

**CONFLICTS OF INTEREST IN BUSINESS LAW:  
GUIDELINES FOR THE PRACTITIONER**

**SECOND EDITION 2000**

**COMMITTEE ON CONFLICTS OF INTEREST IN BUSINESS LAW  
OF THE BUSINESS LAW SECTION  
*and*  
CONTINUING LEGAL EDUCATION  
WASHINGTON STATE BAR ASSOCIATION**

**2101 FOURTH AVENUE – FOURTH FLOOR  
SEATTLE, WA 98121-2330**



© Copyright 1990, 2000  
Washington State Bar Association  
2101 Fourth Avenue – Fourth Floor  
Seattle, WA 98121-2330  
(206) 727-8200

All rights reserved. Permission is hereby granted for the copying of pages or portions of pages in this book, by photocopying or similar process, or by manual transcription, by or under the direction of licensed attorneys, for use in the practice of law.

NO OTHER USE IS PERMITTED that will infringe the copyright without the express written consent of both the Washington State Bar Association and the author or authors of the material involved.

Library of Congress Catalog Card Number: 89-52071  
ISBN 0-88129-228-1 (1990)  
ISBN 0-88129-283-4 (2000)

This Deskbook should be cited as:  
CONFLICTS OF INTEREST IN BUSINESS LAW:  
GUIDELINES FOR THE PRACTITIONER  
(Wash. St. Bar. Assoc. 2nd ed. 2000)

IMPORTANT NOTICE: Washington State Bar Association Continuing Legal Education publications are designed to help attorneys maintain their professional competence. Although all material herein is reviewed prior to publication, in dealing with specific legal matters, attorneys should research original sources of authority. The views and conclusions expressed herein are those of the authors or editors and are not necessarily those of the Washington State Bar Association or any division or committee thereof.

**WASHINGTON STATE BAR ASSOCIATION**  
**BUSINESS LAW SECTION**  
**COMMITTEE ON CONFLICTS OF INTEREST IN BUSINESS LAW**

Alfred M. Falk, Chair

Douglas L. Batey  
Paul D. Fitzpatrick

Allen D. Israel  
Michael A. Raskasky

Clyde W. Summerville  
Joseph Weinstein

**CONTINUING LEGAL EDUCATION COMMITTEE**  
**1999 – 2000**

Donald W. Carter, Chair

Peter H. Arkison  
Dale L. Carlisle  
Thomas L. Dickson  
William P. Fite  
Stephan J. Francks  
Nina Harding  
Alexander J. Higgins  
William J. Jennison  
Eric P. Johnson

Meg. L. Jones  
Bernice C. Jonson  
James H. Kaufman  
Kurt Lichtenberg  
M. Peter Philley  
Robert J. Roche  
Eugene C. Routh  
Alan L. Rubens  
William L. Sells

James M. Shore  
Martin T. Silver  
Shannon Skinner  
Craig S. Sternberg  
Joan E. Sullivan  
Tamara A. Taylor  
Adam E. Torem  
Gordon H. Warren  
Ronald L. Williams

**CONTINUING LEGAL EDUCATION DEPARTMENT**

Thomas B. Russell, Director  
John M. Redenbaugh, Associate Director  
Steven M. Rosen, Assistant Director  
Garth B. Jacobson, Program Attorney  
Margaret A. Morgan, Legal Editor  
Dana West, Managing Editor  
Sheila Harris, Program Coordinator  
Michele Kramer, Program Coordinator  
Sonia Pagonakis, Program Coordinator  
Anné Sterling, Program Coordinator  
Mickie Colony, Faculty Program Assistant  
Stephanie Benson-Greer, Publications Coordinator  
Kelly Cronin, Publications Coordinator  
Ruth Weadock, Publications Assistant  
Judy Ritchie, Secretary

# TABLE OF CONTENTS

## ABOUT THE EDITORS AND CONTRIBUTORS

## TABLE OF CONTENTS

Chapter 1	INTRODUCTORY CONSIDERATIONS FOR DEALING WITH CONFLICTS IN A BUSINESS CONTEXT	
	§1.1 Overview of This Book .....	1-1
	§1.2 Business and Litigation Contexts Compared .....	1-2
	§1.3 General Rules and Obligations of a Lawyer .....	1-2
	§1.4 Consequences of Faulty Conflicts Recognition or Resolution .....	1-4
	§1.5 Checking for Conflicts .....	1-4
	(1) Intake Procedures .....	1-4
	(2) Need for Continued Alertness .....	1-5
	§1.6 Proceed With Caution .....	1-5
	§1.7 Cardinal Points .....	1-6
Chapter 2	WHO IS THE CLIENT?	
	§2.1 Introduction .....	2-1
	§2.2 Reasonable Expectations Test .....	2-1
	§2.3 Was an Attorney-Client Relationship Formed? .....	2-3
	§2.4 Who Speaks for the Entity? .....	2-3
Chapter 3	CONFLICTS OF INTEREST INVOLVING CURRENT CLIENTS; INTERMEDIATION	
	§3.1 Introduction .....	3-1
	§3.2 Conflicts of Interest Involving Current Clients: Rule 1.7 .....	3-2
	(1) Current Clients With Adverse Interests: Rule 1.7(a) .....	3-2
	(a) Reasonable Belief Representation Is Proper .....	3-3
	(b) Informed Consent .....	3-3
	(c) Advance Consent .....	3-5
	(d) Necessity of a Writing .....	3-6
	(2) Representation Materially Limited by Responsibilities to One Other Than the Client: Rule 1.7(b) .....	3-6
	(3) Nonwaivable Conflicts .....	3-7
	§3.3 Lawyer as Intermediary: Rule 2.2 .....	3-7
	(1) Nature of Intermediary Role .....	3-8
	(2) Circumstances in Which Intermediary Role May Be Inappropriate ....	3-9
	(3) Duty of Consult With All Parties .....	3-9
	(4) Duty to Withdraw .....	3-10
	§3.4 Illustrative Example .....	3-11
	§3.5 Cardinal Points .....	3-11
Chapter 4	BUSINESS TRANSACTIONS WITH A CLIENT	
	§4.1 Overview .....	4-1
	§4.2 Elements of Rule 1.8(a) .....	4-2
	(1) Attorney-Client Relationship .....	4-2
	(2) Fair and Reasonable Terms .....	4-3
	(3) Full Disclosure by Attorney and Understanding by Client .....	4-3
	(4) Consent .....	4-3
	(5) Independent Counsel .....	4-3
	§4.3 Brief Illustrations .....	4-4
	(1) Loans .....	4-4

## TABLE OF CONTENTS

	(2) Corporate/Partnership Arrangements .....	4-5
	(3) Purchases of Real Property .....	4-6
	(4) Investments .....	4-7
	(5) Referrals of Independent Counsel .....	4-7
	§4.4 Detailed Hypothetical Analysis—Investing in a Business PartnershiP the Attorney Represents .....	4-8
	(1) Facts .....	4-8
	(2) Analysis .....	4-8
	§4.5 Cardinal Points .....	4-9
Chapter 5	RULE 1.9: CONFLICTS OF INTEREST INVOLVING FORMER CLIENTS	
	§5.1 Introduction .....	5-1
	§5.2 Has the Representation Ended? .....	5-2
	§5.3 Are the Matters the Same or Substantially Related? .....	5-3
	§5.4 Are the Clients' Interests Materially Adverse? .....	5-5
	§5.5 Has the Former Client Consented to or Waived the Conflict of Interest? .....	5-6
	§5.6 Even If the Conflict Is Resolved, Will Confidences or Secrets Be Used? .....	5-8
	§5.7 Consent of the New Client .....	5-8
	§5.8 Hypothetical Case .....	5-8
	§5.9 Cardinal Points .....	5-10
Chapter 6	RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE	
	§6.1 Imputed Disqualification Generally .....	6-2
	§6.2 Imputed Disqualification When Lawyers are in a Continuing Association .....	6-2
	§6.3 Imputed Disqualification When a New Lawyer Joins a Firm .....	6-4
	§6.4 Imputed Disqualification When a Non-lawyer Joins a Firm .....	6-6
	§6.5 Imputed Disqualification of a Lawyer's Former Firm .....	6-7
	§6.6 Imputed Disqualification Cured Through Consent .....	6-7
	§6.7 Rule 1.10(b) in Practice (Illustration and Analysis) .....	6-7
	§6.8 Cardinal Points .....	6-8
Chapter 7	MULTI-STATE ISSUES	
	§7.1 Overview .....	7-1
	§7.2 Choice of Conflicts of Interest Rules in Business Transactions Involving Multiple States: Washington and Model Rule 8.5 .....	7-3
	§7.3 A Lawyer Could Be Subject to Discipline in a State in Which He or She Is Not Admitted .....	7-5
	§7.4 Policy Considerations in Conflicts of Interest .....	7-5
	§7.5 Choice of Ethics Rules by Contract? Probably Not .....	7-6
	§7.6 Cardinal Points .....	7-6
APPENDICES		
	A. Washington Rules of Professional Conduct .....	AA-1
	B. Bibliography .....	AB-1
	C. Sample New Client-Matter Form .....	AC-1
	D. Sample Conflict Check Information Sheet .....	AD-1
	E. Letter to Unrepresented Person Disclosing Attorney's Role (RPC 4.3) .....	AE-1
	F. Letter to Client Confirming Oral Consent to Common Representation .....	AF-1
	G. Clients' Consent to Representation (RPC 1.7) .....	AG-1
	H. Intermediary Letter to Be Signed by Client (RPC 2.2) .....	AH-1
	I. Former Client's Consent to Representation Under RPC 1.9 .....	AI-1
	J. Letter to New Client Acknowledging Lawyer's Duties to Existing Client and Securing Advance Consent .....	AJ-1
INDEX	.....	I-1

**CONFLICTS OF INTEREST IN BUSINESS LAW:  
GUIDELINES FOR THE PRACTITIONER**

**SECOND EDITION 2000**

**EDITORS**

Alfred M. Falk  
Peter R. Jarvis

**CONTRIBUTORS**

Alfred M. Falk  
Paul D. Fitzpatrick  
Allen D. Israel  
Peter R. Jarvis  
Michael A. Raskasky  
Clyde W. Summerville  
Joseph Weinstein

**WSBA LEGAL EDITOR**

Margaret Morgan

**WSBA MANAGING EDITOR**

Dana West

## ABOUT THE EDITORS AND CONTRIBUTORS

---

### EDITORS

---

ALFRED M. FALK is a partner in the firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, P.L.L.C. and chairs that firm's Trusts & Estates Practice Group. He is a graduate of the University of Washington and the University of San Francisco School of Law. He also received an LL.M. in federal taxation from the Holland Law Center at the University of Florida. His practice focuses on estate planning, probate and trust administration, and the representation of closely-held businesses. He currently serves on the Executive Committee of the Business Law Section of the WSBA, and as chair of that Section's Committee on Conflicts of Interest in Business Law.

PETER R. JARVIS received a B.A. from Harvard University in 1972, and an M.A. in Economics and J.D. from Yale University in 1976. He is a member of the Oregon and Washington Bars. A partner at Stoel Rives LLP, Portland, Mr. Jarvis is chair of the Stoel Rives Professional Responsibility Practice Group. He is a frequent writer and speaker on legal ethics issues, and his practice includes advising attorneys with legal ethics questions and defending attorneys accused of legal ethics violations. Mr. Jarvis is also the 2000 chair of the ABA Center for Professional Responsibility Conference Planning Committee. Mr. Jarvis is a former member of the Washington State Bar Rules of Professional Conduct Committee and the Oregon State Bar Legal Ethics Committee. Among other publications, he was Editor-in-Chief and author of several chapters in *The Ethical Oregon Lawyer*, published by the Oregon State Bar; co-author of *Oregon Rules of Professional Responsibility Annotated* (4th ed. 1997), and an ethics columnist for *The Multnomah Lawyer*, a newsletter of the Multnomah Bar Association. In 1991, Mr. Jarvis received the President's Membership Services Award from the Oregon State Bar for his ethics work. In 1993, Mr. Jarvis received the Harrison Tweed Special Merit Award from ALI-ABA for his continuing legal education work in ethics. In 1995, Mr. Jarvis was elected to membership in The American Law Institute.

---

### CONTRIBUTORS

---

ALFRED M. FALK. See "Editors," above.

PAUL D. FITZPATRICK is a Spokane attorney at Fitzpatrick Law Group, P.S., practicing in the areas of small business and estate planning; probate, estate, and trust administration; and taxation. In 1992-93, he was the chair of the Washington State Bar Association Disciplinary Board and was a member of the Joint Task Force on Lawyer Discipline in Washington. He is a member of the executive committee of the tax section of the Washington State Bar Association. He received his B.A. degree from Washington State University, his J.D. degree from Gonzaga University School of Law, and his LL.M. degree in taxation from the University of Florida.

## ABOUT THE EDITORS AND CONTRIBUTORS

ALLEN D. ISRAEL is head of Foster Pepper's Business Practice Group and serves on its five-member Executive Committee. Practicing since 1978, he focuses on corporate, business, M&A, real estate and contract law, including the representation of a variety of management, investment, sports, sports facilities, real estate, and other businesses and non-profit organizations. He represented Football Northwest in its acquisition of the Seattle Seahawks and in the development of their new Stadium and Exhibition Center. Active in a number of professional and community activities, he serves on the University of Washington Law School Dean's Advisory Board, the Visiting Committee for the University of Washington College of Engineering, the Board of *The Jewish Transcript*, and is President of the Northwest Museum of Natural History. He is past Chair of the Pacific Northwest Region of the Anti Defamation League. He received his J.D., M.B.A., and B.S.M.E. from the University of Washington.

PETER R. JARVIS. See "Editors," above.

MICHAEL A. RASKASKY is a senior associate with Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, P.L.L.C. in Tacoma. He graduated from Rutgers University in 1988 and earned his law degree, cum laude, from the University of Puget Sound (now Seattle University) School of Law in 1992. He is a member of the Washington and Oregon Bars. His practice emphasizes representation of businesses and financial institutions in connection with corporate, regulatory compliance, lending and other business and operational matters. His experiences include assisting banks, corporations, cooperatives and other business entities on a wide range of matters including mergers and acquisitions, securities transactions and compliance, complex loan documentation, contract drafting and review, and other business and corporate issues.

CLYDE W. SUMMERVILLE is a member of the partnership of the Seattle-based law firm of Preston Gates & Ellis LLP. He is a graduate of Stanford University (B.A. 1973) and Seattle University (J.D. 1976). He is admitted to practice in Washington state, and before the U.S. District Court, Western District of Washington, the U.S. Court of Appeals, Ninth Circuit, and the U.S. Court of Appeals, District of Columbia Circuit. His practice focuses on general corporate and business matters. He is a member of his firm's Ethics Committee, and he is a member of the Washington State Bar Association Business Law Section Committee on Conflicts of Interest in Business Law.

JOSEPH WEINSTEIN is a business transactions lawyer with an emphasis in mergers and acquisitions and the representation of high net worth individuals, international companies, and the maritime industry. He is a loss prevention partner at the Seattle office of Davis Wright Tremaine, and a frequent speaker on topics concerning conflicts of interest and business ethics. He is a member of Washington State, King County, Western District of Washington, and Ninth Circuit Court of Appeals Bar Associations, as well as the Maritime Law Association of the United States. Before joining Davis Wright Tremaine, Mr. Weinstein served as the Senior Foreign Legal Consultant to the firm of Lee & Ko in Seoul, Korea. Mr. Weinstein is a Washington State native, and received his undergraduate and law degrees from the University of Washington.



## **CHAPTER 1**

### **INTRODUCTORY CONSIDERATIONS FOR DEALING WITH CONFLICTS IN A BUSINESS CONTEXT**

#### **Summary**

- §1.1** Overview of This Book
- §1.2** Business and Litigation Contexts Compared
- §1.3** General Rules and Obligations of a Lawyer
- §1.4** Consequence of Faulty Conflicts Recognition or Resolution
- §1.5** Checking for Conflicts
  - (1) Intake Procedures
  - (2) Need for Continued Alertness
- §1.6** Proceed with Caution
- §1.7** Cardinal Points

#### **§1.1 OVERVIEW OF THIS BOOK**

The duty of loyalty is at the heart of the attorney-client relationship. Lawyers must serve their clients' needs, and business lawyers are no exception. The purpose of this book is practical—to help business lawyers recognize, measure, and manage the risks they encounter when they perform work involving conflicts or potential conflicts of interest. The bare-bones conflicts of interest rules (rules 1.7 – 1.10 and 2.2, hereafter referred to as the “Conflicts Rules”) in the Washington Rules of Professional Conduct (“WRPC” or “rules”) exist largely to codify the duty of loyalty and work best if they are clothed in the practical experience of practicing lawyers. Widespread observance of the Conflicts Rules will also enhance the protection they afford the public far more than will disciplinary actions by the bar or civil claims against lawyers.

This book is divided into seven chapters. This chapter provides a brief overview of the principal Conflicts Rules and the underlying legal and ethical duties on which they are based. Chapter 2 addresses the “Who is the Client” question that often lies at the heart of any conflicts issue. Chapter 3 addresses conflicts of interest questions involving the existing clients and deals with both rule 1.7 and rule 2.2. Chapter 4 deals with conflicts of interest involving former clients and deals largely with rule 1.9. Chapter 6 addresses screening as a means of avoiding ethical violations and deals primarily with rule 1.10. Chapter 7 deals with multi-state ethics issues that may confront both practitioners within a single state and practitioners in multi-state firms. These chapters are followed by Appendices that contain the full text of all of the WRPCs, a bibliography with leads for further research, and sample forms.

### §1.3 / INTRODUCTORY CONSIDERATIONS

**Caveat:** There are some conflicts issues that this book does not address. These include, for example, (1) conflicts problems that may arise when a lawyer becomes concerned that he or she may have committed (or has been accused of) malpractice; and (2) conflicts problems that may arise when the lawyer concludes that he or she must withdraw because of a client's attempt to use the lawyer's services to commit fraud or another crime. The bibliography refers the reader to sources that address these issues.

**Note:** Lawyers with conflicts or other ethics questions can call the Washington State Bar ethics hotline for free advice at (206) 727-8284.

