

# Legal Profession

MF Chapter 11

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## M&F3rd, Chapter 11

Conflicts of Interest: Former, Prospective, Imputed, and Government Clients

### Model Rule 1.9

Duties to Former Clients

#### Model Rule 1.9(a)

looks at the individual lawyer

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.

That's one long complicated sentence best explained by an example illustrating its terms.

Two years ago, Larry Lawyer "formerly represented" Lisa Landlord by drafting a lease for Lisa that she could have her tenants sign when renting apartments from her.

Now, "another person," Tanya Tenant, who rents an apartment from Lisa Landlord, comes to see Larry Lawyer. Tanya wants Larry Lawyer to help break the lease she signed; it's the same lease Larry Lawyer wrote for Lisa Landlord two years ago.

In the language of Model Rule 1.9(a), Tanya Tenant's interests are "materially adverse" to Lisa Landlord (Larry's former client) in the "same or substantially related matter" (the lease that Larry wrote for Lisa Landlord).

Larry Lawyer cannot represent Tanya Tenant and help Tanya break her lease, *unless* Lisa Landlord, "the former client," gives "informed consent confirmed in writing."

**same or substantially related matter**

Model Rule 1.9, Comment [3] explains:

Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute . . .

As in the example above, it’s pretty easy to spot the same transaction or same legal dispute. If Larry Lawyer helps Tanya Tenant out of the lease he wrote for Lisa Landlord, Larry would be undoing the same or substantially related work Lisa paid him to do two years ago.

### **confidential factual information**

But Model Rule 1.9, Comment [3] goes on to describe another category of “same or substantially related matters”:

or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.

Another example helps. Larry Lawyer “formerly represented” Carl Client by doing Carl’s taxes three years ago. Carl is not a current client under Model Rule 1.7, he is a *former client* under Model Rule 1.9.

Now “another person,” Carl Client’s wife, Caty Client, calls Larry Lawyer and wants to hire him to help her obtain a divorce from Carl Client, Larry’s former client.

Using the terminology of Model Rule 1.9, Larry may not represent another person (Caty Client) in the *same or a substantially related matter* in which Caty Client’s interests are materially adverse to the interests of Larry’s former client, Carl.

It’s a divorce, so Caty’s interests are adverse, but is Caty Client’s divorce from Carl *the same or substantially related* to the tax work Larry Lawyer did for Carl Client three years ago?

Tax law is only indirectly related to family law, and filing Carl’s taxes is only indirectly related to the divorce Caty Client wants Larry Lawyer to work on. But because Larry Lawyer did Carl’s tax work, Larry knows a lot about Carl’s finances and assets and other “confidential factual information” that might advance Caty Client’s interests in divorce litigation against Carl Client. So Model Rule 1.9 says the risk of a conflict is too great and prohibits the representation, unless Carl consents.

What kind of confidential factual information? The kind that would materially advance the prospective client’s position in the subsequent matter.

The comments provide other examples:

a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations;

however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

## Organizations

Model Rule 1.9, Comment [3]:

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

## Does “matter” refer only to litigation?

Clearly no. Both the Model Rule and the comments say as much.

If Larry Lawyer helps four doctors form a partnership, he can't later help a third party or one of the four doctors undo that partnership.

If Audrey Attorney drafts a will, she can't later represent a third-party beneficiary in a will contest, even if it's 20 years later.

## Model Rule 1.9(b)

looks at lawyer's former law firm

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.

Model Rule 1.9(b) is still concerned about former client conflicts, but now the emphasis shifts to lawyers leaving firms and moving to other firms, where they may

be asked to represent new clients “whose interests are materially adverse” to clients of their former firm.

It is easy to imagine how Model Rule 1.9 (former client conflicts) combined with Model Rule 1.10 (the imputation rule) could combine to disqualify giant firms from representing any clients with interests adverse to any client represented by any law firm, where any of the lawyers used to work.

Instead, as Model Rule 1.9, Comment [5] explains,

Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has *actual knowledge* of information protected by Rules 1.6 (confidentiality) and 1.9(c)(using or revealing confidential information).

