

Legal Profession

MF Chapter 10

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M&F3rd, CHAPTER 10

Conflicts of Interest: Specific Rules

Introduction

As our authors point out, the conflicts discussed in this chapter have several things in common. First, they occur so often that special rules have evolved from general conflicts of interest provisions. Second, lawyers confronted by these issues cannot rely on their instincts, because personal interests color their view of the fairness of the transaction. For both these reasons, MR 1.8 has developed an almost *per se* approach that either prohibits or heavily regulates the conflict, which is designed both to protect clients and remind lawyers of their obligations.

Model Rule 1.8

Current Clients: Specific Rules

Model Rule 1.7 is the *general* conflicts rule. Model Rule 1.8 is the *specific* conflicts rule, specifically the conflicts that give the profession a bad name. Formerly known as the “prohibited transactions” rule, it’s as if the ABA said, “Let’s make a separate Model Rule listing all of the transactions with clients that typically get lawyers in trouble:”

- lawyers taking advantage of their clients in business transactions,
- lawyers soliciting gifts,
- lawyers writing themselves into their client’s wills,
- lawyers trying to buy the literary or media rights to stories about their clients,
- lawyers allowing third parties to interfere with the representation,
- lawyers making “aggregate” settlements with clients,
- lawyers having sex with clients,

These specific transactions are fraught with peril for unwitting lawyers. That’s why they are grouped together in one Model Rule and governed by strict rules and client protections. The lawyer must abide by the specific requirements of each rule, or risk discipline, even if both lawyer and client are happy, and the lawyer’s failure was inadvertent and unintended. The standard approaches strict liability. No intent required.

Lawyers Are Super Fiduciaries!

Real estate agents, stock brokers, trustees, executors ... those are fiduciaries. Lawyers are *super fiduciaries*. Clients come to lawyers for advice and protection, trust and discretion. Lawyers must be scrupulously loyal. The lawyer’s instincts, no matter how good, are usually not enough.

Of course, lawyers also form friendships with clients, either before or after the lawyer commences representation. But when a court, or a client's relative, or a client's business associate comes in and examines a lawyer's transactions with her clients, the lawyer is not a friend, the lawyer is a *fiduciary* and the presumption is that the lawyers transactions with the client were the product of *undue influence*.

The fear, especially in these specifically regulated transactions is that:

- The lawyer's judgment may be affected by greed or self-interest;
- The client may think that the lawyer is more objective about the transaction than she really is;
- Lawyer may use confidential information to take advantage of the client.

The Iceberg Analogy

Modern neuroscience teaches that our consciousness is a bit like an iceberg. About 10% of brain activity is conscious, meaning, the lawyer is *aware* of about ten per cent of brain activity. But that means, lawyers are *unaware* of the other 90% of brain activity. The scary part: Lawyers make unconscious decisions all day long, and may place their own interests ahead of the interests of their clients without even realizing it.

Another way to look at it: 10% of the lawyers brain is consciously in charge of the representation, so the ABA made Model Rule 1.8 to protect the client from the other 90% of the lawyer's brain.

Model Rule 1.8(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.

Shorter, In Plain English

A lawyer shall not do business with a client or acquire an interest adverse to the client, *unless* (in writing):

1. Terms are fair and reasonable, fully disclosed, and easily understood.
2. Client is told to have another lawyer review the terms (and is given the opportunity to consult one).
3. Client gives informed consent (signed by the client) to the essential terms and to the lawyer's role.

Model Rule 1.8(a) introduces a pattern in these mini-rules that will become familiar. It begins with what sounds like a blanket prohibition:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or pecuniary interest adverse to the client *UNLESS*— the lawyer performs certain specific duties and required conditions.

When is a Lawyer “Doing Business” with a Client?

What kind of “business transactions” are covered by Model Rule 1.8?

Model Rule 1.8 does not normally apply to ordinary fee arrangements between client and lawyer. Those are governed by Model Rule 1.5 (Fees).

Model Rule 1.8(a) also does *not* normally apply to “standard or routine commercial transactions.” May a lawyer take her dry cleaning to the client's laundromat? May a lawyer eat at his client's restaurant, or open a checking account at the client's bank? Of course.

May a lawyer purchase that Picasso her client is trying to sell? DANGER. May she purchase property from the estate she represents? DOUBLE DANGER. With these kind of transactions, the Model Rules step in and say, essentially: It's impossible for a lawyer to get a great deal from his client, because the terms must be “fair and reasonable,” disclosed, and the client's informed consent must be obtained, all in a writing.