This book is the result of work by present and former members of the Committee on Conflicts of Interest in Business Law of the Business Law Section of the Washington State Bar Association. The present members of the committee are listed on page iii. The collective reference to “we” indicates a consensus, although not necessarily a unanimous opinion, of the present members of the committee.

### §1.2 BUSINESS AND LITIGATION CONTEXTS COMPARED

The Conflicts Rules present particular challenges to business attorneys. Although parties in litigation typically bear telling labels such as “plaintiff” and “defendant,” the world of business is often characterized by shades of gray. In competitive commercial relations, businesses may at the same time share a wide range of mutual concerns and a narrow band of contrary interests. Today's competitors may also be today's or tomorrow's allies, partners, or even subsidiaries. In utilizing an attorney, businesspersons may prefer economy and efficiency to the values sometimes associated with zealous advocacy. This interest in efficiency may lead business clients to believe that their goals can best be accomplished by a single lawyer with expertise, experience, and a history of relationships and trust even though there are areas in which the clients' interests do not coincide. In addition, conflicts waivers are often far easier to obtain in a business setting than in a litigation “war.”

As noted in Comment 11 to the ABA Model Rules of Professional Conduct (Rule 1.7): “Conflicts of interest in contexts other than litigation sometimes may be difficult to assess.... The question is often one of proximity and degree.” ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 93 (ABA 4th ed. 1999). The goal of this book is to provide guidance for the attorney who works in the marketplace rather than in the courtroom. The good news is that even though it is not always possible to hit a home run, it is almost always possible to avoid striking out.

### §1.3 GENERAL RULES AND OBLIGATIONS OF A LAWYER

The WRPCs impose general obligations of undivided loyalty, independent judgment, and confidentiality upon all attorneys. *See, e.g.,* WRPC 1.6 – 1.9, 2.2. In any dispute about their meaning and application, the Conflicts Rules are likely to be interpreted to promote the satisfaction of these responsibilities.

It is not always easy to determine how the principles of undivided loyalty, independent judgment, and confidentiality should or will work themselves out in practice. Can an attorney have undivided loyalty to more than one client at a time if the clients wish it so? Alternatively stated, how strong or pervasive does adversity between two people have to become before it is impossible to be completely loyal to both? How independent is independent judgment and what does independence mean? When is it appropriate or inappropriate to share information among multiple clients? What about a client who is more interested in economy and efficiency than in loyalty, independent judgment, or confidentiality? No matter how difficult the questions or bothersome the answers, the Conflicts Rules must be obeyed.

At the risk of oversimplification, the following principles may prove helpful:

- By definition, a lawyer who has only one client in a matter cannot have a multiple current-client conflicts problem. Lawyers should therefore act with care before they agree to represent multiple clients in a single matter. Care should also be taken before opposing a client on a matter that is unrelated to the work that the lawyer is doing for that client.
- In analyzing conflicts problems, lawyers must consider not only the question of potential adversity of positions but also questions of potentially confidential or secret client information.
- A lawyer can never oppose a current client—even on a matter that is wholly unrelated to the work that the lawyer is performing for the client—without a valid conflicts waiver. In fact, there are some conflicts situations that current clients cannot waive.
- A former client conflict exists only if the work that a lawyer proposes to do adversely to a former client is sufficiently related to the work that was previously done for that client. This can be true either because a significantly related transaction or matter is involved or because of overlapping client confidences or secrets.
- All conflicts waivers must, on pain of discipline, be confirmed in a contemporaneous writing.
- Screening a lawyer from involvement in a matter as a means of avoiding disqualification is available as a matter of right only when lawyers change firms and cannot be used as a matter of right in most other situations. If one lawyer in the firm cannot undertake a matter with or without a conflicts waiver, no other lawyer in the same firm will generally be able to undertake that matter.
- Lawyers should be on guard not only with respect to current and former multiple client conflicts but also with respect to personal, business, or economic conflicts between lawyers and clients. These too require waiver.
- It is not enough to assess conflicts of interest at the outset. Continued monitoring is required.
- Conflicts of interest are sufficiently complex that a “white heart, empty head” defense will often be insufficient. As Professor Robert H. Aronson has written:

It is not sufficient that the attorney believes himself able adequately to represent potentially differing interests, or even that all parties have consented. The possibility of subconsciously favoring the interests of either party, the appearance of impropriety that may arise from even the slightest dissatisfaction, the likelihood of receiving confidential information from one party that is damaging or helpful to the other, and the possibility that a court will subsequently disagree with the attorney's decision that he was able adequately to represent both interests—all dictate extreme caution in these situations.

Aronson, *Conflicts of Interest*, 52 WASH. L. REV. 807, 826–27 (1977) (footnote omitted).

## **§1.5(1) / INTRODUCTORY CONSIDERATIONS**

### **§1.4 CONSEQUENCE OF FAULTY CONFLICTS RECOGNITION OR RESOLUTION**

The consequences of faulty conflicts recognition or resolution are clear:

- A lawyer or firm may lose clients and personnel or may destroy a hard-won reputation.
- A lawyer or firm may be civilly sued, not only for malpractice but for the potentially far more damaging tort of breach of fiduciary duty. *See, e.g., Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992).
- A lawyer, and others at the lawyer's firm, may be disciplined. *See, e.g., WRPC 5.1, 5.2. Cf. In re Disciplinary Proc. Against Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998).
- A lawyer or firm may be disqualified from undertaking or continuing with a particular representation. *See, e.g., In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996); *First Small Bus. Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 738 P.2d 263 (1987).
- Even if no damage to a client results, a lawyer may have to forego or even refund potentially substantial fees. *See, e.g., Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598 (1991); *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982).

## **§1.5 CHECKING FOR CONFLICTS**

No attorney wants to blunder inadvertently into a conflicts situation. Such blunders can be avoided only by thorough initial conflicts checks as well as a repetition of any conflicts analysis as the facts change.

### **(1) Intake procedures**

All attorneys and firms need a detailed intake procedure to check for conflicts arising from new clients or new matters for existing or former clients. An intake form is useful in gathering and organizing information. *See* Appendices C and D.

At or before the initial client conference, an attorney should determine the identity of all persons having an interest or role in the subject matter of the representation.

If at all possible, the information needed for conflicts screening should be obtained before substantive discussions that may result in disclosure of confidential client information. If confidential information is in fact disclosed, the attorney and firm may be disqualified from subsequent involvement in a matter even if no formal attorney-client relationship ever arose. *See* ABA Committee on Ethics and Professional Responsibility, Formal Op. 358 (1990); *see also Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977).

A thorough intake procedure ideally should include the principals and related entities of a prospective client or opponent, because relationships other than an attorney-client relationship can materially limit the quality of representation. Under WRPC 1.7(b), for instance, if a law firm is suing a key manager of a corporation on a collection matter, that action may materially limit the law firm's representation of the corporation.

The information on the identity and interests of parties to a transaction must then be reviewed for actual or potential conflicts. Comment 1 to the ABA Model Rules of Professional Conduct (rule 1.7), amended February 17, 1987, suggests adoption of “reasonable [screening] procedures, appropriate for the size and type of firm and practice.” Although we do not think there is a single process that is perfect for all lawyers and firms, most firms utilize a procedure containing one or more of the following components:

(a) *Search by Assigned Staff Person.* An assigned staff person checks all the names listed on the intake form against a master file to determine whether the names appear in any other context, indicating a possible conflict. If a potential conflict surfaces, the issue is referred either to involved attorneys or, perhaps, to a separate conflicts committee within the firm. In addition, the names and relationships indicated on the intake form are entered on the master file. The staff person then initials the intake form to indicate that the conflict search had been completed.

(b) *Computerized Conflicts of Interest Search.* Computerized procedures are becoming increasingly prevalent, but caution is recommended in cases in which the search program would not cause the computer to recognize a name of an entity if there is a typographical error or variation in spelling, abbreviated or shortened name form, or change of name.

(c) *Circulate Intake Forms Among Attorneys.* The lawyers within the firm may be aware of relationships that do not show up on an intake form or as a part of a formal conflicts check. Absent compelling reasons to the contrary, information about new clients or new matters should therefore be circulated to all lawyers in a firm.

## **(2) Need for continued alertness**

A conflicts analysis cannot be done once and then put away forever. As a result of changed circumstances or position, changes in parties, and the like, the analysis may have to be repeated. *See, e.g., In re Altstatt*, 321 Or. 324, 897 P.2d 1164 (1995).

## **§1.6 PROCEED WITH CAUTION**

Although the Conflicts Rules are designed to protect clients, compliance will benefit not only the clients but also their attorneys.

It has been suggested that a good rule of thumb is “when in doubt, don’t.” Washington State Bar Association Legal Ethics Committee Op. No. 161, *reprinted in* WASHINGTON STATE BAR ASSOCIATION RESOURCES (1999–2000); *see also Saylor v. Elberfeld Mfg. Co.*, 30 Wn. App. 955, 964, 639 P.2d 785 (1982). Two qualifications are nonetheless appropriate. On the one hand, “doubt” by someone who has not analyzed the Conflicts Rules may be misplaced. On the other, the absence of “doubt” on the part of someone who has not analyzed the Conflicts Rules is not a sufficient basis on which to proceed.

## **§1.7 / INTRODUCTORY CONSIDERATIONS**

### **§1.7 CARDINAL POINTS**

1. Conflicts of interest questions can be difficult to answer in a complex, changing business environment. Nonetheless, they must be answered.
2. The Conflicts Rules are best understood in the light of underlying values of undivided loyalty, independent judgment, and confidentiality.
3. Any failure to detect or respond to conflicts situations can be costly in terms of time, money, clients, and professional standing. On the other hand, no one is likely to be disciplined for taking too much care to review a conflicts situation.
4. Detailed information about clients and related parties as well as about the proposed transaction is needed for a conflicts check.
5. Conflicts issues must be reconsidered as circumstances change.

## CHAPTER 2

### WHO IS THE CLIENT?

#### Summary

- §2.1 Introduction
- §2.2 Reasonable Expectations Test
- §2.3 Was an Attorney-Client Relationship Formed?
- §2.4 Who Speaks for the Entity?

#### §2.1 INTRODUCTION

The most basic question of any conflicts analysis must be: Who is the client? Once this question is resolved, the process of identifying any conflicts of interest may begin. It is the client to whom the duties of confidentiality, loyalty, and independent judgment are owed.

In a non-business context, it may be somewhat easier to identify the client. However, in the current climate of C and S corporations, family limited partnerships, limited liability companies, limited liability partnerships, and other business entities, the attempt to identify a client can be a frustrating endeavor.

For instance, lawyers must take care to identify their clients when a transaction involves multiple parties. Challenges in identifying a client may arise in any one or more of the following situations: (1) some parties may not be represented; (2) other parties are successors in interest of one sort or another who may or may not “inherit” the representation of a particular lawyer; (3) an organization or entity may have an existence separate from the individuals involved with it; (4) there are parties with whom a lawyer has other than an attorney-client relationship; (5) one person or entity is paying the fees to establish another entity; or (6) a lawyer represents one party to a transaction that involves another party whom the lawyer previously represented or currently represents in a different type of matter.

Nonetheless, conflicts of interest problems necessarily involve at least one current client, former client, or prospective client (in the case of lawyer-versus-client conflicts) or two or more current, former, or prospective clients (in the case of multiple-client conflicts). This chapter reviews the basic issues of “who is the client” and the related question of duties owed to prospective clients.

#### §2.2 REASONABLE EXPECTATIONS TEST

Not surprisingly, it is not necessarily the lawyer who establishes whether there is an attorney-client relationship. The leading case in Washington is *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992). In that case, the court held:

## §2.2 / WHO IS THE CLIENT?

The existence of the relationship ‘turns largely on the client’s subjective belief that it exists.’  
...The client’s subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney’s words or actions.

The step between prospective client and actual client can, however, be a very small one. Under the so-called reasonable expectations test, an attorney-client relationship exists notwithstanding the absence of an express retainer or equivalent agreement if the putative client subjectively believes that an attorney-client relationship exists and if that subjective belief is sufficiently reasonable under the circumstances. *See, e.g., In re McGlothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983).

A good example of what can occur under the reasonable expectations test is provided by the Oregon case of *In re Baer*, 298 Or. 29, 688 P.2d 1324 (1984). Attorney Baer’s wife decided to purchase real property from a couple at an agreed-upon price. Baer then approached the couple and offered to prepare the paperwork in exchange for a reduced price to his wife. The couple agreed and Baer prepared the documents. Subsequently, however, the couple became dissatisfied with what Baer had done and filed a bar complaint. The Oregon Supreme Court held that under the circumstances, Baer’s clients included not only his wife but also the couple and that he, therefore, had a multiple-client conflict of interest, because he was representing both buyer and seller at the same time, and a personal or business conflict, because his wife was doing business with clients whom he was representing. *Cf.* Washington Rule of Professional Conduct (WRPC) 1.7 (discussed in chapter 3), WRPC 1.8 (discussed in chapter 4); *see also* WRPC 4.3 (requiring lawyers to make their roles clear to unrepresented nonclients when roles may be misunderstood).

Based upon the potentially broad reach of the reasonable expectations test, a lawyer who represents some but not all parties to a business transaction should send a nonrepresentation letter to anyone whom the lawyer does not represent and who is not otherwise represented by counsel. The mere fact of the nonrepresentation letter should make it extremely difficult for a putative client to assert a credible subjective belief that such a relationship existed, let alone that the belief was reasonable under the circumstances. Although it would remain theoretically possible for a lawyer who sends such a letter to undo its effect by actually giving legal advice to the putative client, this should be a very rare occurrence.

In considering the potential implications of the reasonable expectations test, business attorneys may find it helpful to distinguish between three overlapping, but arguably distinct, situations. The first situation—and one in which the reasonable expectations test can readily be applied to uphold an attorney-client relationship—involves an attorney who decides to represent fewer than all of a small group of would-be owners in starting a new business enterprise and who nonetheless provides, or may appear to be providing, information or analysis that is circulated to and relied upon not only by the attorney’s own clients but also by other unrepresented individuals.

The second situation, in which the reasonable expectations test is far less likely to be successfully applied, involves officers or employees of existing clients who may, in fact, be the conduits through whom legal advice is given to the client. Unlike the multiple would-be owner situation, the law here is fairly clear that individual officers or employees who speak to company counsel about matters that they know to be company business will find it very difficult to assert that they became individual clients of the lawyer. In other words, the entity, and not its representatives, is the lawyer’s client. *See, e.g., In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998); Oregon State Bar Legal Ethics Opinion 1991-85 (available on Westlaw and on the Oregon State Bar’s website).



A third situation can be said to blend the entity theory and the reasonable expectations theory. Suppose, for example, that 100 percent of the stock of a lawyer's corporate client is owned by a single individual but that lawyer has never done any personal work for the client. Is representation of the corporation nonetheless equivalent to representation of the individual as a matter of law? *See, e.g., In re Banks*, 283 Or. 459, 474–75, 584 P.2d 284 (1978); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1268 (7th Cir. 1983); *Rosman v. Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987). The same result may or may not follow, however, when one business is owned by another business rather than by an individual. *Cf.* ABA Committee on Ethics and Professional Responsibility, Formal Op. 390 (1995); Cal. Ethics Op. No. 1989-113. On the other hand, suppose that a corporation or partnership has two or more unrelated owners rather than just one. In this case, as in cases in which the number of owners increases to greater than two, the argument against holding that representation of the entity is representation of its owners is a strong one unless there is some independent basis on which to conclude that the attorney also represents one or more owners. *See, e.g., Oregon State Bar Legal Ethics Op. No. 1991-85; In re Kinsey*, 294 Or. 544, 660 P.2d 660 (1983).

### **§2.3 WAS AN ATTORNEY-CLIENT RELATIONSHIP FORMED?**

Did an attorney-client relationship exist? Usually it is fairly clear whether such a relationship existed. There are some gray areas, however. For example, if an attorney declines to represent someone after an initial consultation, and the matter was discussed in such detail that confidences or secrets were imparted in good faith, an attorney-client relationship may exist for some purposes under the Conflicts Rules.

“Beauty contests” create the risk that an unintended attorney-client relationship may be formed. When a prospective client interviews several firms to handle a particular matter, it and the law firms know that an attorney-client relationship will result with only one firm. The firms participating in the beauty contest should each obtain in advance a written agreement with the prospective client. The agreement should clarify that information disclosed in the process will be used to perform conflicts checks and provide the firm with the background necessary to fashion a response to the request for proposals to represent the client, but that such information will not be confidential and may not serve as the basis to disqualify the firm from subsequent representations adverse to the client. Prospective clients should monitor closely the nature of the information being disclosed in the process. If in-house counsel is involved, it may be appropriate for that counsel to screen the information before it is submitted to the participating law firms.

### **§2.4 WHO SPEAKS FOR THE ENTITY?**

As discussed in §2.2, a lawyer who represents a business entity will generally represent only the entity and not its officers or employees. This is consistent with the approach taken in ABA Model Rule 1.13.

**ABAMODEL 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 which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

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

(e) 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.

ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 195 (ABA 4th ed. 1999).

Although this rule was not adopted in Washington, ABA Model Rule 1.13 should be understood and used as a guide in representing entities.

## CHAPTER 3

### CONFLICTS OF INTEREST INVOLVING CURRENT CLIENTS; INTERMEDIATION

#### Summary

- §3.1** Introduction
- §3.2** Conflicts of Interest Involving Current Clients: Rule 1.7
  - (1) Current Clients With Adverse Interests: Rule 1.7(a)
    - (a) Reasonable Belief Representation Is Proper
    - (b) Informed Consent
    - (c) Advance Consent
    - (d) Necessity of a Writing
  - (2) Representation Materially Limited by Responsibilities to One Other Than the Client: Rule 1.7(b)
  - (3) Nonwaivable Conflicts
- §3.3** Lawyer as Intermediary: Rule 2.2
  - (1) Nature of Intermediary Role
  - (2) Circumstances in Which Intermediary Role May Be Inappropriate
  - (3) Duty to Consult With All Parties
  - (4) Duty to Withdraw
- §3.4** Illustrative Example
- §3.5** Cardinal Points

#### **§3.1 INTRODUCTION**

Conflicts of interest involving *current clients* of a lawyer or the lawyer's firm raise some of the most difficult problems. (For the rules governing conflicts involving former clients, see chapter 5). Clear conflicts analysis and resolution are particularly important in light of the imputation consequences of Washington Rule of Professional Conduct (WRPC) 1.10—whereby the conflicts of one lawyer are imputed to the entire firm (including distant offices that may never have heard of the particular client or, for that matter, the affected lawyer). WRPC 1.10 is discussed in chapter 6.