No *actual knowledge*, no conflict:

Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

## Model Rule 1.9(c)

### Duties To Former Clients

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.

Plain English: Formerly represented clients shall be treated like current clients when it comes to using or revealing information.

This is the eternal commandment: The lawyer agrees to keep her mouth shut about the client’s business and personal affairs. Past, present and prospective clients all included.

So even former clients are *entitled* to be treated like current clients when it comes to using or revealing client information. Courts will not allow the lawyer to take

arms against a former client and use information gleaned from the prior representation as ammo for attacking the client in another matter.

The Restatement of the Law Governing lawyers describes the same duties using slightly different language:

### **RLGL 3rd § 132.**

#### **A Representation Adverse to the Interests of a Former Client**

Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in § 122, a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of the former client are materially adverse.

The current matter is substantially related to the earlier matter if:

1. the current matter involves the work the lawyer performed for the former client; *or*
2. there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the former client, unless that information has become generally known.

### **Model Rule 1.10**

the imputation rule

Recall that under the Model Rules when one lawyer has a conflict, all lawyers in the lawyer's firm usually also have the same conflict.

This is called the imputation rule. The individual lawyer's conflict is *imputed* to the entire firm, even if it is a gigantic international law firm with 900 lawyers spread all over the world. One lawyer with a conflict becomes the lawyer-equivalent of Typhoid Mary and infects any firm she joins with a systemic conflict of interest.

Lawyers have always chafed at the notion that the entire firm must turn away a desirable client just because one lawyer in the firm has a conflict. Or think of the law firm that can't hire a desirable lawyer because her clients will cause too many conflicts with current clients of the firm.

After decades of arguments pro and con, in 2009, the ABA amended Model Rule 1.10 to allow for screening of lateral hires to alleviate conflicts of interest caused by lawyers changing jobs and by the operation of Model Rule 1.9. New Model Rule

1.10 describes exceptions to the Rule and a mechanism (screening) to alleviate the harshness of imputation.

But Model Rule 1.10(a)(2)'s screening provisions are new. Less than half of current jurisdictions permit screening to avoid imputation for lawyers in private practice. The majority of states have *not* adopted the ABA's screening provisions.

Proceed with care. A lawyer moving from one jurisdiction to another should read the jurisdiction's version of Model Rules 1.6 and 1.10 and determine what information may be shared with prospective employers about current or former representation of clients.

### **Model Rule 1.10(a)**

looks at disqualified lawyer's new firm

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 (general conflicts rule) or 1.9 (duties to former clients),

*unless*

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

### **Prohibition based on personal interest**

If only one lawyer has a conflict, and that conflict is based on the personal interests of that lawyer only, why penalize the entire firm? An ethical rule should not preclude a firm from representing companies in the fur industry just because one associate feels strongly about animal rights. On the other hand, if a senior partner has strongly-held views and has promoted associates who parrot her views, and punished those who dare to disagree, then her interests might be enough to justify imputation. The usual: It depends.

### **"Screening" to avoid imputation**

Model Rule 1.10 also allows screening to avoid imputation when lawyers have moved from one firm to another.

The provision allows screening to avoid former client conflicts, but only those caused by “the disqualified lawyer’s association with a prior firm, and even then” screening” comes with rigorous specific requirements.

The representation will be permitted if:

- (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.

So a lawyer with a conflict caused by his association with a prior firm, may be screened by his new firm, but only if:

- The screened lawyer gets no fee or profits from the representation;
- Written notice is given to affected clients, including:
  - a description of the screening procedures;
  - a statement of the firm’s compliance;
  - an agreement to respond inquiries.
- Lawyer and firm provide certifications of compliance with the screening procedures.

### **Nebraska Rule of Professional Conduct § 3-501.10**

Imputation of conflicts of interest; Nebraska’s 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
  - (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.

