appreciate the significance of the matter in question,” D.C. Rules, Terminology, ¶ [3], and to allow the client to make “a fully informed decision” with awareness “of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation.” D.C. Rule 1.7, comment [19]; see *In re James*, 452 A.2d at 167 (requiring “detailed explanation of the risks and disadvantages to the client”). Ordinarily this will require that either (1) the consent is specific as to types of potentially adverse representations and types of adverse clients (e.g., a bank client for whom the lawyer performs corporate work waives the lawyer’s representation of borrowers in mortgage loan transactions with that bank) or (2) the waiving client has available in-house or other current counsel independent of the lawyer soliciting the waiver.

⁷⁰ Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Further, the lawyer must make full disclosure of facts of which she is aware, and hence cannot seek a general waiver where she knows of a specific impending adversity unless that specific instance also is disclosed. See D.C. Rule 1.7, comment [19]; *City of El Paso v. Salas-Porras*, 6 F. Supp. 2d 616, 625-26 (W.D. Tex. 1998). A corollary of this rule is that if the lawyer cannot disclose the adversity to one client because of her duty to maintain the confidentiality of another party's information, the lawyer cannot seek a waiver and hence may not accept the second representation. D.C. Rule 1.7, comment [19] ("If a lawyer's obligation to one or another client or to others or some other consideration precludes making . . . full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue").

A conflict arising from the lawyer's appearance on both sides of the same matter is, as noted above, nonwaivable. D.C. Rule 1.7(a) & comment [1]. Because of the greatly increased potential for misuse of client confidences—inadvertently or otherwise—advance waivers should exclude from their coverage not only the same matter but also any substantially related matter. See *Painter*, at 321. For this reason, advance waivers ordinarily will not come into play in former-client situations under Rule 1.9 because disqualification under that rule extends only to matters that are the same as, or substantially related to, the initial matter.

Further, although the D.C. Rules do not require that waivers be in writing, D.C. Rule 1.7, comment [20], we join the ABA Committee on Ethics and Professional Responsibility in recommending that—for the protection of lawyers as well as clients—advance waivers be written. See *ABA Opinion* at 173. We note in this connection that the ABA Ethics 2000 Commission has proposed that the Model Rules require all waivers to be written. *Ethics 2000 Report*, prop. Model Rule 1.7(b)(4) & prop. comment [20].

Finally, any decision to act on the basis of an advance waiver should be informed by the lawyer's reasoned judgment. For example, a prudent lawyer ordinarily will not rely upon an advance waiver where the adversity will involve allegations of fraud against the other client or is a litigation in which the existence or fundamental health of the other client is at stake.

In accordance with the foregoing, a client not independently represented by counsel (including in-house counsel) generally may waive conflicts of interest only where specific types of potentially adverse representations or specific types of adverse clients are identified in the waiver correspondence. A client that is independently represented by counsel generally may agree to waive such conflicts even where the specificity requirements set out in the preceding sentence are not satisfied.

2. YOUR LONG-TIME CLIENT BRINGS HER PARENTS TO THE OFFICE; SHE WANTS YOU TO HELP THEM ON A RETIREMENT INVESTMENT IN REAL ESTATE. YOUR LONG-TIME CLIENT WILL PAY YOUR LEGAL FEES AND DIRECT YOUR WORK.

e. ANY PROBLEMS WITH THIS ARRANGEMENT?

COMMENT: Now you have three waivers to get - - one from each parent, acknowledging potential internal conflicts between them, and one from your long-time client about conflicts with her parents.

Besides, can you really let your client “direct your work” for the parents?

Must you meet separately with each parent to make sure the consent of each is really informed?

3. A NEW CLIENT COMES TO YOU TO GET TO GET NEW ZONING ON THE PROPERTY. YOUR BANKING CLIENT HAS MADE A LOAN THAT YOU NEGOTIATED FOR THE BANK ON A PROPERTY DOWN THE STREET; THAT PROPERTY MAY BE IMPACTED.

f. DO YOU HAVE A CONFLICT?

COMMENT:

Did you have a “future” conflict waiver when you represented the Bank? How broad was that letter?

Is the Bank a current client or a former client? That makes a difference – separate rules for Former Clients under 1.9.⁷¹ Are the matters “substantially” related?

Does it matter if the impact on the property is adverse or positive?

⁷¹ RULE 1.9:

Client-Lawyer Relationship

Rule 1.9 Duties To Former Clients

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

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

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

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

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

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

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

If the Bank is a current client, (a) does it matter if the conflict is actual or not - - will the bank use you next time if you adversely impact the collateral for the loan? (b) is your work on zoning “directly adverse” under Rule 1.7, and, if so, can any effective waiver be obtained?

g. MUST YOU GET A WAIVER? FROM WHOM?

ANSWER: if you have to get a waiver, you have to get it from everyone (whether under 1.7 or 1.9) and it has to be informed consent.

4. YOU DISCOVER, DURING A DEAL, THAT THERE IS A PROBLEM YOU’D LIKE TO DISCLOSE TO THE OTHER SIDE AS A MATTER OF ETHICS (ALTHOUGH NOT REQUIRED BY ANY STATUTE OR REGULATION); YOUR CLIENT DOESN’T WANT YOU TO MAKE ANY DISCLOSURE.

QUERY: What kind of problem might this be?