The basic rules governing conflicts of interest between a lawyer's current clients are contained in WRPC 1.7 and 2.2. WRPC 1.7 sets out the general conflicts of interest rule and, for the most part, sets forth the principles on which all other conflicts rules rely. WRPC 2.2, the rule governing "intermediation," presents an alternative approach to certain kinds of conflicts problems.

### §3.2 CONFLICTS OF INTEREST INVOLVING CURRENT CLIENTS: RULE 1.7

#### **RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

\* \* \*

WRPC 1.7(a) deals with direct adversity and provides that, absent full disclosure and informed written consent, a lawyer may not represent a client (the "First Client") if that representation will be "directly adverse" to another client (the "Other Client"). WRPC 1.7(b) is both broader and narrower than WRPC 1.7(a) and provides that, again absent full disclosure and informed written consent, a lawyer may not represent the First Client if the representation of the First Client would be "materially limited" by the lawyer's responsibilities to an Other Client, a third person, or the lawyer's own interests. As is discussed below, WRPC 1.7 also establishes certain categories of conflicts that cannot be waived.

#### **(1) Current clients with adverse interests: Rule 1.7(a)**

WRPC 1.7(a) presents a black-and-white rule on its face. If there is direct adversity, then the lawyer may not represent the First Client against the Other Client absent, at a minimum, informed consent of both clients. However, the rule does not define "direct adversity." Although it may be easy to find direct adversity in a litigation context, Comment 11 to ABA Model Rule 1.7 notes that "[c]onflicts of interest in contexts other than litigation sometimes may be difficult to assess." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 93 (ABA 4th ed 1999).

We are not able to articulate an absolute standard of what is and is not "direct adversity." There are, however, several reasons to apply a broad standard for determining direct adversity. First, the conflict rules are premised on the lawyer's duties of loyalty and confidentiality, which are interpreted broadly by the courts. Second, there is the risk that the Other Client will later charge in a malpractice suit that the Other Client thought the lawyer was representing the Other Client's interests as well. The lawyer may have difficulty in defending this allegation if it cannot be shown that the lawyer made clear to the Other Client that the lawyer was not representing that party's interests.

A fair rule of thumb would be that direct adversity exists *at least* in circumstances in which: (1) the lawyer is preparing documents that the lawyer knows will be reviewed and commented upon by the Other Client; (2) the lawyer is reviewing or commenting upon documents prepared by or for the Other Client; (3) the lawyer is giving advice about rights and remedies under or otherwise

## **CONFLICTS RE CURRENT CLIENTS; INTERMEDIATION / §3.2(1)(b)**

interpreting a document to which the Other Client is a party (at least to the extent the issue concerns the rights and obligations of the Other Client); or (4) the lawyer is involved in negotiations with the Other Client or its representatives.

Direct adversity, on the other hand, does not exist simply from the representation of competitors. As the comments to the ABA Model Rules note, “simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.” For example, a lawyer should be able to represent multiple broadcasters in the same market even though they compete against each other for listeners. *See Curtis v. Radio Representatives, Inc.*, 696 F. Supp. 729, 735-36 (D.D.C. 1988).

### **(a) Reasonable belief representation is proper**

As discussed below, if direct adversity between existing clients is found, it may be possible to resolve the conflict by seeking the informed written consent of both clients. However, even if both clients would be willing to consent and waive a specific conflict, a lawyer facing a direct adversity situation may not seek consent unless the lawyer first reasonably believes that seeking consent will not adversely affect the relationship with the other client. Note that the focus of the rule is on the attorney-client *relationship* rather than the quality of the representation. *See* Hazard & Hodes, *THE LAW OF LAWYERING* §1.7:207 (1998).

The “reasonable belief” test has both subjective and objective components. First, the lawyer must subjectively believe that the representation is proper. Second, this belief must be objectively reasonable under the circumstances. “[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” Comment 5 to ABA Model Rule 1.7.

The “reasonable belief” requirement in many instances may end the conflicts analysis because the lawyer may conclude that he or she cannot accept the representation without damaging the lawyer’s (or the law firm’s) relationship with the Other Client. For example, a lawyer would reasonably conclude that he or she cannot represent the First Client in a hostile takeover bid of the Other Client without harming the relationship with the Other Client and should, therefore, decline the representation.

The reasonable belief standard is factual and circumstance-based. As such, the results could be different depending on the sophistication of the clients and the nature of the relationship between the lawyer and the client. For example, different conclusions as to reasonableness might be reached with respect to large corporations as compared with individuals, or when the lawyer’s representation of the client is of a limited nature.

### **(b) Informed consent**

If a lawyer is to represent current clients in a situation involving direct adversity, WRPC 1.7(a) requires informed consent of the clients to the conflict representation. That is, the lawyer has a duty to consult with both clients and to disclose all material facts that each client would need to evaluate the conflict and for the clients to decide, in their discretion, whether to consent.

As is discussed in §3.2(3), there are some kinds of conflicts that cannot be waived even if all affected clients consent after full disclosure. The fact that a client can waive a conflict after

### **§3.2(1)(b) / CONFLICTS RE CURRENT CLIENTS; INTERMEDIATION**

being given sufficient information to constitute informed consent does not mean, however, that it is always permissible for a lawyer to make the disclosures necessary to obtain that consent. A former client conflict example may illustrate the point. Suppose, for example, that a lawyer previously represented First Client in obtaining a patent. Suppose that Other Client then asks the lawyer to represent it in exploring possible means of working around First Client's patent. Theoretically speaking, this kind of former client conflict can be waived by First Client and Other Client. As a practical matter, however, it may well be that this plan is the last thing that Other Client would want First Client to know. Consequently, an effective waiver is not possible because adequate disclosure of the basis of the conflict cannot be made.

Most waiveable conflicts do not present such difficult problems, but this does not mean that lawyers would be well advised to treat their disclosure obligations cavalierly. The only truly safe way for a lawyer to proceed is to make sure that both the potential advantages and disadvantages of granting consent are explained in a way that is sufficient for the recipient not only to understand that a choice must be made but also to understand the actual or potential benefits and burdens of that choice. To a degree, the extent of the required disclosure will depend upon the sophistication of the parties whose consent is sought. For example, if consent is sought from in-house counsel on behalf of a sophisticated client, perhaps less information, or a more broadly formed waiver, is permissible. On the other hand, if the lawyer is seeking consent from an unsophisticated individual client, more disclosure and explanation may be required. Informed consent requires that the client have reasonably adequate information about the material risks of such representation to that client. "What is required for consultation or full disclosure will, of course, turn on the sophistication of the client, whether the lawyer is dealing with inside counsel, the client's familiarity with the potential conflict, the longevity of the relationship between client and lawyer, the legal issues involved and the ability of the lawyer to anticipate the road that lies ahead if the conflict is waived." ABA Opinion 93-372.

Nevertheless, a strong argument can be made that a lawyer who drafts a conflicts waiver letter should ideally include at least the following:

- A clear identification of the clients to be represented and any to be opposed.
- A clear identification of the work to be undertaken and of any limitations on that work.
- A discussion of whether the conflict could conceivably lead the lawyer to be less zealous or eager on any client's behalf.
- A discussion of how client confidences and secrets will be handled and of whether there is any potential risk of an adverse use of client confidences and secrets.
- A discussion of whether greater conflicts are presently foreseeable and of the effects if those conflicts come to pass (e.g., another lawyer may have to be brought in to duplicate the work).
- A request that the client consider each of these issues with care before reaching a decision, and an offer to answer any additional questions that the client may have before a decision is reached.
- At least when Oregon conflicts rules may also be implicated because of the multi-state nature of a matter or of a firm's practice, a recommendation that the client consult independent counsel before deciding whether or not to consent, as is required by Oregon DR 10-101(B).

## **CONFLICTS RE CURRENT CLIENTS; INTERMEDIATION / §3.2(1)(c)**

Two further points may also be worth noting. One is that clients who are asked for conflicts waivers in business matters are often inclined to want to grant waivers so that proposed transactions can proceed with a minimum of fuss and discomfort. The other is that erring on the side of too much disclosure is probably safer than erring on the side of too little. The lawyer who is concerned that the discussion of a particular risk may cause a client to withhold consent is the lawyer who ought to make sure that the discussion of that risk is included in the letter.

Again, there may be circumstances in which the lawyer cannot even seek the consent. For example, “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” Comment 5 to ABA Model Rule 1.7.

### **(c) Advance consent**

Lawyers should consider, in the proper circumstances, seeking advance consent from clients or prospective clients. “Advance consent” is consent to particular conflicts that do not exist at present but may arise in the future. For example, a lawyer might condition his willingness to serve as tax counsel on an isolated matter for Bank X to the agreement of Bank X that the lawyer and the lawyer’s firm may represent specific borrowers in lending transactions with Bank X in the future.

There is some debate on the efficacy of advance consent. The ABA Committee, in Formal Opinion 93-372, concluded that advance consent was permitted under the Model Rules but expressed a “guarded view.” The Committee’s concern was whether the client was truly informed.

Informed consent by the client is as necessary for effectiveness of a prospective waiver as for a contemporaneous waiver, but in the nature of things the consent is much less likely to be fully informed. Given the importance that the Model Rules place on the ability of the client to appreciate the significance of the waiver that is being sought, it would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting clients would survive scrutiny. Even that information might not be enough if the nature of the likely matter and its potential effect on the client were not also appreciated by the client at the time the prospective waiver was sought.

Keep in mind that an advance consent ideally should address both current client conflicts under rule 1.7 and potential former client conflicts under rule 1.9. Again, the level of sophistication of the client should have direct bearing on whether the consent sought was sufficiently informed. In addition, the nature and scope of the consent must be clearly set forth. As the ABA Opinion noted:

For example, a prospective waiver from a client bank allowing its lawyer to represent future borrowers of the bank could not reasonably be viewed as permitting the lawyer to bring a lender-liability or a RICO action against the bank, unless the prospective waiver explicitly identified such drastic claims.

ABA Formal Opinion 93-372. *See also* OSB Legal Ethics Opinion 1991-122 (re efficacy of prospective waiver).

### §3.2(2) / CONFLICTS RE CURRENT CLIENTS; INTERMEDIATION

#### (d) Necessity of a writing

Note that WRPC 1.7(a) requires that the consent to adverse representation be in writing. Therefore, reliance on an oral waiver to the conflict is contrary to the WRPCs. Moreover, it is extremely risky. Perhaps the most important lessons concerning conflicts of interest are to recognize the conflict, deal with directly, and put it in writing.

It is not necessary, however, for the clients themselves to sign the written consent. The definition of “written consent” would encompass a letter from the lawyer confirming oral consent of the client. *See* Preamble to WRPC (Terminology), reprinted in Appendix A. Nevertheless, the better and safer practice is to have the client sign the consent.

#### (2) Representation materially limited by responsibilities to one other than the client: Rule 1.7(b)

##### **RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE**

\* \* \*

**(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:**

**(1) The lawyer reasonably believes the representation will not be adversely affected; and**

**(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.**

\* \* \*

WRPC 1.7(b) does not use the direct adversity language that is contained in WRPC 1.7(a). Instead, an WRPC 1.7(b) conflict is present whenever the lawyer’s representation of a client may be materially limited by the lawyer’s obligations to another client, a nonclient or the lawyer him- or herself. As a practical matter, however, three points are worth noting. First, this is not an “either/or” situation. Many WRPC 1.7(a) conflicts are also WRPC 1.7(b) conflicts. Second, conflicts waiver letters must be written to all affected or potentially affected clients under either rule (there may only be one affected client under a WRPC 1.7(b) conflict, while a WRPC 1.7(a) conflict necessarily involves at least two affected clients), and the components of the waiver letters will be more similar than different.

Finally, WRPC 1.7(b), like WRPC 1.7(a), creates a class of current client conflicts that cannot be waived. Under WRPC 1.7(b), a lawyer cannot proceed unless the lawyer can reasonably conclude that the representation of the client whose consent is being sought will not be adversely affected by the limitation that triggered the conflict. For present purposes, however, the categories of per se nonwaivable conflicts under the two sections of WRPC 1.7 are likely to be the same. *See* §3.2(3).

The Conflicts Rules do not define “material limitation.” Whether something is a material limitation depends on the facts and circumstances of the particular situation. Several other rules contain examples of potential material limitations, including WRPC 1.8(a) (business relation between the lawyer and the client), WRPC 1.8(f) (the lawyer receiving payment from a person other than a client) and WRPC 1.8(i) (representation of a client where lawyer is related to opposing counsel).



Because the material limitations issue is often judged by bar disciplinarians and angry jurors after Murphy's Law has been applied to a transaction and things have gone awry, the safest course is again to make disclosure and seek consent in any close cases.

### **(3) Nonwaivable conflicts**

As is noted above, there are certain types of current client conflicts that cannot be waived under either WRPC 1.7(a) or WRPC 1.7(b). The official comments to ABA Model Rule 1.7 make clear that nonwaivable conflicts can include attempts to represent two or more parties to a business transaction whose interests are "fundamentally antagonistic"—even if an argument can be made that the parties may also share some interests in common. But what does it mean to say that the interests of parties are fundamentally antagonistic?

In some jurisdictions, for example, the simultaneous representation of buyers and sellers or other sets of parties in similar relationships has been held under the rules of those jurisdictions to present a nonwaivable conflict. *See, e.g., In re Johnson*, 707 P.2d 573 (Or. 1985). *See also Baldassarre v. Butler*, 625 A.2d 458 (N.J. 1993) (nonwaivable conflict exists if, but only if, a transaction is "complex"; unfortunately, no definition of "complex" transaction is given, nor is it explained whether complexity must be determined with or without regard to sophistication of clients involved). In other jurisdictions, a less strict rule may be applied—at least if all parties appear to be taking informed and consistent positions on all material terms.

As of the time of this publication, there do not appear to be any Washington disciplinary decisions or ethics opinions that address this issue. At a minimum, therefore, business lawyers should think twice (or perhaps even more than twice) before agreeing to the simultaneous representation of parties such as buyer and seller or lender and borrower. Even if such conflicts are subsequently determined in Washington to be waiveable, the risk that a subsequently disappointed party may assert, and that a jury or disciplinary body may agree, that the lawyer did not give sufficient disclosure of all potential points of conflict to all interested clients may well be unacceptably high.

### **§3.3 LAWYER AS INTERMEDIARY: RULE 2.2**

#### **RULE 2.2 INTERMEDIARY**

**(a) A lawyer may act as intermediary between clients if:**

**(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;**

**(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and**

**(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.**

\* \* \*

### **§3.3(1) / CONFLICTS RE CURRENT CLIENTS; INTERMEDIATION**

As can be noted, WRPC 2.2 contains some language that is similar to the language of WRPC 1.7. Lawyers who become confused about the relationship between WRPC 1.7 and WRPC 2.2 have nothing to be ashamed of. In fact, this confusion has led to a presently pending proposal before the Ethics 2000 Commission that could result in a combination of these two sections into a single integrated section. Pending further case law or black-letter clarification of the relationship between these two sections, the following points seem worth noting:

- WRPC 1.7 and WRPC 2.2 overlap in the sense that both provisions allow a single lawyer or law firm to represent multiple would-be partners or incorporators with similar bargaining power and whose interests appear to be reasonably consistent as long as all clients consent after full disclosure.

- WRPC 2.2 allows a single lawyer to mediate a preexisting dispute between parties—something that WRPC 1.7 does not allow.

- On the other hand, this does not mean that WRPC 2.2 should be viewed by business lawyers as an easy alternative to WRPC 1.7, which contains significantly lower standards for multiple representations in a context outside of dispute resolution/mediation. There is no particular reason to believe, for example, that the disclosure and consent obligations under WRPC 2.2 are lower than the comparable obligations under WRPC 1.7.

- Similarly, the specific requirements of WRPC 2.2 that are discussed below will often prove just as restrictive in practice as the WRPC 1.7 requirements. *See, e.g.,* Utah State Bar Op. No 116 (1992) (holding that lawyers cannot simultaneously represent divorcing spouses as clients under Utah RPC 1.7 or RPC 2.2 and assertions that RPC 2.2 “implies that the parties have a common interest that overrides their separate interests”). *See also In re Herzog*, 710 So. 2d 793 (La. 1998) (affirming stipulation for discipline under Louisiana RPC 1.7 and 2.2 of attorney who had attempted to act as intermediary in corporate merger).

WRPC 2.2 provides that in the *appropriate circumstances* a lawyer may act as an intermediary for both clients as long as: (1) the lawyer consults with each client concerning the advantages and disadvantages of the common representation, including the effect on the attorney-client privilege, and obtains each client’s written consent; (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with each client’s best interests; that each client will be able to make informed decisions, and that there is little risk of material prejudice to either of the client’s interests; and (3) that common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

#### **(1) Nature of intermediary role**

Note that a lawyer’s role as an intermediary is as a counselor and not an advocate. That is, the lawyer’s job is to seek common ground between clients in the best interests of each client rather than seeking to obtain an advantage for one party over the other. As such, the lawyer cannot provide strategic and confidential negotiating advice to one party that the lawyer does not share with the other party. It would also be inappropriate for a lawyer in an intermediary role to give tactical advice to one party against the other.

**(2) Circumstances in which intermediary role may be inappropriate**

The lawyer must make a reasonable determination that he or she is capable of serving as an intermediary. Relevant factors may include: (1) the complexity of the transaction; (2) prior or existing relationships with any of the parties; (3) the sophistication of the parties and each party's ability to make informed decisions; (4) the degree to which the parties' interests differ; (5) the risk that intermediation may fail; (6) the lawyer's ability to be impartial; and (7) the likelihood of contentious negotiations or hostility in the future.