Notice that the word “screening” appears nowhere in Nebraska’s version of Model Rule 1.10. That doesn’t mean there’s no such thing as screening in Nebraska. Other Rules have their own separate screening provisions, like Model Rule 1.18 (Prospective Clients), which allows the screening of a lawyer who may know too much because of her prior consultation with a prospective client. Screening of former government lawyers who join private law firms is routine. What Nebraska has not yet accepted is the notion that lawyers should be able to screen other lawyers to avoid being conflicted out of representing clients of the lawyers former firm.

This remains controversial, because it lets lawyers instead of clients decide who gets screened and who doesn’t.

### **Model Rule 1.10(b)**

looks at the disqualified lawyer’s former firm

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.

For example. Leona Lawyer stops working for Dewey, Cheatum & Howe LLC (DC&H) where she represented and advised Caleb Client about running his small business. She gets a job instead at Bickers & Bickers, a divorce firm.

What happens back at Leona's former firm, DC&H? The firm no longer represents Caleb.

May DC&H represent Harry Hothead who wants to sue Caleb Client for defamation arising out of a particularly heated Twitter rant?

Probably. The defamation via Twitter is not *the same or substantially related* to the small business advice Leona Lawyer provided for Caleb back when she worked at DC&H. If the lawyers remaining at DC&H have no information protected by Rules 1.6 and 1.9(c) that is material to the defamation litigation, then DC&H may proceed with the representation of Harry Hothead.

### **Model Rule 1.10(c)**

Even if lawyers are unable to screen their way around a conflict, they may avoid disqualification under the Rule by obtaining a waiver from the affected clients obtained with the client's informed consent confirmed in writing.

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

## **Model Rule 1.11**

### **Special Conflicts Of Interest**

Model Rule 1.11 deals with "special conflicts" arising out of a lawyer's conflicting roles in moving between private practice and government service.

### **Model Rule 1.11(a)**

For *former* government lawyers, now in private practice.

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.

For example, former Attorney General of the United States, Loretta Lynch is “a lawyer who has formerly served as a public officer or employee of the government.”

Under Model Rule 1.11(a)(1), if Ms. Lynch goes into private practice after serving as top prosecutor under President Barrack Obama, she is subject to Model Rule 1.9(c), which means she may not *use* information relating to her representation to the *disadvantage* of her former client (the United States government), nor may she *reveal* information relating to her prior representation, *except as these Rules would permit or require*, meaning the usual confidentiality exceptions and ethical obligations apply.

Any former client, even the federal government, is treated like a current client when it comes to *using* or *revealing* information under the Model Rules.

Using the same hypothetical to illustrate subparagraph (2), while Attorney General of the United States, Ms. Lynch charged Dylan Roof, the shooter in the Charleston church shooting, with a hate crime under federal law and sought the death penalty for Roof. Using the terms from Model Rule 1.11(a), Ms. Lynch “personally and substantially participated” in the prosecution of Dylan Roof. Ms. Lynch may not, later, as a private lawyer, represent Dylan Roof or his family or anyone else “in connection with” the Charleston church shooting, because she “participated personally and substantially as a public officer or employee, *unless* the appropriate government agency” (the Department of Justice in this case) “gives its informed consent, confirmed in writing, to the representation.”

### **Model Rule 1.11(b)**

Also for *former* government lawyers, now in private practice.

- (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.

If after leaving government service, former Attorney General of the United States, Loretta Lynch, joined the firm of Lawyer, Lawyer & Lawyer, LLC, no lawyer in Ms. Lynch’s new firm may represent anyone in connection with the Charleston church shooting *unless*:

- (1) Ms. Lynch is timely screened from any participation in the matter and gets no part of the fee earned from that case; and
- (2) written notice is promptly given to the appropriate government agency (the Department of Justice) so it can ascertain compliance with the rule.

### **Model Rule 1.11(c)**

Also for *former* government lawyers, now in private practice.

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.

Stretching the Loretta Lynch hypothetical to its limits, if in the course of prosecuting Dylan Roof in the Charleston church shooting case, Loretta Lynch learned that a member of Roof’s family committed various unrelated torts against Patty Plaintiff in Charleston, Ms. Lynch may not represent Patty Plaintiff in her suit against the Roof family member. Patty Plaintiff’s “interests are adverse to that person” (the member of Roof’s family about whom she acquired confidential government information) and the information could be used against the Roof family member.