Informed Consent

Under Model Rule 1.7 (the general conflicts of interest rule), the client's informed consent must be “confirmed in writing.” Under Model Rule 1.8, the standard is higher, because doing with a client calls for the highest formalities of the Model Rules: disclosure, advice *and* consent, all in writing. The lawyer must disclose “fair and reasonable” terms that are “easily understood” (no legalese).

How does a lawyer prove the terms of his business deal with the client were fair and reasonable? If it's the Picasso or some land or anything else of uncertain value, get an appraisal or an estimate.

The lawyer must *advise* the client to seek the advice of independent counsel (and the client must be given the opportunity to consult) to review the terms of the deal. The client must give *informed consent* in a writing *signed by the client*, and the consent must be to the essential terms of the deal, and to the *lawyer's role*, i.e. is the lawyer representing the client in this transaction, or not.

Applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice.

But the lawyer need not require that the client take advantage of the opportunity to seek counsel of another lawyer.

The client signing requirement was added by 2002 revisions to the Model Rules.

Transactions with clients are suspect!

A trap for the unwary lawyer. Client need *not* prove lawyer abuse. Lawyer can get in trouble just because the lawyer did not jump through the Rule 1.8(a) hoops. A pure heart is no defense.

Undue Influence

Are business contracts between attorney and client presumptively invalid as the product of undue influence?

In jurisprudence, undue influence is an equitable doctrine that involves one person taking advantage of a position of power over another person. This inequity in power between the parties can vitiate one party's consent as they are unable to freely exercise their independent will.

When lawyers transact business with their client, undue influence is presumed, and the lawyer must rebut the presumption.

Pay Legal Fees With Stock?

What happens when lawyers take all or part of their fee in the form of stock in the client's business, or some other property of uncertain valuation?

See Model Rule 1.8, Comment [1]: Model Rule 1.8 does not *normally* apply to fee arrangements; fees are governed by Rule 1.5. But look what happens if the lawyer

accepts an interest in the client's business or property (not money) as payment of all or part of a fee. Now the lawyer must comply with both rule 1.5 (the fee must be reasonable) and rule 1.8(a) (the terms must be fair and reasonable, must be disclosed in writing, client must be encouraged to seek independent representation).

Model Rule 1.8(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.

Notice this rule forbids *using* information to the client's disadvantage, in the same way Model Rule 1.6 forbids *disclosing* information.

Earlier versions of this Rule were inspired by agency law. Under the common law, the agent (e.g., the lawyer) may not use secret information of the principal (client) without consent. Period. Remedy is disgorgement of the agent's profits.

Lily Lawyer Uses Information

For example, Lily Lawyer represents Eureka Real Estate (Eureka), which is arranging to buy up large parcels of land to build a popular venue in an otherwise undesirable part of town. Lily knows that the project will cause land near the project to rapidly appreciate, so Lily *uses* that information to invest in a few parcels of surrounding real estate.

When Eureka learns of Lily's use, under the common law, Lily must disgorge any and all profits derived from her investments, whether Lily's real estate purchase harmed Eureka, or not.

But under Model Rule 1.8(b), Lily's purchase based on information she gleaned by representing Eureka is unethical only if buying the real estate was using information to the disadvantage of Eureka. For example, if it could be shown that Eureka wanted the land for itself and would have purchased it if Lily had not gotten there first.

When In Doubt, Ask

When in doubt, the lawyer should *ask* the client/principal for permission, and if client consents, lawyer is home free.

But if client refuses (or if lawyer never seeks consent), then the lawyer is accountable to the client for profits under:

- Restatement Second Agency §388 (“restitutionary relief in the form of disgorgement of profit”);
- Restatement Third Law Governing Lawyers §60 (“lawyer who uses confidential information of a client for the lawyer’s pecuniary gain other than in the practice of law must account to the client for any profits made”)

Under Model Rule 1.8, the lawyer may not use confidential information to the client’s disadvantage.”

Easiest to remember it this way: DON’T USE OR DISCLOSE CONFIDENTIAL INFORMATION. What’s confidential? Almost everything.