These factors help highlight the circumstances in which a lawyer could or could not serve as intermediary. A common situation in which a lawyer serves as intermediary is in the formation of companies and the preparation of shareholder/owner agreements. The interests of the parties may be aligned, the issues in such documents may be fairly well defined, and the lawyer should be able to explain to the clients the options and have the clients jointly instruct the lawyer how such documents should be drafted. Another situation would be the representation of multiple shareholders in the sale of 100 percent of the stock of the company.

The examples above should be contrasted, however, with situations in which there are substantial differences between the interests of the parties. For example, it is generally not possible for a lawyer to act as an intermediary between buyer and seller or lender and borrower in complex transactions. There are too many issues and too much divergence of interests for this to be safely accomplished.

Even in areas in which intermediation is common, other factors could preclude a lawyer from serving as an intermediary. For example, if the lawyer is able to communicate with only one of the clients, it is difficult to act as an intermediary. When the level of sophistication or power between the two clients is significantly different, or when the parties have unequal bargaining positions, intermediation may not be advisable. Similarly, when the lawyer has a longstanding client relationship with one of the parties, declining to serve as an intermediary may be prudent:

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Comment 7 to ABA Model Rule 2.2.

**(3) Duty to consult with all parties**

WRPC 2.2 also requires that an attorney consult with each client concerning the decisions to be made and the considerations relevant to making them while the attorney is acting as an intermediary. The ongoing consultation must be conducted impartially, in the best interests of all of the clients, and with due regard to the agreed balance between disclosure and confidentiality, so that each client may make adequately informed decisions.

One of the matters that should be the subject of consultation is the effect of intermediation on the attorney-client privilege. That is, as between the clients, unless the clients otherwise consent, there is no privilege and, therefore, everything that the lawyer tells to one party (or that party tells to the lawyer) is not subject to the privilege and is discoverable. In fact, a lawyer serving as an

### **§3.3(4) / CONFLICTS RE CURRENT CLIENTS; INTERMEDIATION**

intermediary should tell the parties that there should be no confidentiality as between either client and the lawyer and that all material communications between the lawyer and one client will be shared with the other client. If such an understanding is not acceptable to the parties—for example, if one of the parties does not want to have confidential communications shared with the other party—then intermediation will not be appropriate.

Serving as an intermediary also *may* not be appropriate if the lawyer consults with only one of the parties and relies on that party to both pass on information and provide the lawyer with instructions. WRPC 2.2(b) requires that while serving as an intermediary, “the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.” When communication is limited but the lawyer and the parties nonetheless conclude that service as an intermediary is appropriate, it would be particularly important to have this procedure memorialized in writing and agreed to by all parties. See Appendix H.

#### **(4) Duty to withdraw**

WRPC 2.2 requires that the intermediary withdraw if any client so requests or if the lawyer determines that any of conditions necessary to serving as an intermediary cease to exist. This risk of withdrawal and the possible additional costs associated with obtaining new counsel should be the subject of the informed consent sought from the clients. WRPC 2.2(c) provides that upon withdrawal “the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.” In other words, one of the risks of a “failed” intermediation is a non-consentable conflict with respect to the subject of the joint representation and, therefore, the lawyer cannot represent any of the parties concerning this matter.

On the other hand, if one of the clients to the joint representation simply wants separate counsel, but does not object to the lawyer continuing to represent the other party, it should not be necessary for the lawyer to withdraw from the representation.

In short, a lawyer should not serve as an intermediary if there are danger signals such as:

- substantial and material differences of position between the parties;
- uncertainty whether the parties can reach agreement;
- reluctance or refusal by one party to share confidential information with the other; or
- communications by the lawyer to or through only one client.

Even with adequate disclosure and written consent, a lawyer should be extremely confident in his or her ability to identify and communicate to each client all of the material issues that each client should consider in connection with the intermediation and the various options available to each client. This task is more difficult to the extent that the clients are not similarly situated with respect to such things as economic position or levels of sophistication.

### **§3.4 ILLUSTRATIVE EXAMPLE**

Assume that a lawyer (or law firm) has two clients—Longstanding Client A and Newer Client B. Assume further that A and B inform the lawyer that they have decided to engage in some sort of business transaction together. Speaking only to current client-based conflicts-of-interest issues, what are the lawyer's options? The answer will, of course, depend in part on the nature of the proposed transaction and in part on the nature of the clients and the lawyer's relationships with each of them.

- If, for example, A wishes to buy something from or sell something to B, it is clear that the lawyer is free under WRPC 1.7 to represent either A or B, but not both, as long as both A and B consent after full disclosure. As Washington law presently stands, however, it is not at all clear whether a lawyer can use either WRPC 1.7 or WRPC 2.2 to represent both A and B in a transaction of this type.

- If, on the other hand, A and B wish to start a business together, it is likely that both WRPC 1.7 and WRPC 2.2 would allow the simultaneous representation of A and B as long as their interests appear reasonably aligned and both consent after full disclosure.

- No one should assume, however, that representing parties with conflicting interests is a risk-free proposition. If, for example, a lawyer fails to make adequate disclosures to his or her clients or fails to see that the continuing requirements of WRPC 2.2 are fully complied with, the lawyer is at risk of both civil and disciplinary liability.

- The fact (if it be a fact) that a lawyer can ethically represent multiple current clients does not always mean that it is in the lawyer's or the clients' best interests to do so. If, for example, the lawyer chooses to represent both A and B in a single matter at the same time, the lawyer may find that if A and B subsequently have a falling-out with respect to the joint matter, the lawyer will be left with no clients at all. Sometimes discretion truly is the better part of valor, and it is better to seek clearance up front and while everyone is still friendly to represent one and only one client on a particular matter or set of related matters.

### **§3.5 CARDINAL POINTS**

1. Clearly identify who are, and who are not, your clients. Advise everyone of the decision in writing.
2. As a practical if not also technical legal matter, conflicts of interest are always present whenever a lawyer represents one current client adversely to another current client (even on entirely unrelated matters) and are often though not always present whenever a lawyer represents multiple current clients who are ostensibly on the same side of a matter.
3. Whether under WRPC 1.7 or under WRPC 2.2, some conflicts cannot be waived.
4. For those current client conflicts that can be waived, thoughtful and carefully written conflicts waiver letters are absolutely essential.
5. Sometimes less is more. The fact that a lawyer may ethically and in theory represent multiple current clients in a particular matter or set of matters does not mean that it is necessarily in the lawyer's or the clients' best interests to do so.



## CHAPTER 4

### BUSINESS TRANSACTIONS WITH A CLIENT

#### Summary

- §4.1** Overview
- §4.2** Elements of Rule 1.8(a)
  - (1) Attorney-Client relationship
  - (2) Fair and Reasonable Terms
  - (3) Full Disclosure by Attorney and Understanding by Client
  - (4) Consent
  - (5) Independent Counsel
- §4.3** Brief Illustrations
  - (1) Loans
  - (2) Corporate/Partnership Arrangements
  - (3) Purchases of Real Property
  - (4) Investments
  - (5) Referrals of Independent Counsel
- §4.4** Detailed Hypothetical Analysis—Investing in a Business Partnership the Attorney Represents
  - (1) Facts
  - (2) Analysis
- §4.5** Cardinal Points

**RULE 1.8 CONFLICT OF INTEREST;  
PROHIBITED TRANSACTIONS; CURRENT CLIENT**

**A lawyer who is representing a client in a matter:**

**(a) 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 interests are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;**

**(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and**

**(3) The client consents thereto.**

\* \* \*

#### **§4.1 OVERVIEW**

In general, business transactions between attorneys and their clients are regarded with disfavor by the courts, largely because of the fiduciary relationship between attorneys and their clients. “Transactions between attorney and client, as in all other cases where fiduciary relations exist between parties, one of whom possesses superior knowledge and ability and the other is

## **§4.2(1) / BUSINESS TRANSACTIONS WITH CLIENT**

subject to his influence, are regarded with a scrutinizing and jealous eye by courts of equity....” *Committee on Professional Ethics & Conduct of the Iowa State Bar v. Mershon*, 316 N.W.2d 895, 897–98 (Iowa 1982) (citations omitted). However, recognizing the impracticality of an absolute ban, Washington Rule of Professional Conduct (WRPC) 1.8(a) provides a set of rules under which such transactions may be effected.

WRPC 1.8 may fairly be viewed as an offshoot of WRPC 1.7(b). *See generally In re McMullen*, 127 Wn.2d 150, 164, 896 P.2d 1281 (1995). In general, WRPC 1.7(b) prohibits attorneys from representing clients when the representation may be materially limited by the attorney’s own interests unless (1) the attorney reasonably believes the representation will not be adversely affected and (2) the client consents in writing after full disclosure of the material facts. See §3.2(2) for a detailed discussion of WRPC 1.7(b). As a result, when evaluating whether to enter into a business transaction with a client, attorneys should also review and consider WRPC 1.7(b).

WRPC 1.8(a) should not be read to apply to certain common transactions that may occur between an attorney and client. The Comment to ABA Model Rule 1.8(a) notes that certain common commercial transactions between an attorney and his or her client do not give rise to the concerns that the rule is intended to address. For example, an attorney receiving medical, dental, banking or brokerage services from a client, or purchasing products manufactured or distributed by a client, would not ordinarily have an advantage over the client and would not be subject to the rule.

Finally, because most of the subparts of WRPC 1.8 do not necessarily relate to business transactions with clients, a discussion of all of such subparts is beyond the scope of this chapter. The reader should refer to the complete copy of WRPC 1.8 in Appendix A concerning potential conflict situations not covered by this chapter.

## **§4.2 ELEMENTS OF RULE 1.8(a)**

WRPC 1.8(a) requires that business transactions with clients be (1) fair and reasonable, (2) fully disclosed and transmitted in writing to the client in a way the client can understand, (3) the client must consent, and (4) the client must be given a reasonable opportunity to seek the advice of independent counsel. *In re Gillingham*, 126 Wn.2d 454, 462, 896 P.2d 656 (1995). Note also that in Washington, business transactions between an attorney and a client are considered prima facie fraudulent unless the attorney can show that “(1) there was no undue influence; (2) the attorney gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger.” *In re McMullen*, 127 Wn.2d 150, 164, 897 P.2d 1281 (1995) (citing *In re McGlothlen*, 99 Wn.2d 515, 525, 663 P.2d 1330 (1983)).

### **(1) Attorney-client relationship**

WRPC 1.8(a) does not apply to transactions in which no attorney-client relationship exists. However, attorneys should not assume that no attorney-client relationship exists simply because there is no formal, articulated engagement. See chapter 2 for a discussion on when an attorney-client relationship arises. *See also In re Pappas*, 159 Ariz. 516, 768 P.2d 1161 (1988) (finding that for purposes of the rules governing professional conduct, an attorney-client relationship exists when a person holds an objectively reasonable belief that such a relationship exists and relies upon



that belief, and when the attorney does nothing to refute that belief); *In re McGlothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983) (for purposes of disciplinary rules, attorney-client relationship continues as long as influence arising from the relationship continues). *But see In re Owens*, 144 Ill. 2d 372, 581 N.E.2d 633 (1991) (finding no attorney-client relationship between attorney and business partner).

## **(2) Fair and reasonable terms**

The terms of any business transaction between attorney and client must be objectively fair and reasonable. Note that even when the terms of a transaction may appear fair and reasonable, an attorney may still run afoul of WRPC 1.8(a), even if the client entered into the business transaction knowingly and voluntarily and suffered no harm. *See, e.g., In re Gillingham*, 126 Wn.2d 454, 896 P.2d 656 (1995).

## **(3) Full disclosure by attorney and understanding by client**

In any business transaction with a client, the attorney has a heavy burden of showing that a full and fair written disclosure of the transaction was made to the client. The primary purpose of requiring attorneys to fully disclose the nature and substance of a contemplated business transaction with a client is to permit the client to assess whether to do business and to continue to be represented despite the attorney's conflicting self-interest. The extent of such disclosure may also serve as a measure of the attorney's good faith.

The attorney should ensure that his or her written disclosure to the client be prepared so as to enable the client to fully understand (1) the nature of the transaction and each of its terms; (2) the extent of the attorney's interest in the transaction; (3) the ways in which the attorney's participation in the transaction might affect the attorney's exercise of professional judgment in any other legal work for the client; and (4) the nature of the respective advantages and risks to both the attorney and the client in the transaction. Comment, *Borrowing Money from a Client: The Harsh and Demanding Responsibilities of an Attorney*, 20 J. LEGAL PROF. 385, 390 (1995/1996) (citing C. Wolfram, MODERN LEGAL ETHICS at 484–85). The attorney should not assume that he or she has complied with the disclosure provision of WRPC 1.8(a) simply because the client may in fact understand the nature of the transaction. *See, e.g., In re Gillingham*, 126 Wn.2d 454, 896 P.2d 656 (1995); *Committee on Professional Ethics & Conduct of the Iowa State Bar v. Mershon*, 316 N.W.2d 895 (Iowa 1982).

## **(4) Consent**

The Washington version of rule 1.8 requires that the disclosures described above be in writing, but does not require that the client's consent be in writing. *Compare* ABA Model Rule 1.8(a)(3). Nonetheless, good practice dictates that the attorney should always obtain the client's consent in writing.

## **(5) Independent counsel**

As part of an attorney's written disclosure to a client concerning a business transaction, the attorney should expressly recommend that the client seek the advice of an independent attorney. Courts have held that the failure of an attorney to advise a client to seek outside counsel in

## **§4.3(1) / BUSINESS TRANSACTIONS WITH CLIENT**

connection with a business transaction is a violation of the attorney's ethical duties. *See, e.g., Ritter v. State Bar of California*, 709 P.2d 1303 (Cal. 1985). As part of that recommendation, attorneys should also be sure to include a written explanation of the attorney's conflict of interest in the transaction and the reasons why the client should seek the advice of independent counsel. *See, e.g., In re Singer*, 865 P.2d 315 (Nev. 1993); *Committee on Professional Ethics & Conduct of the Iowa State Bar v. Mershon*, 316 N.W.2d 895 (Iowa 1982). Moreover, referring attorneys should avoid participation in meetings or consultations involving the client and the referred attorney to ensure that the advice the client receives is truly independent. *See Committee on Professional Ethics & Conduct of the Iowa State Bar v. Carty*, 515 N.W.2d 32 (Iowa 1994).

## **§4.3 BRIEF ILLUSTRATIONS**

### **(1) Loans**

**(a) Facts.** Attorney and Client become friends during the course of a professional relationship spanning in excess of ten years. Attorney starts a wine importing business, and Client offers to give a gift of \$25,000 to Attorney towards the business. Attorney agrees to accept the money, but only as a loan and only if Client draws up a repayment schedule, which Client does. Although the loan is not secured, the terms of the loan transaction are otherwise fair and reasonable to Client. Attorney repays the loan in full with interest.

**Analysis.** Attorney's conduct is a violation of WRPC 1.8(a) because Attorney did not disclose and transmit in writing to Client the terms of the loan. Although the loan was repaid and Client suffered no actual injury in connection with the transaction, Attorney's failure to provide the written disclosure required by rule 1.8(a) still constituted a violation of the rule. *See In re Gillingham*, 126 Wn.2d 454, 896 P.2d 656 (1995).

**(b) Facts.** Client is a reasonably prudent investor. Attorney asks Client for a loan, which will be secured by a deed of trust on Attorney's home. Attorney tells Client that Attorney's home is worth approximately \$125,000, a reasonably accurate figure. Client is aware that Attorney is unable to repay an earlier loan made by Client. Client also knows that Attorney is hard pressed financially, is desperate for money, and that the loan is risky. Attorney did not advise Client to seek independent counsel, although Client has the opportunity to do so. Client makes the loan.

**Analysis.** Attorney has violated WRPC 1.8(a) by failing to give adequate written disclosures concerning his financial condition. Despite the fact that Client had knowledge of Attorney's financial desperation and believed the loan to be risky, Attorney violated the rule by failing to provide to Client complete written financial statements and a written appraisal and title report on Attorney's home. *See In re Johnson*, 118 Wn.2d 693, 826 P.2d 186 (1992).

**(c) Facts.** Client, an 84-year-old woman with a lack of financial sophistication, hires Attorney to assist Client in breaking a trust of which Client is a lifetime beneficiary. In response to concerns expressed by the trustee, Attorney proposes forming an informal trust and placing the trust funds in an account requiring both Client's and Attorney's signatures.

Attorney is in a precarious financial position and arranges for a \$30,000 unsecured loan from Client. Attorney drafts a promissory note calling for 12 percent interest. The note contemplates interest-only payments for three years, with the balance due at the end of that term. Attorney prepares for Client a disclosure document containing the details of the transaction, including

certain positive benefits (the high rate of return) and negative attributes (the unsecured status) of the loan. The disclosure also advises Client to seek independent counsel. Client signs the disclosure, and the loan is funded from the informal trust.

Eight months later, Attorney takes a second unsecured loan for \$10,000 with terms nearly identical to the first loan. Attorney prepares a disclosure similar to that prepared for the first loan, which Client signs. The second loan is also funded from the informal trust.

Sixteen months later, Attorney prepares a new promissory note to replace the original two notes. The interest rate is nine percent, and the note has no maturity date; however, assuming straight amortization, the note would be repaid in ten years. Another disclosure form similar to the first two was prepared by Attorney and signed by Client.

*Analysis.* Attorney has violated WRPC 1.8(a). Despite Attorney's attempt to comply with the rule by providing Client with written disclosure and obtaining Client's written consent, Attorney failed to disclose to Client Attorney's precarious financial condition and the fact that Attorney was not a good credit risk. Moreover, the terms of the loans were not fair and reasonable to Client because Attorney, having undertaken a fiduciary duty with respect to Client's funds, placed 64 percent of such funds in a risky, long-term unsecured loan inappropriate for Client, who was elderly and financially unsophisticated. *See In re McMullen*, 127 Wn.2d 150, 164, 897 P. 2d 1281 (1995).

## **(2) Corporate/partnership arrangements**

**(a) Facts.** Client, a high-tech, start-up Internet company, retains Attorney to incorporate the company and to provide additional legal services. Client proposes an arrangement by which Client will pay for Attorney's services with shares of Client's common stock. Attorney agrees and prepares a written fee letter memorializing the arrangement, which Client signs. Attorney then incorporates Client, and Client issues to Attorney five percent of Client's outstanding shares. The value of the shares approximately equals the value of the attorney's services.