### **Model Rule 1.9 vs. Model Rule 1.11**

same or substantially related vs. personally and substantially

On what matters may a former government lawyer work after leaving the agency?

Model Rule 1.11 (special government conflicts) does not use the “same or substantially related matter” standard described in Model Rule 1.9 (former client

conflicts). Instead the Model Rule 1.11 standard is looser and more government-lawyer-friendly, it asks whether the government lawyer “personally and substantially participated in the matter.

#### **Model Rule 1.11, Comment 4**

Model Rule 1.11 balances interests of former clients against society’s interest in having qualified lawyers provide public service without forever tarring them with conflicts just because they once worked for the government.

Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

#### **Model Rule 1.11(d)**

For *current* government officers and employees, formerly in private practice

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

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

Imagine, by some miracle, the Department of Justice hires Saul Goodman of *Better Call Saul* and *Breaking Bad* fame to prosecute meth dealers as a member of a new DOJ task force. Saul can’t prosecute Walter White the meth dealer, because

prosecutor Saul may not “participate in a matter in which the lawyer participated personally and substantially while in private practice,” unless the appropriate government agency (the Department of Justice) gives its informed consent, confirmed in writing.

#### **Model Rule 1.11(e)**

- (e) As used in this Rule, the term “matter” includes:
  - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
  - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

#### **Model Rules, Scope & Preamble**

##### **Comment [18]**

Under various legal provisions . . . the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.

For example, a lawyer . . . may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment . . . .

These Rules do not abrogate any such authority.

#### **Other Rules**

Could a Department of Justice Employee who worked on an environmental matter write a pro bono amicus brief on behalf of a private client in the same case after leaving the government?

Yes with consent under Model Rule 1.11, but then there’s this statute:

##### **18 USC section 207**

- (a) Restrictions on All Officers and Employees of the Executive Branch and Certain Other Agencies.—

(1) Permanent restrictions on representation on particular matters.

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

- (A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,
- (B) in which the person participated personally and substantially as such officer or employee, and
- (C) which involved a specific party or specific parties at the time of such participation,

shall be punished as provided in section 216 of this title.

Under the terms of this statute a Department of Justice Employee who worked on an environmental matter is prohibited from writing a pro bono amicus brief on behalf of a private client in the same case after leaving the government.

All of which goes to show, as always, that other laws and rules may apply.

## **Model Rule 1.18**

### **Duties To Prospective Clients**

#### **Model Rule 1.18(a)**

A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

If Colleen Client consults Adam Attorney about representing her in a will contest against the estate of her former husband, Harry Client, Colleen is a prospective client under Model Rule 1.18.

### What is consultation?

Old Model Rule 1.18(a) spoke of a person “who discusses with a lawyer the possibility of forming a client-lawyer relationship,” which might make it sound like the consultation must happen in person or over the phone.

New Model Rule 1.18(a) clearly speaks of “a person who *consults* with a lawyer about the possibility of forming a client-lawyer relationship . . .”

These minor changes occur throughout, where the 20/20 Commission has done is touch-ups here and there changing antique references to letters or documents to “communications” or “electronic communications.”

### Model Rule 1.18, Comment [2]

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances.

For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response . . . .

### Gray Areas

If the lawyer’s website says:

Contact Dooling & Dooling LLC if you took Miraclex and now you have heart problems. Our experts will analyze your medical records and determine if you have a cause of action against the maker of Miraclex.

Is that solicitation or consultation? Is that inviting the prospective client to submit documentation? Probably not, but it skirts awfully close. Better to have mechanisms in place to prevent casual surfers to the lawyer’s website from sending unrequested information in the first place, without adequately warning them.

Bearing in mind that disciplinary counsel and state supreme courts look at this from the reasonable client’s perspective, not the reasonable lawyer’s perspective.