Exceptions

Of course, Rule 1.8(b) also contains the usual notable exception: “*except as permitted or required by these Rules.*” As usual, any Rule purporting to silence a lawyer or require the lawyer to disclose information will have exceptions in other Rules. The following are other Rules that may require lawyers to disclose or use client information despite the prohibitions of Model Rule 1.8:

Exceptions Found In Other Model Rules

- Model Rule 1.2(d) lawyer shall not counsel a client to commit criminal or fraudulent act.
- Model Rule 1.6 confidentiality exceptions
- Model Rule 4.1(b) failure to disclose material fact when necessary to avoid assisting a criminal or fraudulent act by a client.
- Model Rule 3.3 Candor toward the tribunal
- Model Rule 8.1 Bar Admission & Disciplinary matters
- Model Rule 8.3 Reporting professional misconduct
- ABA Canons of Professional Ethics (1908): “The Lawyer should refrain from *any action* whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.”
- Model Code DR 4-101(B)(3) (1981) (equally definitive) absent informed client consent, a lawyer may not “knowingly ... use a confidence or secret of his client for the advantage of himself or of a third person.”
- Model rule 1.8(b) lawyer “shall not use information relating to representation of a client *to the disadvantage* of the client” unless client consents.

Client Confidences

- Model Rule 1.6: “A lawyer shall not *reveal* information . . .”
- Model Rule 1.8(b): “A lawyer shall not *use* information . . .”

Model Rule 1.6 deals with *disclosure* of client information. Model Rule 1.8(b) deals with *use*. What kind of information? Confidential information, or “information relating to the representation of a client.”

Model Rule 1.8(c): Gifts

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.

In plain English, a lawyer shall not ask clients for gifts, or ask to be written into their client’s wills, or prepare “an instrument” giving the lawyer any substantial gift, *unless* the client is a close relative.

The Restatement of the Law Governing Lawyers says unless the lawyer is a “relative or other natural object of the client’s generosity.” so the key blanket prohibitions go like this: Unless you are a relative or other natural object of the client’s generosity, do not solicit gifts or prepare instruments giving the lawyer a substantial gift.

Bit of a paradox here, at least under the Model Rules. Compare these two:

The Mercedes

Dear Rick:

Because you have been such a great lawyer to me over the years, please draw up the documents transferring title in this \$35,000 Mercedes to your name.

Warmly,

Clio Client

The Rolex

Dear Rick:

Because you have been such a great lawyer to me over the years, please accept this \$35,000 Rolex Oyster Perpetual Yacht-Master II Mens Watch which you did not solicit.

Warmly,

Clio Client

If the lawyer doesn't solicit the substantial gift and doesn't prepare any instrument giving herself a substantial gift, then Model Rule 1.8 would permit the client to give Rick a gift, even a substantial one, with the big caveat contained in rule 1.8, comment 6. Namely, that the gift "may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent."

Model Rule 1.8(c) does not prohibit substantial gifts if the lawyer is drafting no instrument. When courts try to figure out what is a substantial gift they look at either the client's resources, or the lawyers, or both.

The Rearview Mirror

Model Rule 1.8(c) is an *ethical rule* for the common law and other laws governing lawyers the Restatement (RLGL) warns that substantial gifts from clients are suspect. Years later, the client's heirs will ask: "What happened to Dad's Rolex?"

"Oh," someone screams, "the LAWYER GOT IT." The lawyer may be okay under the Model Rules but the client's family may sue him in equity for exercising undue influence on Dad.

RLGL 3rd § 127(1)☒

A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client's generosity *and* the gift is not significantly disproportionate to those given other donees similarly related to the donor.

In plain English, a lawyer may not prepare a will or any other documents that transfer a gift from client to lawyer, unless the lawyer is "like family" to the client, and the gift is roughly the same as what the others who received gifts.

If the lawyer prepares her father's will, in which the father leaves half of his estate to the lawyer, and a fourth of his estate to each of the lawyer's brothers. The RLGL says you have a problem.

RLGL 3rd § 127(2)☒

Client Gift to a Lawyer

A lawyer may not accept a gift from a client, including a testamentary gift, unless:

- a. the lawyer is a relative or other natural object of the client's generosity;
- b. the value conferred by the client and the benefit to the lawyer are insubstantial in amount;
- c. the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

In plain English, according to the Restatement, a lawyer MAY NOT accept a gift from a client, UNLESS:

- Lawyer is a relative;
- Value is insubstantial; OR
- Client has received independent advice, or has been encouraged to seek such advice

The Restatement deals with all laws governing lawyers, not just ethical rules, and because of the common law's equitable doctrine of undue influence, gifts from clients to lawyers may be rescinded if they arise out of a relationship tainted with the undue influence of the lawyers. So Model Rule 1.8(c), the *ethical* rule, is more permissive than the RLGL, which says: No substantial gifts. Period.