*Analysis.* Attorney has violated the rules because he failed to recommend that Client obtain independent counsel. WRPC 1.8(a) applies to this situation because Attorney's acquisition of Client's stock amounts to entering into a business transaction with Client. Although such transactions are not per se unethical, Attorney must still comply with all of the requirements of WRPC 1.8(a). Attorney should also give proper consideration to whether Attorney's fee is reasonable (WRPC 1.5), and whether Attorney's representation of Client will be limited by Attorney's own interests (WRPC 1.7(b)). *See, e.g., Utah Ethics Opinion No. 98-13 (1998); Mississippi Ethics Opinion No. 230 (1995).*

**(b) Facts.** Attorney, Client, and Architect form a corporation for the purpose of developing land owned by Client. Attorney provides no written disclosures to Client and makes no recommendation that Client seek independent counsel. In exchange for their respective shares in the corporation, Client contributed the land, Attorney contributed legal services, and Architect contributed engineering services. Attorney gives the corporation an interest-free demand note to represent his services. Attorney performs over \$6,000 in legal services and expends \$900 in out-of-pocket costs. The corporation is subsequently unable to obtain financing, and the development plans falter. Client dies, and Attorney conveys all of his shares back to the corporation pursuant to a prior oral agreement with Client. Attorney has made no profit on the transaction and seeks no payment for the services rendered.

#### **§4.3(3) / BUSINESS TRANSACTIONS WITH CLIENT**

*Analysis.* Attorney has violated the rule because he failed to give the required disclosures and recommendation for independent counsel. Although Attorney is forthright and honest, that does not relieve him of his responsibilities under the rules. *See Committee on Professional Ethics & Conduct of the Iowa State Bar v. Mershon*, 316 N.W.2d 895 (Iowa 1982) (decided under DR 5-104(A)).

**(c) Facts.** Attorney C represents and is one of the three owners of ABC Corporation. B approaches Attorney C with a new opportunity in the same line of business as ABC Corporation and asks Attorney C to form BC Corporation without informing A or giving A an opportunity to participate, either personally or through ABC Corporation. Because B is the driving force behind ABC Corporation and because A has never treated him with respect, Attorney C does so.

*Analysis.* Even if A is not an individual client of Attorney C pursuant to the “reasonable expectations” test (see §2.2 of this book), Attorney C may well be subject to discipline and to civil liability for helping B as well as himself to usurp ABC Corporation’s corporate opportunities and breach fiduciary duties owed to ABC Corporation. *See, e.g., In re Kinsey*, 660 P.2d 660 (Or. 1983); *Granewich v. Harding*, 985 P.2d 788 (Or. 1999); *In re Pappas*, 768 P.2d 1161 (Ariz. 1988). *But cf. In re Owens* 581 N.E.2d 633 (Ill. 1991) (no ethics violation found as to entry into business transaction with nonclient).

#### **(3) Purchases of real property**

**(a) Facts.** Client mentions to Attorney that Client wants to sell a house. Attorney is aware of an appraisal that had been done on the house that valued the house at \$9,000; however, since the appraisal, the condition of the house had deteriorated. Attorney offers to help Client find a purchaser, then offers to purchase it himself. Attorney offers to draw up the necessary papers to save on attorney fees. Attorney then purchases the house by real estate contract for \$8,500. A year later, attorney sells the house by real estate contract for \$14,500. Despite the higher price, because of the differing payment terms, it is not possible to determine the relative value of each contract. Client is not harmed by the transaction.

*Analysis.* Attorney has violated the rules because Attorney did not provide adequate disclosures to Client concerning the purchase, including, among other things, information about the appraisal that had previously been done. Attorney also failed to show that Client could not have found a buyer on the same terms under which Attorney purchased the house, and failed to recommend that a new appraisal be done. Although the purchase measured against ordinary standards might be entirely proper, it did not meet the strict standards imposed upon attorneys dealing with clients. *See In re McGlothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983).

**(b) Facts.** Client is having financial difficulties and has become unable to meet her mortgage payments on a piece of real property she owns. Attorney, who is representing Client in a civil action, is looking for a place to live. Seeking to assist Client with her financial problems, Attorney and Client negotiate and Attorney drafts a lease/purchase agreement for the property under which Attorney was to make payments directly to the mortgagee. However, neither party pays the mortgagee for amounts then in arrears. The mortgagee threatens to foreclose, and at the same time, Attorney and Client begin to differ on the strategy to be used in the civil action. Client pays the arrearages and locks Attorney out of the property.

*Analysis.* Attorney violated the rules because he failed to make adequate disclosure to Client and failed to afford her an opportunity to obtain independent counsel. This is true even though Attorney intended no harm and was in fact trying to aid Client with her financial difficulties. Because the parties had differing interests in the transaction, Attorney should have provided complete disclosures to Client, including disclosures about any potential adverse effects of the transaction, and advised Client to seek independent counsel. *See West Virginia State Bar v. Cometti*, 189 W. Va. 262, 430 S.E.2d 320 (1993).

#### **(4) Investments**

**(a) Facts.** Attorney is a corporate secretary and a director of Corporation, but has no ownership interest in Corporation. Attorney encourages Client, an unsophisticated investor, to invest in Corporation by purchasing five \$10,000 certificates of deposit and pledging them as collateral for Corporation's line of credit. Corporation paid Client \$1,000 per month as compensation for supplying the collateral. Prior to the investment, Attorney advises Client to consult with a named stock broker, investment counselor, and the Attorney's CPA; however, Attorney never advises Client to seek independent legal counsel. Corporation falls on hard times, and Client loses about \$25,000 of her investment.

*Analysis.* Attorney violated the rules because he failed to advise Client to seek independent legal counsel and failed to make proper disclosures concerning the transaction. Even though Attorney had no ownership interest in Corporation, Attorney and Client had differing interests in the transaction, and as a result, Attorney had a duty to provide the required disclosures and to otherwise comply with the rules. *See In re Luebke*, 301 Or. 321, 722 P.2d 1221 (1986).

#### **(5) Referrals of independent counsel**

*Facts.* Attorney is in the process of entering into a transaction with Client involving the assignment of a real estate contract by Attorney to a corporation owned by Client. Recognizing the conflict of interest, Attorney suggests that Client contact another attorney, Referral, who is familiar with Client and who is also a very close personal friend of Attorney. Attorney, Client, and Referral attend a meeting to discuss the assignment. Attorney sits in on the meeting and expresses his opinions. No other meeting between Referral and Client is held.

*Analysis.* Attorney has not met the independent counsel requirement. Although Attorney recognized the conflict and recommended Referral as counsel for Client, Attorney's friendship with Referral and Attorney's attendance at the only meeting between Referral and Client made it improbable that Referral could be truly independent. Attorney should have insisted that Client secure independent counsel. *See Committee on Professional Ethics and Conduct of the Iowa State Bar v. Carty*, 515 N.W.2d 32 (Iowa 1994).

## **§4.4(2) / BUSINESS TRANSACTIONS WITH CLIENT**

### **§4.4 DETAILED HYPOTHETICAL ANALYSIS—INVESTING IN A BUSINESS PARTNERSHIP THE ATTORNEY REPRESENTS**

#### **(1) *Facts***

Two long-term clients ask a lawyer to invest with them in a real estate development. The three would form a general partnership to acquire property and construct town houses. According to the proposal, each would have an equal interest in the partnership.

#### **(2) *Analysis***

A lawyer is generally prohibited from entering into business transactions with a client or acquiring financial interests adverse to a client. WRPC 1.8(a) describes the four conditions necessary for an exception to this general prohibition: (1) the transaction and terms are fair and reasonable to the client; (2) there is a full disclosure transmitted in writing to the client in a manner reasonably understood by the client; (3) the client is given a reasonable opportunity to seek independent counsel; and (4) the client consents. Overlaying these conditions is the additional burden imposed upon attorneys to show that (1) there was no undue influence; (2) the attorney gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger.

Under the circumstances considered here, it appears at first blush relatively easy for the attorney to meet the rigors of WRPC 1.8(a). On the face of it, equal investments by all three parties in exchange for equal shares in the partnership looks inherently “fair and reasonable.” But even in that simple example, the weave of the story almost invariably becomes more complex.

Although the attorney initially may be sought as a source of investment capital, usually the lawyer’s professional skills are also viewed as an available asset. When the two clients ask the lawyer to draft even a simple partnership agreement, the opportunity for later dispute about “fair and reasonable” terms begins to loom. If the lawyer drafts a bare-bones partnership agreement and the lawyer is later favored by the absence of buy-and-sell provisions, the lawyer may be accused not only of neglect, but of self-dealing. On the other hand, if the lawyer attempts to guide the two clients through the maze of issues typically addressed by complex partnership agreements, the chances for later second-guessing about what is “fair and reasonable to the client” may be multiplied. Of course, if the lawyer does become involved in the drafting of the partnership agreement, WRPC 1.7 and 2.2 may also apply, even if the clients are given a reasonable opportunity to seek independent counsel.

Assume that the attorney carefully explains to both clients the requirements of WRPC 1.8(a). The lawyer asks the two clients whether they are prepared to suffer the inconveniences of compliance with the rule, or whether they wish to find another partner or another lawyer. After the clients again express the wish to proceed, the parties sit down and outline the terms of a simple partnership agreement, which the lawyer prepares and insists must be reviewed by independent counsel. A prudent attorney might also insist that the independent counsel write an opinion that the lawyer’s interest in the partnership is fair and reasonable under all the circumstances relative to the two clients. Finally, before proceeding, the lawyer should obtain written acknowledgement from both clients of their consultation with the independent counsel. Only after all the steps are complete can the lawyer confidently write a check for the investment.

Most often, lawyers confront the prospect of investing in a client's business in much more complex circumstances. Several adjustments to the original hypothetical will show how quickly the bramble can grow. For instance, suppose the lawyer is taking an interest in the real estate development in lieu of a fee for legal services. Originally, the possibility for abuse looked remote because the lawyer was investing a proportional amount of money with the clients and was paid independently for any legal services. When those events merge, however, compliance with the "fair and reasonable" standard becomes elusive. Suppose also that the lawyer has a longstanding relationship with one of the two clients, but has only recently become acquainted with the other partner. In such a case, the partner who has known the lawyer for a brief time may be quick to question the value of the lawyer's contribution to the partnership and the implications of the lawyer's relationship to the partner who brought the attorney into the transaction.

If the lawyer chooses to brave the perils, the disclosure required to the two partners should include such things as the nature, extent, and terms of the lawyer's participation, the lawyer's possible inability to represent the partnership in either internal or external disputes, and the nature of the lawyer's interest and its effect on the lawyer's loyalty and independence of judgment. The risks and advantages of the transaction must be disclosed to all members of the partnership, as well as the benefits of obtaining independent counsel. The disclosure must be couched in terms that can be understood by everyone who has an interest in the partnership which, if the interest is community property, includes the spouses.

Although consultation by the clients with independent counsel provides some protection to the lawyer, it is not a guarantee of safe passage. Hindsight will be a hard taskmaster if the deal goes sour or, ironically, too well.

Although the Washington version of rule 1.8 requires that the disclosure to the client be in writing, there is no similar writing requirement for the consent of the client. In contrast, ABA Model Rule 1.8 does require that the consent be in writing. It is advisable that such documentation be obtained, particularly when there are a number of partners to the investment, some of whom do not have a prior relationship with the attorney. Effective consent presupposes fairness and reasonableness of the transaction, clear disclosure, and an opportunity to seek advice of independent counsel.

#### **§4.5 CARDINAL POINTS**

1. Because of the fiduciary relationship between an attorney and his or her client, business transactions between attorneys and their clients are closely scrutinized by the courts.
2. In addition to WRPC 1.8(a), attorneys entering into business transactions with clients should pay special attention to the requirements of WRPC 1.7(b).
3. Business transactions with clients must, at a minimum, be objectively fair and reasonable; however, violations of WRPC 1.8(a) can occur even when a transaction is fair and causes no harm to the client.
4. An attorney entering into a business transaction with a client must provide full and complete written disclosure to the client concerning all material aspects of the proposed transaction to enable the client to fully assess whether to continue with the transaction despite the attorney's conflicting self-interest.

#### §4.5 / BUSINESS TRANSACTIONS WITH CLIENT

5. An attorney should always obtain his or her client's consent in writing prior to entering into a business transaction.
6. An attorney must expressly recommend that the client obtain the advice of independent counsel prior to entering into a business transaction with the attorney. That recommendation should be in writing.
7. The referral for independent advice must be a bona fide referral and not a sham. There must be substantive discussions between the referred attorney and the client outside the presence of the referring attorney.
8. An attorney should evaluate whether the particular transaction is appropriate for the client given the client's particular personal and financial circumstances.
9. Fee arrangements by which an attorney agrees to accept stock or another financial interest in a client as payment for legal services are business transactions subject to WRPC 1.8(a), along with WRPC 1.5 and 1.7(b).

**Comment:** Undoubtedly, an attorney's safest course of action with respect to rule 1.8(a) is to avoid completely all business transactions with clients. In this regard, Professor Marianne M. Jennings suggests a simple rule to substitute for rule 1.8. "Just title the rule: '1.8 Business Transactions with Clients.' Then underneath the title put, 'NO!'" Jennings, *The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing to Do with Ethics: The Wally Cleaver Proposition as an Alternative*, 1996 WIS. L. REV. 1223, 1246. Barring that, attorneys contemplating entering into a business transaction with a client should carefully comply with all aspects of rule 1.8(a) and should keep in mind the high level of scrutiny with which such transactions are reviewed. See *Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan*, 97 Wn. App. 901, 988 P.2d 467 (1999).



## CHAPTER 5

### RULE 1.9: CONFLICTS OF INTEREST INVOLVING FORMER CLIENTS

#### Summary

- §5.1** Introduction
- §5.2** Has the Representation Ended?
- §5.3** Are the Matters the Same or Substantially Related?
- §5.4** Are the Clients' Interests Materially Adverse?
- §5.5** Has the Former Client Consented to or Waived the Conflict of Interest?
- §5.6** Even If the Conflict Is Resolved, Will Confidences or Secrets Be Used?
- §5.7** Consent of the New Client
- §5.8** Hypothetical Case
- §5.9** Cardinal Points

#### **RULE 1.9 CONFLICT OF INTEREST; FORMER CLIENT**

**A lawyer who has formerly represented a client in a matter shall not thereafter:**

- (a) 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 consents in writing after consultation and a full disclosure of the material facts; or**
- (b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.**

#### **§5.1 INTRODUCTION**

Washington Rule of Professional Conduct (WRPC) 1.9(a) generally prohibits a representation that is "materially adverse to the interests of the former client" regarding "the same or a substantially related matter." The WRPC confirms that duties of loyalty and confidentiality to a client do not end with termination of the attorney-client relationship. An attorney has no duty to accept a particular client, but once he or she does, the attorney loses a certain amount of freedom to accept new clients, even after the end of the relationship with the first client. In addition, WRPC 1.9 is included in the provisions to which WRPC 1.10 applies, imputing one attorney's disqualification to the whole firm of which he or she is a member.

WRPC 1.9(b) prohibits the use of a client's confidences or secrets to a former client's disadvantage, even if the client has consented to a representation that would otherwise be barred by WRPC 1.9(a).

WRPC 1.9 is often enforced by disqualification motions in litigation rather than by malpractice actions or disciplinary proceedings. Disqualification has serious consequences for the client and for the attorney. The client must retain new counsel who must learn about the matter, frequently without the benefit of the work product of the disqualified attorney. Allowing the new counsel to use the work product of the disqualified attorney would "infect" the new counsel with the taint of

## **§5.2 / CONFLICTS RE FORMER CLIENTS**

the confidences or secrets that led to the disqualification. The disqualified attorney suffers destruction of the relationship with the client as well as financial losses resulting from the cost of transferring the representation to the new counsel and the inability to collect fees for the work done before disqualification. Of course, disciplinary actions are used to enforce these provisions as well.

### **§5.2 HAS THE REPRESENTATION ENDED?**

The question whether the representation has ended assumes that the person concerned is or was a client at one time. That assumption bears scrutiny. See §2.3.

Once it is clear who the client was, it usually becomes apparent who the attorney was. Complications arise, however, from the increased movement of attorneys among firms. If one attorney is affected by WRPC 1.9, then so are all attorneys in the same firm. *See* WRPC 1.10(a). If an attorney was once a member of a firm that is disqualified under WRPC 1.10, changing firms does not necessarily cleanse the conflict. If the attorney had any knowledge of the client's confidences and secrets, the conflict follows that attorney even though he or she was not the primary attorney who actually represented the client. If that attorney has moved to another firm, WRPC 1.10 will operate to disqualify the entire new firm as well. Of course, if the attorney with primary responsibility for a client's matters leaves for another firm, the former firm will continue to be disqualified from work adverse to what is now its former client as long as any member of the firm has knowledge of that client's affairs. With regard to imputed disqualification issues, generally, see §6.1, especially the discussion of "screening."

Once it has been established that an attorney-client relationship existed, the question whether the representation of the former client has ended should also be examined and verified before applying WRPC 1.9. If there is any doubt that a person to whom legal services were once delivered may still reasonably regard himself or herself as a client of the lawyer (i.e., there is no tangible evidence of disengagement from either the lawyer or the client), then the facts should be evaluated under WRPC 1.7 and not WRPC 1.9. See chapter 3.

A gray area may exist if a client has entrusted several matters to an attorney over a period of years, but the attorney is not presently handling a matter for that client. This situation is frequently held to represent an inactive but ongoing attorney-client relationship. *See International Bus. Machs. Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978). When there is doubt about the nature of the relationship, the burden will fall on the attorney to do something to clearly terminate it if the attorney is seeking to rely on WRPC 1.9 (rather than WRPC 1.7). It is good practice to document the end of an attorney-client relationship, if it is in fact ending.