Tricky, because if the submission of information constitutes “a consultation,” then it triggers duties under Model Rule 1.18.



However, the same Comment [2] specifies that:

In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest.

Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

#### **Model Rule 1.18(b)**

- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

After confiding lots of confidential information during her consultation with Adam Attorney, Colleen Client decides not to hire him and hires another lawyer.

Even though Colleen Client and Adam Attorney never formed an attorney-client relationship, Adam may not use or reveal information gleaned from consulting the prospective client.

Not only that, Adam may also be unable to represent Harry Husband's estate.

#### **Model Rule 1.18(c)**

- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

After Colleen Client runs off and gets different lawyers to represent her, Harry Client's children call Adam Attorney and ask him to defend Harry's estate against

the lawsuit Colleen intends to bring.

If Adam received information from Colleen that could be significantly harmful to her in her lawsuit against Harry Client's estate, Adam is disqualified from representing the estate or Harry's heirs, unless he can satisfy the restrictions found in subsection (d).

#### **Model Rule 1.18(d)**

When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
  - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (ii) written notice is promptly given to the prospective client.

Adam Attorney may represent Harry's estate only if he can get informed consent from *both* Colleen Client and Harry's heirs. *Or*, Adam must be screened from participating in the litigation involving Harry's estate and must receive no part of the fee from it. But here's the catch, Adam may be screened only if, when he consulted with Colleen Client, he took care "to avoid exposure to more disqualifying information than was necessary" to decide whether to represent Colleen Client.

In this version of the hypothetical, Adam probably may not be screened and must try for consent instead.

#### **Former & Prospective Clients**

Both are treated like clients when it comes to USING or REVEALING information.

## What is a firm?

### Model Rule 1.0(c)

- What is a “law firm”?
- Rule 1.0(c) comments 2, 3 & 4
- Rule 1.10 (Imputation) Comment 1: “Whether two or more lawyers constitute a firm . . . can depend on specific facts.”
  - physical separation of attys & files;
  - common financial interest?
  - protection of client confidences

Public defenders. Concern for client protection is often higher because of the greater protections afforded criminal defendants.

Remember conflicts in criminal cases can rise to constitutional problems; ineffective assistance of counsel etc.

Should be okay if co-defendants are represented by lawyers from physically separate public defender’s offices, even if, for some purposes, the offices are linked in a state-wide network.

ABA Formal Opinion (paragraph c on page 260) whether the law firms have a “close and regular, continuing and semi-permanent relationship.”

An affiliated law firm usually means the firms share a common partner or share fees in a case or hold themselves out as affiliated.

Relationship between primary firm and its local counsel would not normally seem to be a *per se* affiliation.

What if Lawyers share office space but not fees?

### Model Rule 1.0, Comment [2]:

Two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm.

However if they act like a firm and present themselves to the public like a firm, then they will be treated like a firm under the Rules. Kind of an odd rule. Why is the PUBLIC FACE important if they in fact protect client confidences from disclosure within the office and do not share legal fees.

Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other

ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

**Model Rule 1.0, Comment [3]:**

With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

**Model Rule 1.0, Comment [4]:**

Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

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what does it mean? page 395 (M&F3rd)

“utmost good faith” (literally, “most abundant faith”). It is the name of a legal doctrine which governs insurance contracts. This means that all parties to an insurance contract must deal in good faith, making a full declaration of all material facts in the insurance proposal. This contrasts with the legal doctrine caveat emptor (let the buyer beware).

In terms of legal ethics, it means: Lawyers are super fiduciaries.

## Corporate Families

### Model Rule 1.7, comment 34

“Lawyer who represents a corporation . . . does NOT . . . necessarily represent any . . . parent or subsidiary.”

“Lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer . . .”

Some circumstances might make the affiliate, as well as the represented entity, the client of the lawyer. These include:

- (1) significant control of the nonclient by the client;
- (2) financial loss or benefit to the nonclient that will have a direct, adverse impact on the client; and
- (3) disclosure of confidential information of the nonclient entity. Any or all of these might suffice to create an implied client-lawyer relationship with the affiliate.