Doctrine of Undue Influence

Similar to duress, a court will find undue influence was exercised when someone who shares a special trust with the victim, uses that trust to persuade them into signing (or not to sign) a contract. It is essentially an abuse of the victim's confidence and trust. Courts will protect a person who is found to have been unduly influenced.

From [Undue Influence Lawyers | LegalMatch Law Library](#)

Presumptively Invalid . . .

- Transactions entered into during the existence of a fiduciary relationship are presumptively invalid as the product of undue influence.
- Transactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving fairness and honesty.

Testamentary Gifts & Lawyer As Executor

Main witness (the client) will be dead!

Model Rule 1.8, Comment [8]: "does not prohibit a lawyer from seeking to have the lawyer ... named as executor of the client's estate" or other lucrative position. But see Rule 1.7 conflict of interest!

Comment [8] requires the lawyer to secure the client's "informed consent" when the lawyer's personal interest would itself create a conflict.

The client will not be around! Put it in writing!

Model Rule 1.8(d): Literary Rights

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.

In plain English, until the matter is concluded, a lawyer can't make a deal for a story based on the representation.

What is the real problem here? A possible conflict, of course. In this case a conflict between what makes the best book or movie deal versus what is the best outcome for the client. The best entertainment properties tend to be about guilty people who get off (O.J.) or innocent people who go to jail (*Making A Murderer*). So the ABA does not want a trial lawyer who may see herself as the hero of this trial-based with a pretty good settlement offer? Or faced with the knowledge that good trial movies don't typically end in confidential settlement agreements.

Reversal of Fortune

Many find the media spectacle of a lawyer profiting by telling tales about their clients to be unseemly, even if the lawyer manages to secure the necessary confidentiality waivers.

One example, Alan Dershowitz. Dershowitz represented Claus von Bülow, a British socialite, who had been found guilty for attempted murder of his wife, Sunny von Bülow, who went into a coma in Newport, Rhode Island, in 1980 (and later died in 2008).

Dershowitz had the conviction overturned, and von Bülow was acquitted in a retrial. Dershowitz told the story of the case in his book, *Reversal of Fortune: Inside the von Bülow case* (1985), which was turned into a movie in 1990.

Critics of Dershowitz claim that he routinely violates legal ethics (by using and disclosing confidential information), and is a "tacky" self-promoter who writes books about his high-profile cases for money and fame.

[Feuding Lawyers Get a Hearing - Their Peers, an Earful - NYTimes.com](#)

Model Rule 1.8(e): Financial Assistance To Client

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.

In plain English, a lawyer shall not pay money to a client, or loan a client money in connection with pending or contemplated litigation, except:

- Lawyer may *advance* court costs and expenses of litigation only . . .
- May *pay* court costs and expenses for indigent clients.

For example, a lawyer may reimburse an indigent out-of-state client for her travel costs to attend court hearings.

Most read the Rule in a way that permits financial assistance to low-income clients, especially if those clients are otherwise unable to afford access the courts.

Model Rule 1.8(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.

In plain English, the lawyer shall not be paid by somebody other than the client to represent the client *unless*:

- Client gives informed consent to the arrangement;
- The person paying for representation does not interfere;
- Client info is kept confidential and not shared with person who pays.

Comment 11 describes how lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees).

Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

This Rule comes up often in the insurance business, because people with insurance are defended by lawyers hired by the insurance companies. But the same thing happens when Dad pays for Junior's criminal defense lawyer, after junior has been charged with minor in possession. Junior must consent to the representation. Maybe he doesn't want his Dad involved? If Junior consents, Dad can't interfere with the representation, or get confidential information about the representation. What's confidential? Almost everything.

Example

Let's begin with Dastardly Dan Defendant (Dan), who pays premiums to an Mutual Insurance Company (Mutual) insurance company. Dan promises to pay the insurance company premiums his car insurance policy, in case he has a car accident.

If Dan is involved in a car accident, and Pugnacious Plaintiff (Pug) sues him and accuses Dan of causing the accident, then Mutual will pay Pug's claim for damages, or hire Lana Lawyer to defend Dan against Pug's lawsuit.

If Mutual hires Lana Lawyer to defend Dan in the lawsuit, is there an attorney-client relationship between Dan and Lana Lawyer? Does it require loyalty, confidentiality, communication, and the other duties spelled out in the Model Rules? Yes. If Lana Lawyer agrees to represent Dan, she's a super-fiduciary to Dan, even though Dan isn't paying her.