Note that a law firm may not terminate a representation in the middle of the matter in order to undertake an adverse representation in an unrelated matter. Under the "hot potato rule," termination of the relationship will not be effective to turn a current client into a former client. The firm will still be subject to the standards of WRPC 1.7. *See Picker Int'l v. Varian Assocs.*, 670 F. Supp. 1363 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989) (law firm for plaintiff disqualified after it merged with law firm that represented defendant in other, unrelated matters). *But cf. Ex parte AmSouth Bank*, 589 So. 2d 715 (Ala. 1991). In *AmSouth Bank*, a conflict arose due to a change in the configuration of adverse parties in the middle of a lawsuit; the court held that the firm could withdraw from its representation of one of them and continue the representation of the other, as

long as the firm was not responsible for creating the conflict and the withdrawal would not cause undue hardship to the client the firm wanted to drop.

**ILLUSTRATIVE CONFLICT SITUATION:**

**Lawyer's new firm seeks to represent a client in a matter adverse to a client of lawyer's former firm**

(a) *Defining characteristics.* A lawyer at one law firm moves to a different law firm, which then or in the future represents a client in a matter adverse to the interests of a client of the first law firm. The lawyer who made the move may or may not have been involved in the representation of the client his new firm seeks to proceed against.

(b) *Example.* Lawyer Able leaves his old law firm to practice with a new law firm. Some time after Able's switch, his new law firm wishes to represent Corporation B in a matter adverse to Corporation C, a client of the old law firm. If Able was never exposed to any information about Corporation C, WRPC 1.9 should not prohibit the representation. WRPC 1.9 would also not be a bar to the representation if the new matter is not related to any matter handled for Corporation C by the old law firm while Able was there. On the other hand, if Able did learn enough about Corporation C confidences and secrets to be of some help to Corporation B in the new matter, the matters would be related and WRPC 1.9 will prevent the representation. *See* WRPC 1.10(b) (re possibility of screening Able from the matter so that the new law firm may undertake the representation).

**§5.3 ARE THE MATTERS THE SAME OR SUBSTANTIALLY RELATED?**

The term "substantially related" is not defined in the Washington Rules of Professional Conduct. Courts have discussed the phrase, however, in the context of disqualification motions. Unfortunately, there is no uniformly accepted test for what should be compared in determining whether there is a close connection between two matters.

Although some opinions are couched in terms of protecting privileged information, going to the duty of confidentiality, others speak in terms of an ongoing duty of loyalty to the prior client regardless of whether any confidences or secrets have been or could have been disclosed. For example, if one attorney represents two people forming a new business entity, a later representation of one of those parties against the other will not usually risk a breach of confidentiality, because both parties were privy to all the confidences and secrets. The attorney will be barred from the subsequent representation (or subject to a malpractice claim), nonetheless, if the matters are the same or related. *See Damron v. Herzog*, 67 F.3d 211 (9th Cir. 1995); *Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979).

As a general proposition, in determining whether matters are substantially related, courts look to the substance of the transactions themselves and to the nature of confidential information likely to have been shared during the prior representation. If the new transaction is significantly connected to the former transaction, or if confidences or secrets relevant in the new transaction were revealed or might have been revealed in the prior transaction, the two matters are substantially related. *See, e.g., International Corp. v. Intercapital Corp.*, 41 Wn. App. 9, 700 P.2d 1213 (1985), *rev'd on other grounds sub nom. First Small Bus. Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 738 P.2d 263 (1987); *see also Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th

### §5.3 / CONFLICTS RE FORMER CLIENTS

Cir. 1983) (disqualification due to former representation so clear that law firm should be sanctioned for bad faith resistance to the disqualification motion). *Cf. Realco Servs., Inc. v. Holt*, 479 F. Supp. 867, 872 n.4 (E.D. Pa. 1979) (“The disruption and prejudice that befall a client whose counsel is disqualified are reasons to avoid a hasty conclusion in favor of disqualification, based merely on a ‘doubt’ about the propriety of the representation.”).

The former client need not establish that the attorney actually had access to or received privileged information. It is sufficient that the lawyer *could have obtained* confidential information in the first representation that would be relevant in the second. *See U.S. Lord Elec. Co. v. Titan Pacific Constr.*, 637 F. Supp. 1556 (W.D. Wash. 1986); *Teja v. Saran*, 68 Wn. App. 793, 846 P.2d 1375 (1993).

Courts will look more closely at situations in which an attorney has represented a client on several matters that involve the same general factual setting and that give the attorney unique insight into the client’s affairs or method of operating. *See Contant v. Kawasaki Motors Corp.*, 826 F. Supp. 427 (M.D. Fla. 1993), in which an attorney was disqualified from representing a plaintiff against Kawasaki in a products liability case because the attorney had previously (seven years earlier) defended Kawasaki in identical claims, although none of those claims related to the claim in the present case. *See also Stitz v. Bethlehem Steel Corp.*, 650 F. Supp. 914 (D. Md. 1987), in which former in-house labor counsel for the defendant for nine years was disqualified from representing the plaintiff in a labor dispute with the corporation.

On the other hand, *see Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981), in which the court refused to disqualify the plaintiff’s attorney in a churning case even though the attorney defended the brokerage in similar prior cases. *See also* Comments to ABA Model Rule 1.9, which state, in part:

[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

### ILLUSTRATIVE CONFLICT SITUATIONS:

#### **(1) Sequential representation of potentially adverse parties—representing the seller of a business, and later the buyer**

##### *(a) Defining characteristics*

Here we deal with problems that arise in sequential representation, when a lawyer represents one client and later represents a second client whose interests are potentially adverse to the first client. In most but not all instances, these cases involve a nexus between the two clients—either property they own sequentially or a contractual relationship between the two clients, or both.

##### *(b) Examples*

In the classic example, lawyer Able represents Corporation S, the seller of a business, at the time of sale. The buyer, Corporation B, subsequently retains Able to continue acting as counsel for the business. The nexus is the property of the business and the contractual relationship between the buyer and seller.

A similar property connection may give rise to conflicts when a lawyer is retained first by the seller of land and then by the purchaser who seeks to develop it, or when an attorney initially works

on the development of property and then later represents a client who seeks to acquire that property. A contractual tie exists when an attorney represents a landlord first in negotiations with a commercial tenant, and is then asked by the tenant to represent the tenant's business. Another example of a contractual nexus occurs if a lawyer who represents the supplier of raw materials in its negotiations with a manufacturer is later hired by the manufacturer to act as general counsel.

Not all problems of sequential representation involve property or contractual ties between successive clients. For instance, a lawyer may be prevented from representing a new client by virtue of information previously obtained from an existing client who competes with the prospective client. Likewise, an attorney representing a property owner who seeks to forestall commercial development may later be precluded from representing another property owner in the same area who wishes to obtain a zoning change to enable commercial development.

**(2) Representation of two clients followed by representation of one of them in a matter adverse to the other**

*(a) Defining characteristics*

An attorney represents two parties in a context in which each party knows or presumes that his or her confidences and secrets will be shared with the other party and thus, as between them, such information is no longer confidential. These circumstances arise when an attorney undertakes a joint representation in which there is a free flow of information among the attorney and the two clients.

*(b) Examples*

Lawyer Barbara jointly represents Connie and Donald in the formation of a limited liability company. Connie later withdraws as a member of the company and brings an action against the company and Donald for a breach of the operating agreement. Even though Barbara has no confidences or secrets of Connie that relate to the matter, disqualification from representation of the company and Donald is likely.

A similar set of circumstances may arise from the joint representation of a husband and wife in their estate planning. Again, confidences and secrets will be shared in a setting in which it is assumed that they flow freely among the attorney and the two clients. If one spouse obtains other counsel and commences an action to dissolve the marriage, certainly the estate planning counsel (and his or her firm) may not handle the dissolution matter for the other spouse. It is possible that they would even be disqualified from continuing estate planning work for either spouse.

**§5.4 ARE THE CLIENTS' INTERESTS MATERIALLY ADVERSE?**

Whether the interests of the new and former client are "materially adverse" with regard to the substantially related matter is a question of fact, again calling for careful judgment on the part of an attorney. Representation will be adverse to the former client if advocating or advancing the new client's interests will in some way be harmful to the interests of the former client. It is not necessary that the later representation strikes a totally adversarial posture. It is enough if the two positions are not exactly aligned. In the ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, the authors suggest the following approach:

## **§5.5 / CONFLICTS RE FORMER CLIENTS**

The lawyer should take a clear-eyed view of the two representations. Would a reasonable observer conclude that the current client's success is likely to involve some detriment to the former client? Resolve doubts in favor of finding that the two representations may be adverse, because as a practical matter the judge probably will do the same.

*Id.* at 51:214.

Although the term “materially” seems to suggest that a matter of degree is involved in this judgment, the underlying values of loyalty and confidentiality generally do not lend themselves to such relativity under the rules. We read the qualifier “materially” to add little to WRPC 1.9, and conclude that if the proposed and former representations are found to be “substantially related” and “adverse” to the former client, a disqualifying conflict likely exists.

Although WRPC 1.9 suggests only a present-tense analysis (“*are* materially adverse”), we believe it is likely a court, in retrospect, will require an attorney to have foreseen what was reasonably foreseeable. Because assessment under WRPC 1.9 in part involves a representation or transaction that has concluded, predicting future conflicts should be somewhat easier than under WRPC 1.7.

### **§5.5 HAS THE FORMER CLIENT CONSENTED TO OR WAIVED THE CONFLICT OF INTEREST?**

The limitations on representation imposed by WRPC 1.9 will not apply if “the former client consents in writing after consultation and a full disclosure of the material facts.” Thus, if a new representation relates to one for a former client, and the new matter will be adverse to the interests of the former client, the attorney must elect whether to decline the representation or to seek a consent. Such an election should be made even if there is doubt about whether the matters are related or adverse to the former client. Forging ahead without a consent is risky. The attorney puts his or her new client at risk of changing counsel midstream and the attorney risks disciplinary proceedings or a civil action by the former client.

The majority of decisions concerning what constitutes “full disclosure” have been decided under WRPC 1.7 or its predecessor. The nature of the required disclosure, however, would be similar under WRPC 1.9. See §3.2(1)(b) of this book. The attorney must explain the implications of the representation, including the advantages and risks involved, and suggest that the client obtain the advice of independent counsel. See *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 588–89, 675 P.2d 192 (1983). One court has stated that “full disclosure” implies communicating “all of the facts and implications” of an attorney’s representation and any circumstances that might cause a client to question the undivided loyalty of the lawyer. *City Council v. Sakai*, 58 Haw. 390, 570 P.2d 565, 574 (1977). It has also been held that such disclosure includes a clear explanation of the risks and disadvantages to the client and an explanation of the advantages of seeking independent legal advice. *Matter of James*, 452 A.2d 163 (D.C. App. 1982); *In Re Boivin*, 271 Or. 419, 533 P.2d 171 (1975). It has generally been accepted that the requirement of full disclosure is not satisfied by merely informing the client of the fact of multiple representation. See, e.g., *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981).

Before proceeding to seek a consent, counsel should consult with the new client about the need to disclose information which may be (or which the client considers to be) confidential or secret. Counsel should also explore with the new client the possibility that seeking the consent will itself

put others on notice of the client's intentions or legal position at a time that would work to the client's disadvantage.

Realistically, it is not likely that a former client will be motivated to give such a consent. When seeking such a consent, it would be prudent to advise the former client to obtain independent counsel with respect to the request, preferably in writing. One's chances of obtaining a consent may be enhanced by reciting, if true, that the firm's attorneys who worked on the former client's matter will not work on the new client's matter. It may also be helpful to limit the scope of the consent to the negotiation and documentation of a matter, but not to representation of the new client in litigation, arbitration, etc., should a dispute arise between the new client and the prior client (i.e., "You won't be sued by your former counsel."). See sample Former Client's Consent Letter, Appendix I.

A client might consent to conflicts of interest that might arise in the future, as part of the arrangement under which new counsel begins work for the client.

**Example:** Law Firm A is under consideration to provide legal services for City B on a specific project. City B realizes that Law Firm A will need to represent clients against the City in connection with other, unrelated matters. City B may be likely to consent to such conflicts of interest in advance, particularly conflicts of a type that are common and familiar to the City.

This is most likely with sophisticated clients that are accustomed to using more than one firm or who have in-house counsel. Such advance consent may prove particularly helpful in those situations in which a law firm undertakes a new, limited representation for a client that has many affiliates who may later be involved in matters with other clients of the law firm. It is still necessary to fully inform the client of the risks and to ensure that the client is properly represented by independent counsel in connection with granting the consent which, of course, should all be done in writing. See the discussion of advance consents in §3.2(1)(c).

Even if a consent would be required to engage in a representation, but representation is undertaken without the consent, if the former client acquiesces under circumstances that render it unfair to force a change of counsel on the new client, a court may find that the conflict has been waived. However, a court will not interpret the former client's delay in objecting to the new representation, alone, as a waiver. If the former client unfairly waits too long to object, however, and springs the objection at some point in the proceedings that would give it a tactical advantage, a court is likely to permit the representation to continue. Rather than waiver, the relief is really more in the form of a laches defense. The courts look for situations in which the former client had full information about the representation and its adverse nature, failed to object until it would gain an advantage by doing so despite an earlier opportunity to object, and the new client would suffer extreme hardship if counsel is disqualified. See *Chemical Waste Management, Inc. v. Sims*, 870 F. Supp. 870 (N.D. Ill. 1995). Note, however, that these cases provide no protection against disciplinary action.

## **§5.8 / CONFLICTS RE FORMER CLIENTS**

### **§5.6 EVEN IF THE CONFLICT IS RESOLVED, WILL CONFIDENCES OR SECRETS BE USED?**

Generally, an attorney must protect the confidences and secrets of a client. *See* WRPC 1.6. Even if a former client has consented to the representation of a new client in a related matter that is adverse to the former client, the attorney is still subject to the duty of confidentiality imposed by WRPC 1.9(b).

Can a former client give a prior consent to the disclosure of privileged information? WRPC 1.9(b) does not provide for such a consent, but WRPC 1.6 does. If a client may consent to the use or disclosure of its confidences and secrets to its own disadvantage, it would be a very dangerous practice to rely on such a consent unless it is in writing, the information to be disclosed is quite specifically listed, and the former client is actually represented by independent counsel (as versus merely having been advised to obtain counsel).

### **§5.7 CONSENT OF THE NEW CLIENT**

Even if the prior client does provide the requisite consents, don't overlook the probable need for a consent from the new client. Such a consent probably will be required under WRPC 1.7(b) (see §3.2(2)), or possibly under WRPC 1.7(a) (see §3.2(1)).

## **§5.8 HYPOTHETICAL CASE**

### **(a) The case**

A good illustration of sequential representation involves a lawyer who has incorporated a closely-held business and represented it for a number of years. The owners elect to retire and the lawyer assists them in negotiating a sale of all the business assets. In the course of negotiations, the buyers become familiar with the attorney, and afterwards ask the attorney to continue representing the business.

### **(b) Analysis**

There are substantial business reasons why new owners ask the former owner's attorney to continue to represent the business. The lawyer may have knowledge and expertise that remains pertinent to that particular business notwithstanding a change of ownership. Because most sellers have a continuing financial stake in the integrity of the business, they are often as pleased as the buyer to secure continuity of legal representation. A lawyer experienced with a business can help new owners avoid pitfalls that might complicate their ability to meet continuing obligations to the seller. Given this harmony of interests, it is easy to neglect potential future problems reflected in the concerns of WRPCs 1.7, 1.9, and 2.2. *See* §§3.2 and 3.3.

Assuming the attorney is not asked to continue representing the business until after the sale has closed, there will not be direct adversity between the two clients. Yet, as any lawyer who has taken this route with frequency will attest, the potential for post-sale adversity between buyer and seller is substantial, regardless of good feelings at closing. Even in the event of a cash sale, future disputes may arise around such issues as terms of the sale or alleged breaches of representations



and warranties. Given the frequency of after-the-sale disputes between buyers and sellers, any lawyer who would continue to represent the business must make difficult assessments about the past and predictions about the future.

At the outset, an attorney must define the scope of past and contemplated future representation. Suppose, for instance, the attorney had little contact with the seller other than representing the business at hearings before a licensing agency that regulates its operations. That type of specialized representation presents negligible risk of withdrawal necessitated by future disputes between buyer and seller. On the other hand, a buyer's lawyer who had been deeply immersed in representing a business and in structuring its sale on behalf of the seller would in all likelihood be disqualified from representing either party in a later dispute, especially if it involved any aspect of the sale.

Once the scope of proposed representation is determined, the lawyer must attempt to measure the probability of a future dispute between buyer and seller, as well as the likely extent and nature of the dispute. Questions the attorney should ask include the following:

- How complex was the sale and how well informed were both parties?
- How sophisticated are both buyer and seller?
- How contentious by nature are both buyer and seller?
- Based on the lawyer's assessment of each party, how likely is it that future disputes may be resolved by intermediation?
- After the sale, how much interest does the seller continue to have in the business?
- How tightly structured was the sale to take care of unforeseen contingencies?
- Given the nature of the business and the structure of the sale, how long will it be before potential sources of dispute are laid to rest?
- How much will both buyer and seller be injured if the lawyer is later forced to withdraw?

In some situations it may be easy for a lawyer to continue post-sale representation. For example, a mother and father make a cash sale of a small business to a daughter who has worked in the business for many years. The parents have had and will probably continue to have access to confidential information about the business; the daughter has first-hand knowledge of the business; relationships are in harmony; and the likelihood of future disputes minimal. Under these circumstances, the risk of continuing representation is slight, both for clients and the lawyer.

In contrast, consider the sale of a complex, financially troubled business that occurs after heated, acrimonious negotiations between a buyer and seller, with a substantial part of the purchase price deferred. The prospect of future dispute is significant, the likelihood of the lawyer's disqualification high, and the costs of such disqualification substantial. It is difficult to judge at what point the aggregation of these prospects amounts to a material limitation of the lawyer's representation of the business after the sale. This case is probably not the time for an attorney to try to use the vagaries of WRPC 1.7(b) with surgical precision to justify continued representation.