- (A) The client representative “puffed” in the negotiations, but it was not fraud?*
- (B) Your client has not revealed something to the other side that it would consider pertinent, but which is not required by law to be disclosed – like property where the buyer takes it “as is” without any warranties of any sort?*
- (C) Your client has not committed a crime or fraud (Rule 1.6) but the other side does not realize that the structure of the deal will have severe adverse tax consequences to it; your client could use this structure or another with no real impact - - but your client likes the idea of structuring the deal this way because your client wants to “put the hurt” on the other side. Besides, is hard, nasty bargaining against the Rules of Professional Conduct (even though it might be considered by some a violation of “codes of civility” or concepts of “professionalism”)?*

h. DO YOU HAVE A PERSONAL CONFLICT?

Does your sense of morality have any role in this if your client is not breaking the law? Why or why not?:

The Comments to Rule 1.16 seem to allow you to withdraw if your client acts in ways you deem “repugnant”⁷²

⁷² COMMENT TO RULE 1.16:

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. *The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.*

i. WHAT DO YOU DO?

Withdrawal is your only option (Rule 1.16⁷³), but it must be done in a way that protects the client. Watch out, however, because Rule 1.16 is not the same in every state.

j. DOES IT MATTER HOW SERIOUS THE PROBLEM IS?

IF IT IS SERIOUS ENOUGH TO FOR YOU TO DISCLOSE THE CONFIDENCE UNDER RULE 1.6, YOU STILL HAVE TO TRY TO GET THE CLIENT TO CHANGE ITS MIND BY GOING TO THOSE WITH THE HIGHEST AUTHORITY IN THE COMPANY. SEE RULE 1.13.⁷⁴

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

⁷³ ABA RULE 1.16:

Client-Lawyer Relationship

Rule 1.16 Declining Or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

⁷⁴ ABA RULE 1.13:

Client-Lawyer Relationship

5. YOU'RE DOING A DEAL AND YOU FIND THAT THE KEY PERSONNEL WHO RUN THE COMPANY ON THE OTHER SIDE OF THE TABLE PREVIOUSLY HAD BEEN THE PRESIDENT AND V.P. OF A NOW-BANKRUPT COMPANY YOU HAD FORMERLY REPRESENTED. WHEN THEY FIND OUT YOU'RE INVOLVED, THEY INSIST YOU DISQUALIFY YOURSELF.

k. WHAT DO YOU DO?

We're back to the waiver issue, but this time involving a former "client" (Rule 1.9) – or are the key personnel really the former "client"?

Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

- Did you represent the key personally individually or just the company?
- Did you make it clear when you dealt with them previously you did not represent their personal interest?
- Are the matters substantially related.
- Was there a waiver letter? What did it say.

What does your current client want you to do?

- Did you reveal the former representation to the current client and get a waiver?
- Do you need to get a waiver now? Will it protect you if the key personnel do not give you a waiver?

6. YOU'RE LOOKING TO HIRE AN EXPERIENCED LATERAL WHO SOMETIMES HAS BEEN ON THE OTHER SIDE OF THE TABLE FROM YOU ON DEALS.

I. WHAT KIND OF CONFLICTS CLEARANCE DO YOU NEED TO GET?

Now we have two issues.

- *Who were the "former" clients of the lateral which the lateral is leaving behind. Rule 1.9 controls that.*
- *Who are your current clients who were on the other side of the table from the lateral? Do you need to get their consent? That's Rule 1.7.*
- *Can you ask the potential lateral for a list of clients?*
 - *Will this cause the potential lateral to breach any confidences just by giving you the names?*
 - *What if the deals that the lateral currently is handling are confidential (her clients are trying to buy property low from X and flip it for a high price to Y (your client)), but the deal hasn't gotten to the lawyer stage yet for Y, which is why you don't know about it, and if this were known, it would kill the deal).*

Can any of this truly be covered by a "future conflicts" waiver – can a future conflicts waiver effectively apply to new lateral hires?

m. CAN YOU "SCREEN" THAT PERSON OFF IF THEY WORK IN ANOTHER OFFICE OF YOUR FIRM?

"Screens" without client consent are not currently permitted under the Model Rules except for the situation of former judges, law clerks, and government employees.

Rule 1.0 defines "screened"

k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

COMMENT TO RULE 1.0:

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10,⁷⁵ 1.11 {Govt. employee}, 1.12 {former judge or arbitrator} 1.18 {prospective client}.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel

⁷⁵ RULE 1.10:

Client-Lawyer Relationship

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

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

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

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

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

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

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

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

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

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

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

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

and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

7. [THE “EXTRA HYPO” IN CASE WE NEED EXTRA TIME.] YOU ARE ON YOUR WAY TO A LEGAL CONFERENCE AND ARE SITTING IN A HUB AIRPORT BETWEEN FLIGHTS. YOU ARE NOT LICENSED TO PRACTICE LAW IN THE STATE WHERE THE HUB AIRPORT IS LOCATED. WHILE SITTING IN THE HUB AIRPORT BETWEEN FLIGHTS, YOU CHECK YOUR BLACKBERRY OR I-PAD AND FIND THAT THERE’S AN EMAIL FROM A POTENTIAL NEW CLIENT.

- **CAN YOU OPEN THE EMAIL? IF YOU OPEN IT, CAN YOU RESPOND?**

[ANSWER: See Rules 5.5 and 8.5]

- **If you respond, what can you say? Can you give legal advice in the email?**

[ANSWER: See Rules 5.5 and 8.5]

[End]