Yes, and that's the easy part. The hard part is what about the relationship between Lana Lawyer and Mutual? Mutual is paying Lana Lawyer to represent Dan? Is there an attorney-client relationship between Lana Lawyer and Mutual? Does Lana have one client, Dan? Or two clients? Dan and Mutual, the Insurance company?

Insurer Retains Lawyer to Represent Insured

Restatement Third says:

Whether the lawyer has one client or two is a matter of insurance law, not the law governing lawyers.

Still in dispute. Insurance companies like to argue that they too are clients. The old way of analyzing the problem was to make it a multiple client problem, but that makes the analysis confusing.

Normally only the client may tell the lawyer to settle. The insurer may say, "Settle!" The insured may say, "No way!"

Either way, 1.8(f) (compensation from one other than the client) and 1.7(a)(current conflicts) apply.

Lana Lawyer may owe enforceable duties to the Mutual Insurance company, even if it is not a client, and these concerns do not go away if the lawyer has two clients instead of one.

For purposes of ethical analysis only, it's easiest for Lana Lawyer to assume that she has one client, Dan, and that a third party, Mutual, is paying Dan's legal bills.

Insurer Retains Lawyer to Represent Insured

Model Rule 1.8 Comment 11 says the insured is the client and the liability insurer will be the party compensating the lawyer.

Restatement Third says whether the lawyer has one client or two is a matter of insurance law, not the law governing lawyers.

Still in dispute. Insurance companies like to argue that they too are clients.

Old way to treat the problem was to make it a multiple client problem, but makes the analysis confusing.

May lawyer write a report to the insurer if the insured objects under Rule 1.6 (confidentiality)? Normally only the client may tell the lawyer to settle. The insurer may say, "Settle!" The insured may say, "No way!"

Right to sue for malpractice. Some states say only a client may sue, whereas probably only the insurer really suffers the financial loss. Either way 1.8(f) (compensation from one other than the client) and 1.7(a)(current conflicts) apply.

The lawyer representing the insured may owe enforceable duties to the insurance company even if it is not a client.

Model Rule 1.8(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.

In plain English: No Aggregate Settlements, unless:

- Each client gives informed consent in a writing signed by the client;
- Lawyer's disclosure shall include nature of all claims or pleas and participation of EACH PERSON to the settlement.

As in the *Burrow* case, one of the remedies for violating the common law version of Rule 1.8(g) is fee forfeiture.

Model Rule 1.8 Comment [13]

Aggregate Settlements

Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted.

RLGL § 37: Fee Forfeiture

A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

In plain English, a lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation.

Considerations:

- gravity and timing of violation;
- willfulness
- effect on the value of the lawyer's work
- any other threatened or actual harm to the client
- adequacy of other remedies

The Burrow court added something:

To the factors listed in section 37 we add another that must be given great weight in applying the remedy of fee forfeiture: “The public interest in maintaining the integrity of attorney-client relationships.”

RLGL § 37: Fee Forfeiture comment e

Ordinarily, forfeiture extends to all fees for the matter for which the lawyer was retained, such as defending a criminal prosecution or incorporating a corporation. (For a possibly more limited loss of fees under other rules, see Comment a hereto.) See § 42 (client’s suit for refund of fees already paid). Forfeiture does not extend to a disbursement made by the lawyer to the extent it has conferred a benefit on the client (see § 40, Comment d).

Sometimes forfeiture for the entire matter is inappropriate, for example when a lawyer performed valuable services before the misconduct began, and the misconduct was not so grave as to require forfeiture of the fee for all services. Ultimately the question is one of fairness in view of the seriousness of the lawyer’s violation and considering the special duties imposed on lawyers, the gravity, timing, and likely consequences to the client of the lawyer’s misbehavior, and the connection between the various services performed by the lawyer.

In plain English, “Ordinarily, forfeiture extends to all fees for the matter for which the lawyer was retained ...” Yikes! But see: “Sometimes forfeiture for the entire matter is inappropriate ... when a lawyer performed valuable services before the misconduct began ...”

How much of the lawyers’ fees are forfeited is a question of law for the court. It’s an equitable remedy similar to a constructive trust

Model Rule 1.8(h)

Limitation of Liability to Client

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.

In plain English, a lawyer *shall not*:

1. A lawyers can't make a deal limiting her client's ability to sue for malpractice, unless the client is represented by his own independent lawyer.
2. A lawyer can't settle a malpractice claim with an unrepresented client or former client *unless* the client is advised in writing to seek advice of independent legal counsel and is given the opportunity to do so.