Even if convinced that WRPCs 1.7 and 1.9 are not prohibitive at the outset, a lawyer still has many reasons to discuss the risk of sequential representation with both clients and to obtain their consents. As a threshold matter, an attorney may not be able to make an informed judgment about the likelihood of adversity in the absence of information that would be revealed through discussions with the parties. Also, in preliminary talks, the lawyer may discover that the seller

## **§5.9 / CONFLICTS RE FORMER CLIENTS**

objects to the attorney working for the buyer. Such an objection by the seller might foreclose the attorney from later reaching a reasonable belief that direct adversity did not affect the relationship with the seller. *See* WRPC 1.7(a) and §3.2(1)(a) of this book.

As in the case of business competitors, the seller, if given the opportunity, may wish to impose conditions on the lawyer's representation of the buyer in which the buyer agrees that, in the event of future direct adversity between buyer and seller, the lawyer may represent the seller. Enforceability may be a problem. *See* Appendix J for a sample letter.

If any attorney decides to continue representing the business after a sale, it is essential that a system be established to detect buyer-seller conflicts as early as possible. These conflicts can be detected most efficiently through an agreement by both parties that they will notify the lawyer immediately should a concern surface regarding the sale transaction. At the same time, the lawyer must regularly question whether developments in the business portend a dispute between the parties. If conflicts materialize, the lawyer must proceed with an analysis under WRPCs 1.7, 1.9, or 2.2, whichever is appropriate under the circumstances. Even if there has been previous consent to sequential representation, emergence of new or actual conflicts might require fresh disclosure and renewal of consent.

## **§5.9 CARDINAL POINTS**

1. Under WRPC 1.9, a lawyer cannot become involved in a matter of interest to a former client if the lawyer's involvement is materially adverse to the former client and the matter is substantially related to the prior representation.
2. Conflicts of interest involving one member of a firm are imputed to all members of the firm.
3. Even if no conflict exists, or is waived, the attorney may not undertake or continue the representation if a former client's confidences or secrets will be used to that client's disadvantage, unless a consent covers that as well.

## CHAPTER 6

### **RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE**

#### Summary

- §6.1** Imputed Disqualification Generally
- §6.2** Imputed Disqualification When Lawyers Are in a Continuing Association
- §6.3** Imputed Disqualification When a New Lawyer Joins a Firm
- §6.4** Imputed Disqualification When a Non-Lawyer Joins a Firm
- §6.5** Imputed Disqualification of a Lawyer's Former Firm
- §6.6** Imputed Disqualification Cured Through Consent
- §6.7** Rule 1.10(b) in Practice (Illustration and Analysis)
- §6.8** Cardinal Points

#### **RULE 1.10 IMPUTED DISQUALIFICATION; GENERAL RULE**

(a) Except as provided in section (b), 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, 1.8(c), 1.9, or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer ("the personally disqualified lawyer"), or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired confidences or secrets protected by rules 1.6 and 1.9(b) that are material to the matter; provided that the prohibition on the firm shall not apply if:

(1) The personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;

(2) The former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of confidential or secret information;

(3) The firm is able to demonstrate by convincing evidence that no confidences or secrets that are material were transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

Any presumption that confidences or secrets of the former client have been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

## **§6.2 / RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE**

**(c) 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 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 acquired confidences or secrets protected by rules 1.6 and 1.9(b) that are material to the matter.**

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

### **§6.1 IMPUTED DISQUALIFICATION GENERALLY**

Under the Washington Rules of Professional Conduct (“WRPC” or “rules”), imputed disqualification generally occurs when an entire firm (private law firm, corporate/organization legal department, or legal services organization) is barred from representing a client because one or more of its lawyers is personally disqualified from representing that client because of a conflict of interest. *See* WRPC 1.10; and WRPC Terminology, definition of “firm” or “law firm.” A firm’s imputed disqualification typically occurs because one of the firm’s current members became disqualified while associated with the firm. *See* WRPC 1.10(a); §6.2. However, an individual lawyer’s disqualification may at times be imputed to a firm when the personally disqualified lawyer is new to the firm. *See* WRPC 1.10(b); §6.3. Also, imputed disqualification may arise even after the personally disqualified lawyer has left the firm. *See* WRPC 1.10(c); §6.5. Although only the affected client’s consent can cure imputed disqualification that arises within a continuing association of lawyers, *see* WRPC 1.10(d), a firm newly hiring a personally disqualified lawyer may avoid imputed disqualification by erecting an “ethical screen” to prevent the exchange of client confidences between the new lawyer and the rest of the firm. *See* WRPC 1.10(b); §6.3. Such “ethical screens” have traditionally been allowed with new lawyers joining a firm from government service, *see* WRPC 1.11, or from work in the judiciary, *see* WRPC 1.12. Similarly, a firm left by a personally disqualified lawyer may avoid imputed disqualification by proving that no protected client confidences were exchanged between the departed lawyer and any of the lawyers remaining with the firm. *See* WRPC 1.10(c); §6.5. The imputation principle embodied in rules 1.10, 1.11 and 1.12 is also evident in other Washington Rules of Professional Conduct—for example, the rule concerning the lawyer as witness, WRPC 3.7; the rule concerning responsibilities of a partner or supervising lawyer, WRPC 5.1(c); and the rule concerning responsibilities regarding the non-lawyer assistant, WRPC 5.3(c).

### **§6.2 IMPUTED DISQUALIFICATION WHEN LAWYERS ARE IN A CONTINUING ASSOCIATION**

The imputed disqualification rule applies when a personally disqualified lawyer has an ongoing association with a firm and the individual lawyer’s disqualification arose during this ongoing association. For as long as an individual lawyer is associated with a firm, all lawyers in that firm will share the same strict duties of loyalty to the clients whom the individual lawyer represents or represented while that lawyer was associated with the firm. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 158 (ABA 4th ed. 1999) (hereafter “ABA MODEL RULES”). Under WRPC

## **RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE / §6.2**

1.10(a), accordingly, an irrebuttable imputation of disqualification attaches to every lawyer in a firm when any lawyer currently working for that firm has become personally disqualified, under rules 1.7, 1.8(c), 1.9, or 2.2, while working for that firm. Because a lawyer's disqualification in non-conflict situations does not implicate his or her duty of loyalty, an individual lawyer's disqualification under rules other than 1.7, 1.8(c), 1.9, or 2.2 will not require the imputed disqualification of the entire firm. *See, e.g., Federal Deposit Ins. Corp. v. U.S. Fire Ins. Co.*, 50 F.3d 1304 (5th Cir. 1995) (firm not disqualified from representing claimant even though two members of firm were personally disqualified due to probability they would be called as witnesses). Note that under Washington's rule 3.7, if a lawyer is likely to be a necessary witness, then that lawyer and other lawyers in the same firm are disqualified, with limited exceptions.

Traditionally, an additional justification for application of the imputed-disqualification rule in the context of a continuing association has been the presumption that client confidences would be shared between lawyers in a firm. *See* ABA MODEL RULES at 161. Because there is no presumption that confidences will be shared between lawyers in different firms, by contrast, the disqualification of one firm's lawyers generally will not be imputed to a different firm acting as co-counsel. *See, e.g., First Small Business Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 738 P.2d 263 (1987); *Richers v. Marsh & McLennan Group Assocs.*, 459 N.W.2d 478 (Iowa 1990). Although generally there is no rule of imputation between different firms acting as co-counsel, the nature of the working relationship between unrelated firms must be carefully scrutinized. When firms are working closely together to represent a common client, one firm will not be permitted through the participation of another firm to do indirectly what it is ethically prohibited from doing directly. *See, e.g., Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225, 229 (2nd Cir. 1977) (disqualifying counsel). *But see Essex Chemical Corp. v. Hartford Acc. & Indem. Co.*, 993 F. Supp. 241 (D.N.J. 1998) (not disqualifying counsel). Imputed disqualification can, however, be avoided by waiver by the affected client. *See* §6.6.

In certain instances, the literal terms of WRPC 1.10(a) must be read in the context of their practical application. WRPC 1.10(a) requires lawyers in a firm to refrain from "knowingly" representing a client whom any one of the firm attorneys would be barred from representing. The term "knowingly" is defined to mean "actual knowledge." *See* WRPC, Terminology. However, the ABA Model Rule has thus far been interpreted to bar such representation whether the lawyers in the firm knew or should have known of the imputed conflict. *See* Ethics 2000 Comm. Draft for Public Comment, ABA Model Rule 1.10—Reporter's Explanation of Changes, Text: 1 (March 23, 1999) (recommending change to "knows or reasonably should know" to conform to actual practice) (hereafter "Ethics 2000—Explanation"); *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1451 (E.D. Wis. 1993) (disqualifying law firm on the grounds that it should have known, although it did not, that a newly hired lawyer was personally disqualified). If lawyers in a firm undertake a representation and subsequently discover that one of the firm attorneys is personally disqualified, then, as soon as the situation becomes apparent, the representation should be discontinued and the case relinquished to other counsel.

In addition, the proposed revision to the ABA Model Rules extends the potential for imputation of disqualification to all paragraphs in ABA Model Rule 1.8 rather than just 1.8(c), while simultaneously eliminating the potential for imputation where the only conflict that exists is between the individual lawyer's personal interests and the interests of the client. Ethics 2000—Explanation, Text: 2, 3. ABA Model Rule 1.8 and WRPC 1.8 are similar. The proposed revision tracks the rationale behind, and perhaps the practical effect of, ABA Model Rule 1.10(a). All of the

### **§6.3 / RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE**

paragraphs of ABA Model Rule 1.8 (except the limitations in rule 1.8(i) on representations by lawyer-relatives in different firms) potentially implicate duties of loyalty shared by associated lawyers, while a lawyer's personal inability to represent a client does not limit the professional loyalties of the other lawyers with whom that lawyer is associated. *See, e.g.*, ABA MODEL RULES at 119 (the personal disqualification of lawyer-relatives in different firms is not imputed to their firms).

The Washington rule's strict provision for the imputed disqualification of all the lawyers in a firm applies only when the personally disqualified lawyer became disqualified while associated with that firm and remains associated with the firm. WRPC 1.10(a). Lawyers in a firm do not share an individual lawyer's strict duty of loyalty when the individual lawyer's representation of a client ended before the individual lawyer joined the firm, nor do they retain such a duty after the individual lawyer has ended an association with the firm. Accordingly, when the personally disqualified lawyer is either new to the firm or gone from the firm, the firm's other lawyers may be able to avoid imputed disqualification under the provisions of WRPC 1.10(b) and (c) respectively. *See* §§6.3 and 6.4.

### **§6.3 IMPUTED DISQUALIFICATION WHEN A NEW LAWYER JOINS A FIRM**

When a new lawyer joins a firm, other lawyers associated with the firm do not assume a full-fledged duty of loyalty towards former clients of the new lawyer or former or current clients of the new lawyer's former firm. The new lawyer may be presumed, however, to have acquired confidential information about all the clients of that lawyer's former firm, even if that lawyer did not represent them personally. *See, e.g.*, *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2nd Cir. 1975) (not disqualifying counsel); *U.S. Football League v. National Football League*, 605 F. Supp. 1448 (S.D.N.Y. 1985) (disqualifying counsel). It may also be presumed, moreover, that those confidences will be shared between the new lawyer and the lawyers with whom that lawyer has become associated. *See, e.g.*, *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983). These presumptions however, may be rebutted under the circumstances described below. In hiring a personally disqualified lawyer, a firm thus risks imputed disqualification on the basis of the "double presumption" that the new lawyer learned confidential information while the lawyer was with his or her former firm, and that the lawyer shared that information after joining the current firm.

Because the new lawyer's disqualification, by hypothesis, is not due to representation of a current client, the new lawyer will not be personally disqualified unless the lawyer seeks to represent a client with interests materially adverse to a former client of the lawyer, or the lawyer's former firm, in the same or a substantially related matter. *See* WRPC 1.9. If the new lawyer is personally disqualified, however, that disqualification will be imputed to the firm if the new lawyer had acquired material confidences or secrets protected by rules 1.6 and 1.9(b), unless the firm rebuts the presumption that those confidences have been, or will be, shared with the other lawyers in the firm. *See* WRPC 1.10(b).

Although the new lawyer is presumed to have acquired confidential information about all of the clients of that lawyer's former firm, that presumption can be rebutted at least with regard to clients whom the new lawyer did not personally represent. *See, e.g.*, *Silver Chrysler Plymouth Inc. v. Chrysler Motor Corp.*, 518 F.2d 751 (2nd Cir. 1975) (distinction drawn between young associates

### **RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE / §6.3**

with limited information and responsibility at large firms, and partners who are more directly involved with representing clients). If the new lawyer did acquire confidential information, the presumption that the client's secrets *will* be shared among lawyers in the new firm can be rebutted if the firm effectively screens the new lawyer from participation in the matter, does not apportion the new lawyer any portion of the firm's fee for the matter, and gives the new lawyer's former client notice of the conflict and the screening mechanism erected. *See* WRPC 1.10(b)(1), (2); *See also* Washington State Bar Association Committee on Professional Conduct, Opinion 190, September 24, 1993 (regarding fees). Similarly, the presumption that the former client's confidences *have* been shared among lawyers in the new firm can be rebutted if the firm demonstrates by convincing evidence that the new lawyer did not transfer any material confidences or secrets before the ethical screen was implemented and notice given to the former client. *See* WRPC 1.10(b)(3).

A firm can rebut the presumption that confidences have been or will be shared after implementation of an ethical screen by having the new lawyer serve an affidavit on the lawyer's former law firm and former client attesting that the lawyer will not participate in the matter or discuss the matter or the representation with anyone in the law firm, attesting that everyone in the law firm participating in the matter will be told that the new lawyer is screened from participating in or discussing it, and describing the law firm's screening procedure. *See* WRPC 1.10(b). The law firm's screening procedures will be subject to judicial review. *See* WRPC 1.10(b).

Although an affidavit will remove the presumption that confidences have been or will be shared *after* the ethical screen was implemented, and serves in practice to give notice of the ethical screen's implementation, it does not prevent an argument that confidences may have been shared *before* the screen was in place. *See* WRPC 1.10(b)(3). As a result, a firm that does not implement an ethical screen before hiring a new lawyer must at a minimum prove by "convincing evidence" that no confidences were shared between the new lawyer and the other lawyers in the firm. *See* WRPC 1.10(b)(3). *Cf. Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1451 (E.D. Wis. 1993) (construction of ethical screen did not cure the presumption that confidences had been shared because it was not put into place until more than two years after the personally disqualified attorney joined the firm). *See, e.g., State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988) (untimely, ineffective ethical screening attempt fails to prevent disqualification of entire prosecuting attorney's office).

In determining whether or not confidences actually have been shared, the following factors have typically been considered:

(1) The size and structural divisions of the law firm and the likelihood of contact between the personally disqualified attorney and the attorneys responsible for the present representation. *See, e.g., U.S. ex rel. Lord Elec. Co. v. Titan Pacific Constr. Co.*, 637 F. Supp. 1556, 1566 (W.D. Wash. 1986) (ethical screen effective despite the small size of firm, given the personally disqualified attorney's peripheral involvement in the firm as a non-participating attorney).

(2) The implementation of rules to prevent the new attorney from having access to relevant files and other information pertaining to the matter, possibly including the physical segregation of case files or their placement under lock and key and restrictions on access to computer files. *See, e.g., Nemours Foundation v. Gilbane*, 632 F. Supp. 418 (D. Del. 1986) (ethical screen effectively isolated personally disqualified attorney from relevant case files).

## **§6.4 / RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE**

(3) The promulgation of policies to prevent the lawyer from sharing in the fees derived from the matter. *See* Washington State Bar Association Formal Opinion 190 (1993) (under WRPC 1.10(b), personally disqualified equity-holding lawyers should receive no portion of the profits of a matter from which they are personally disqualified, and associates should not receive any bonus tied directly to such a matter).

In permitting the use of an ethical screen to rebut the presumption of shared confidences resulting from a new hire in a non-governmental context, Washington is joined by only nine other states. *See* WRPC 1.10(b); Illinois Rule of Professional Conduct 1.10(b)(2), (e); Kentucky Rule of Professional Conduct 1.10(d); Maryland Rule of Professional Conduct 1.10(b); Massachusetts Rule of Professional Conduct 1.10(d)(2); Michigan Rule of Professional Conduct 1.10(b)(1); Minnesota Rule of Professional Conduct 1.10(b); Oregon Code of Professional Responsibility 5-105(I); Pennsylvania Rule of Professional Conduct 1.10(b)(1), (2); Tennessee Code of Professional Responsibility 5-105(D), Tennessee Proposed Rule of Professional Conduct 1.10(c). The terms of these screening rules vary.

The rules of professional conduct in the majority of states follow the ABA Model Rules (and its predecessor, the ABA Model Code) and do not include any provision for rebutting the presumption of shared confidences through the use of an ethical screen. Although not all of these states bar the use of ethical screens to remove the presumption of shared confidences, the vast majority do. *Compare Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St. 3d 1, 688 N.E.2d 258 (Ohio 1998) (permitting the use of an ethical screen) *with Kassis v. Teacher's Ins. and Annuity Assoc.*, 717 N.E.2d 674 (1999) (ethical screening is useless where newly hired, personally disqualified lawyer had acquired material confidences of the affected client while with the lawyer's former firm) *and Henriksen v. Great American Sav. and Loan*, 11 Cal. App. 4th 109, 14 Cal. Rptr. 2d 184 (1992) (same).

## **§6.4 IMPUTED DISQUALIFICATION WHEN A NON-LAWYER JOINS A FIRM**

Although the ABA Model Rules, by their terms, apply to lawyers, a firm may be disqualified if it fails to prevent, through an effective ethical screen, a newly hired non-lawyer (e.g. paralegal or secretary) from sharing confidences about a client of the non-lawyer's former firm. *Compare Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466 (Tex. 1994) (disqualifying firm that failed to screen legal secretary); *In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 283 Cal. Rptr. 732 (1991) (disqualifying firm that failed to effectively screen paralegal who switched sides); *and Lackow v. Walter E. Heller & Co. Southeast, Inc.*, 466 So. 2d 1120 (Fla. Dist. Ct. App. 1985) (disqualifying firm) *with Arzate v. Hayes*, 915 S.W.2d 616 (Tex. App. 1996) (sufficient precautions taken to screen legal assistant) *and Apopka v. All Corners, Inc.*, 701 So. 2d 641 (Fla. Dist. Ct. App. 1997) (no disqualification; secretary screened). *See* Ethics 2000—Explanation, Draft Comment 7 (non-lawyers must be screened to avoid communication of confidential information that both non-lawyers and firm have a duty to protect).