Model Rule 1.8(i)

Proprietary Interest In Litigation

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.

For example, a lawyer conducting patent litigation for a client may not be part owner of the patent. Nor could the lawyer purchase an interest in a shopping center she was representing in litigation.

Both the ABA and Model Rules recognize that a lawyer may acquire a financial interest in the subject of litigation to secure fees and costs. Also, a lawyer may charge contingent fee and enforce an attorney's lien.

Model Rule 1.8, Comment 16:

Acquiring Proprietary Interest in Litigation

Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation.

In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires.

The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized

by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by rule 1.5.

champerty, noun

A proceeding, illegal in many jurisdictions, by which a person not a party in a suit bargains to aid in or carry on its prosecution or defense by furnishing money or personal services in consideration of his receiving a share of the matter in suit . . .

Alternative Litigation Finance (ALF)

Alternative Litigation Finance (ALF) or Litigation Funding seems to be receiving considerable attention lately. It refers to third party financing of litigation to support litigation activity. Simply stated, it is an advance against any future lawsuit settlement or award amount. Litigation financing companies offer litigants (generally plaintiffs) cash advances to cover pressing bills and living expenses, subject to a financing fee, in exchange for a slice of potential winnings. Litigation funding is available in most of the common law jurisdictions in the U.S.

From [Alternative Litigation Finance: Good or Bad?](#)

As Silicon Valley investor Peter Thiel recently demonstrated it's possible and legally permissible to invest in lawsuits. But lawyers interested in Alternative Litigation Finance (ALF) need expert help to make sure they comply with a welter of ethical rules, including the following.

- Model Rule 1.8(a) doing business with client . . .
- Model Rule 1.8(e) providing financial assistance to a client . . .
- Model Rule 1.8(f) no interference . . .
- Model Rule 5.4(c) same . . .
- Model Rule 1.8(i) acquiring a proprietary interest in the litigation . . .
- Model Rule 1.16 terminating the lawyer-client relationship . . .
- Model Rule 1.7(a)(2) general conflict of interest because of material interest . . .

Model Rule 1.8(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.

Intimate Relationships Between Lawyers and Clients

- It's so unnecessary, and harmful;
- Loss of objectivity and emotional distance;
- Conflicts of interest, "Is she telling me that because she's my lawyer? Or because she's my lover?";
- Confusion about confidentiality of communications. Secrets of the case versus secrets of the bedroom.

Model Rule 1.8(j) deals only with "sexual relations" a term that was subject to a great deal of debate during the Clinton presidency. Notice that the Rule exempts consensual sexual relationships *that already existed* when the client-lawyer relationship commenced.

Comment 17 describes the problems well enough.

Model Rule 1.8 Comment 17

Client-Lawyer Sexual Relationships

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage.

In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship.

Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having *sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client*.

Typical of the specific prohibitions under 1.8. The ABA doesn't care if there's no prejudice and the client is happy and the relationship is consensual, it's *still prohibited*.

“Body Heat”

For a vivid illustration of how bad an idea it is for a lawyer to have sex with his client, see *Body Heat*, starring William Hurt, Kathleen Turner, Ted Danson and Mickey Rourke. How wrong can things go for this gullible lawyer? One of only two movies using the Rule Against Perpetuities as a plot device, Alexander Payne’s *The Descendants*, being the other.

When the Client is a Corporation.

Model Rule 1.8, Comment [19]

Client-Lawyer Sexual Relationships

When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship *with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters.*

Model Rule 1.8(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.

Model Rule 1.8, Comment [20]

Imputation of Prohibitions

Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Model Rule 1.10(a): Imputation

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 . . .

Model Rule 1.10(a) follows the same logic as Model Rule 1.8(k), a purely personal conflict should not be imputed to other members of the law firm.

Model Rule 5.4.

Professional Independence

The Model Rules protect (sometimes over-protect?) the lawyer's professional independence. Of course profit is an incentive, but lawyers run law firms, not MBAs and accountants. Paraphrasing the Rule itself: With few exceptions, a lawyer shall not practice law in partnership or professional corporation in which a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Model Rule 5.4(a)

Sharing Fees with Nonlawyers

A lawyer or law firm shall not share legal fees with a nonlawyer, except that ...

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

Model Rule 5.4(b)

A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Model Rule 5.4(c)

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Model Rule 5.4(d)

A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein (exception for estate of a former lawyer)
- (2) a nonlawyer is a corporate director or officer ... or position similar
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.