As a general matter, however, the presumption that client confidences will be revealed may be weaker when a non-lawyer is hired, and so the strength of the screen may not need to be as great. *See, e.g., Esquire Care, Inc. v. Maguire*, 532 So. 2d 740 (Fla. App. 1988). However, a distinct minority of courts have concluded that, far from being any weaker, the presumption that client confidences will be revealed by non-lawyers is irrebuttable, and thus have ruled that screens will



## **RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE / §6.7**

not serve to prevent a law firm's imputed disqualification when hiring a non-lawyer with confidential information. *See, e.g., Koullisis v. Rivers*, 730 So. 2d 289 (Fla. Dist. Ct. App. 1999), *certified for appeal*; accord *State ex rel. Creighton University v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). Those jurisdictions did not, however, have rules such as Washington's that allowed lawyers to be screened.

### **§6.5 IMPUTED DISQUALIFICATION OF A LAWYER'S FORMER FIRM**

When a lawyer leaves a firm and takes clients, lawyers remaining with the firm, who did not represent the former client themselves, are bound only by the obligation to respect the confidences of the firm's former client. Because no one at the firm, by hypothesis, continues to represent the departed lawyer's former clients, the personal disqualification of the departed attorney will not be imputed to the firm unless it seeks to represent a client with interests materially adverse to a client of the departed lawyer in the same or a substantially related matter. *See* WRPC 1.10(c). Even in such a case, the firm can still avoid imputed disqualification if it can prove that no lawyer remaining with the firm acquired material confidences or secrets that would be protected by rules 1.6 and 1.9(b). *See* WRPC 1.10(c). Proving that no lawyer remaining with the firm acquired such protected material confidences or secrets may in practice require establishing that the firm relinquished without reviewing the files of the subject former client and purged its electronic records of all computer-based information about the subject former client. Imputed disqualification can be avoided by waiver by the affected client. *See* §6.6.

### **§6.6 IMPUTED DISQUALIFICATION CURED THROUGH CONSENT**

Imputed disqualification may be waived by the affected client. *See* WRPC 1.10(d). Simple consent by a client to a firm's representation of an adverse party will not, however, be deemed consent to the firm's adverse use of the client's confidential information in subsequent litigation. *See Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978). Also, consent by a client must meet the rigorous standards prescribed by the Washington Rules of Professional Conduct. *See, e.g.,* WRPC 1.7(a)(2), and WRPC Terminology, definitions for "consents in writing" or "written consent," and "consult" or "consultation."

### **§6.7 RULE 1.10(b) IN PRACTICE (ILLUSTRATION AND ANALYSIS)**

Law Firm A currently represents Plaintiff, an individual, in his product liability claim against Defendant, a manufacturer of widgets. Lawyer previously worked as a litigation associate at Law Firm B, a small litigation boutique that had represented Defendant against other product liability claims related to its manufacture of widgets. Lawyer had written one research memorandum outlining the elements of a product liability claim and had sat in on a lunchroom conversation during which Defendant's litigation strategy was discussed by the partner in charge of the representation. Lawyer had since joined Law Firm A, a large but friendly firm, as a part-time associate in its business department, in the same branch office as the firm's litigation department, where his practice was limited to evaluating and drafting employment contracts. Law Firm A did not construct an ethical screen around Lawyer until six months after its representation of Plaintiff

## **§6.8 / RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE**

had begun, during which time a claim had been filed and Defendant's managers in charge of widget production and design had been deposed.

Immediately after discovering the conflict, Law Firm A instructed Lawyer not to participate in or discuss the matter with any other lawyer or non-lawyer in the firm, informed all other lawyers and non-lawyers in the firm that Lawyer was screened from participating in the matter, physically segregated the case files, and notified Lawyer that he would not receive any additional compensation from the firm's representation of Plaintiff. Law Firm A notified Defendant and Law Firm B of the conflict immediately after discovering it, asked Defendant if it would permit Law Firm A to continue to represent Plaintiff, and offered to make reasonable adjustments to its ethical screen if requested by Defendant. Defendant, however, asked the court to disqualify Law Firm A. Lawyer then served an affidavit on Defendant and Law Firm B attesting that Lawyer would respect the ethical screen, and detailing its provisions.

Law Firm A agrees that Lawyer is personally disqualified from representing Plaintiff, as the matters are substantially similar and Lawyer's participation in the lunchtime conversation gave him protected confidential information about Defendant.

Lawyer's affidavit serves to rebut the presumption that protected confidences would be shared after the screen was constructed, as well as giving the required notice about the screen to Defendant. Defendant would bear the burden of proof in attempting to show that the ethical screen was in fact ineffective. Law Firm A's prompt construction of an ethical screen, its early notice to Defendant, and its willingness to strengthen its ethical screen if requested would probably convince a court that the screen will be effective.

However, Law Firm A would still bear the burden of proving, by convincing evidence, that no protected confidences were in fact shared before the ethical screen was implemented. Law Firm A could point to its large size, the fact that Lawyer is an associate, Lawyer's part-time status, the fact that Lawyer served in the business department and no longer worked on litigation or products liability-related matters, and the limited extent of Lawyer's confidential knowledge as evidence supporting its claim that no confidences had been shared. The fact that Law Firm A is "friendly," however, would count against Law Firm A's proof that no confidences had been shared, as would Lawyer's employment in the same branch office as the lawyers involved in the case, Lawyer's previous experience as a litigator, and, most importantly, the fact that significant elements of the case had occurred before the ethical screen was implemented. A court's willingness to allow Firm A's continued representation might well turn on Lawyer's ability to prove that he had conscientiously refrained from sharing confidential information about previous clients with other attorneys.

## **§6.8 CARDINAL POINTS**

1. Imputed disqualification generally occurs when an entire firm (private law firm, corporate/organization legal department, or legal services organization) is barred from representing a client because one or more of its lawyers is personally disqualified from representing that client because of a conflict of interest.
2. Imputed disqualification occurs when a personally disqualified lawyer has an ongoing association with a firm and the individual lawyer's disqualification arose during this ongoing association.

**RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE / §6.8**

3. When a new lawyer joins a firm, it is presumed that he or she has acquired confidential information about all the clients of that lawyer's former firm, even if the new lawyer did not represent them personally, and it may also be presumed that those confidences will be shared between the new lawyer and the lawyers with whom he or she has become associated. These presumptions may be rebutted under certain circumstances.
4. When a lawyer leaves a firm and takes clients, lawyers remaining with the firm, who did not represent the former client themselves, are bound only by the obligation to respect the confidences of the firm's former client. Imputed disqualification of the former firm may be avoided under certain circumstances.
5. Imputed disqualification may be waived by the affected clients.



## **CHAPTER 7**

### **MULTI-STATE ISSUES**

#### Summary

- §7.1** Overview
- §7.2** Choice of Conflicts of Interest Rules in Business Transactions Involving Multiple States: Washington and Model Rule 8.5
- §7.3** A Lawyer Could Be Subject to Discipline in a State in Which He or She Is Not Admitted
- §7.4** Policy Considerations in Conflicts of Interest
- §7.5** Choice of Ethics Rules by Contract? Probably Not
- §7.6** Cardinal Points

#### **§7.1 OVERVIEW**

Conflicts of interest rules are not identical in every state. For example, in some jurisdictions, representing multiple clients with adverse interests in the same matter is flatly prohibited, regardless of the clients' consent. So whose conflicts rules apply when a business client is represented by a Washington attorney in another state, perhaps because the client resides in the other state or perhaps because the business transaction for which the client is represented takes place in the other state? Whose rules apply when a Washington attorney is also a member of and subject to the bar of another jurisdiction? If you are in a multi-state law firm, whose rules apply when more than one office is involved in an engagement? And what happens when a law firm staffs a business engagement with several attorneys when perhaps none of them share membership in the same bar? Is it possible that each attorney is governed by different conflicts rules while working on the same deal? Is it possible that more than one state's conflicts rules are applicable?

Because many business engagements transcend jurisdictional boundaries, the opportunities for running afoul of some state's ethics rules abound. It may come as a surprise to some Washington lawyers, but Washington's ethics rules may not be the only rules that govern the engagement. In fact, a lawyer may be governed by the ethics rules of more than one jurisdiction at the same time. And other lawyers in the same law firm working on the same transaction, and indeed the law firm itself, may be "governed by" different sets of ethics rules.

We care about this for at least two important reasons. First, of course, because individual attorneys are subject to disciplinary action for violation of the ethics rules of the jurisdictions in which they are admitted. And second, because law firms as well as individual attorneys may incur professional liability based on a violation of the governing rules, e.g., for an impermissible conflict of interest. The issues raised in this chapter are applicable to lawyers in Washington-only based practices who may only occasionally stray out of this state as well as to lawyers in multi-state law firms who routinely practice around the country or around the world.

## §7.1 / MULTI-STATE ISSUES

**Note:** This chapter does not discuss the myriad of issues related to the unauthorized practice of law by practicing in a state other than the state to which a lawyer may be admitted. A discussion of issues to be considered by transactional lawyers may be found in Comment (e) to §3 of the RESTATEMENT OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 2, April 6, 1998), entitled “Extra-jurisdictional practice by lawyer.”

Unfortunately, there is no clear guidance, and very little learning, to be found at this time on the subject of conflicts of interest rules in multi-jurisdictional practice. (For a general discussion of multi-state practice of law and its numerous implications, see *Symposium: Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657 (1995).) The American Bar Association, through its Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct, has begun serious study of multi-jurisdictional practice issues. See the Commission’s website at [www.abanet.org/cpr/ethics2k.html](http://www.abanet.org/cpr/ethics2k.html). But until there is a coherent national policy, the most conservative, and not necessarily welcome, advice is to analyze the conflicts of interest rules in every jurisdiction that could possibly apply—every jurisdiction where the law firm has a participating office, where it has participating attorneys licensed to practice, where the clients reside, and where the business transaction has significant contacts—and let the most restrictive rules be your guide. However, even this advice assumes that there is no irreconcilable conflict among the possibly applicable ethics rules—i.e., one state’s rules require certain conduct and another state’s rules flatly prohibit such conduct. (It may be some consolation that this dilemma is more likely to arise in the area of maintaining client confidences, for example, than in the area of conflicts of interest.)

Consider the risks associated with the following hypothetical example: A State X-resident partner of a “Seattle based” law firm with “satellite offices” in State X and the District of Columbia (each office staffed with lawyers licensed in those jurisdictions) wants to represent two State X resident clients in a new “local matter” in D.C., using associates from State X, Washington and D.C. Both are regular clients of the law firm’s State X office, and the firm has previously represented both in a series of deals in State X based upon oral conflicts waivers, as permitted in State X. (State X allows a lawyer to represent multiple clients with adverse interests with the consent of each client, which need not necessarily be written.) Can the law firm undertake the engagement for the new matter in exactly the same way it has done for previous matters, i.e., with the two clients’ oral consent? Although the answer to that question may depend on facts not presented here, it is relevant to know that Washington also allows multiple representation with consents, *but requires that the clients’ consents be in writing*. But even worse, the District of Columbia *more broadly prohibits representing multiple clients with adverse interests in the same matter* than does Washington or State X. So the State X partner, not aware of the conflicts rules in Washington or the District, may have created exposure for her law firm. Additionally, the associates in the District and in the state of Washington could also face disciplinary action.

Or consider the following hypothetical example: An attorney based in Washington represents a corporation and its two shareholders in a “friendly merger” with an LLC based in Oregon, whose sole member is one of the two shareholder-clients. The attorney has obtained written waivers of the conflict from the two shareholder-clients, from the corporation, and from the LLC, as required in Washington. Both the LLC and its member reside in Oregon, but the corporation and the other

shareholder reside in Washington. Later, relations between the two shareholder-clients disintegrate, and the shareholder/member-client—who consented in writing to the conflict—later sues the attorney, claiming that she incompetently represented the LLC and him in his capacity as its sole member, or intentionally sold them out to the corporation, all of which the attorney denies. It turns out that Oregon, the state where the unhappy shareholder/member-client resides, permits written conflict waivers *but such waiver is not effective unless the lawyer advises the client to seek independent legal advice before reaching a decision*. It may also be that Oregon has stricter conflicts rules in this situation than Washington. Is the written conflict waiver effective? Or does the attorney have exposure based on an invalidly waived conflict under the Oregon Rules of Professional Conduct?

## **§7.2 CHOICE OF CONFLICTS OF INTEREST RULES IN BUSINESS TRANSACTIONS INVOLVING MULTIPLE STATES: WASHINGTON AND MODEL RULE 8.5**

The Washington Rules of Professional Conduct (WRPC) do not address multi-jurisdictional practice other than to say a lawyer admitted in Washington is subject to Washington disciplinary authority.

### **RULE 8.5 JURISDICTION**

**A lawyer licensed or admitted for any purpose to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.**

As one can readily see, Washington rule 8.5 does not give much guidance. It states the obvious: that lawyers admitted in Washington are subject to Washington's disciplinary authority. ("Admitted" means either regularly admitted or admitted pro hac vice.) The rule does not inform the lawyer whose substantive ethics rules might be applied in a multi-jurisdictional action, and there is no implication that the Washington rules should be the lawyer's exclusive disciplinary authority either.

Washington rule 8.5, adopted in 1985, is based on the older 1983 ABA Model Rule of Professional Conduct 8.5 ("Old Model Rule 8.5"). In 1993, the American Bar Association adopted an amended Model Rule 8.5 ("New Model Rule 8.5") which deals with multi-jurisdictional practice issues.

### **ABAMODEL RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW**

**(a) Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

**(b) Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

**(1)** for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

**(2)** for any other conduct,

**(i)** if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

**(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.**

**Comment**

***Disciplinary Authority***

[1] Paragraph (a) restates longstanding law.

**Choice of Law**

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

[5] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[6] The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

**Model Code Comparison**

There was no counterpart to this Rule in the Model Code.

ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 603-04 (ABA 4th ed. 1999).

Because New Model Rule 8.5 has not been adopted in Washington, it has no binding authority in Washington although it might, like any other rule or secondary source, be looked to for guidance.

New Model Rule 8.5 does several things that Washington rule 8.5 does not. First, New Model Rule 8.5(a) makes clear that it does not matter where the lawyer's conduct occurs in order for the lawyer to be subject to the disciplinary *authority* of his or her home bar, and that attorneys are potentially subject to the disciplinary *authority* of more than one jurisdiction for the same conduct.



Second, New Model Rule 8.5(b) includes a provision on “choice of law.” For conduct that is not court-related, under New Model Rule 8.5(b)(2)(i), when the lawyer is admitted to only one jurisdiction, the rules of the admitting jurisdiction apply. However, under New Model Rule 8.5(b)(2)(ii), when a lawyer is admitted to more than one jurisdiction, the rules of the jurisdiction in which the lawyer (not the law firm) *principally practices* will apply, unless the conduct has its predominant effect in another jurisdiction where the lawyer is also admitted, in which case the rules of that jurisdiction will apply.

But even relying on New Model Rule 8.5 may be problematic, at least in terms of providing guidance in avoiding professional liability exposure of a law firm based on a conflict of interest. Because it relates to attorney discipline, New Model Rule 8.5 focuses on the individual attorney involved in a matter, implicitly treating the attorney as a solo practitioner. This is helpful in terms of clarifying attorney discipline jurisdiction, which inherently affects individual attorneys. But conflicts of interest rules implicate the involved law firm as well, and New Model Rule 8.5 offers little useful guidance in that respect. *See Symposium: Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657 (1995).

### **§7.3 A LAWYER COULD BE SUBJECT TO DISCIPLINE IN A STATE IN WHICH HE OR SHE IS NOT ADMITTED**

A lawyer could be subject to discipline in a state in which he or she is not licensed, if the lawyer provides legal services in that state. The Comments to both the Old and New Model Rule 8.5 are silent on the issue of a jurisdiction’s right to discipline a lawyer not admitted to its bar who renders legal services within the jurisdiction. However, a few states (Alaska, Arkansas, California, Maryland, Michigan, and North Dakota) have expressly reserved the right to discipline an attorney who is not licensed or admitted to its bar but who nonetheless renders legal services within the state. Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer At All?*, 36 S. TEX. L. REV. 715, 749 (1995).

### **§7.4 POLICY CONSIDERATIONS IN CONFLICTS OF INTEREST**

If there are no clear rules regarding the choice of conflicts of interest standards in a multi-state business engagement, courts can make a determination based on general choice of law policy considerations. The Comment to New Model Rule 8.5 states: “If the rules of professional conduct in...two jurisdictions [in which a lawyer is licensed and practices] differ, principles of conflict of laws may apply.” Although not ethics issues, the standards to which an attorney will be held in a malpractice action, *see Boyson, Inc. v. Archer & Greiner, P.C.*, 308 N.J. Super. 287, 705 A.2d 1252 (1998), or in an action regarding attorney negligence toward a non-client, *see Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996), and rules regarding contingent fee agreements, *see Mitzel v. Westinghouse Electric Corp.*, 72 F.3d 414 (3d Cir. 1995), may also be determined by analogous choice of law principles, and are not necessarily those of the attorney’s home state.

## **§7.6 / MULTI-STATE ISSUES**

### **§7.5 CHOICE OF ETHICS RULES BY CONTRACT? PROBABLY NOT**

In dealing with conflicts of interest in business transactions, it is clearly prudent (and required in states including Oregon and Washington) to get the informed consent of each party in writing. Is it possible to choose which state's ethics rules apply to multi-state engagements at the same time in the same conflict waiver document? To do so would seem to have obvious advantages for the law firm and perhaps the clients as well. See Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer At All?*, 36 S. TEX. L. REV. 715, 793 (1995), for an interesting proposal to allow choice of ethics jurisdiction by contract. Unfortunately, however, the better argument is that a lawyer cannot bargain with a client for the application of ethics rules. See Arvid E. Roach II, *The Virtues of Clarity: The ABA's New Choice of Law Rule for Legal Ethics*, 36 S. TEX. L. REV. 907, 928 (1995).

### **§7.6 CARDINAL POINTS**

1. Washington retains disciplinary *jurisdiction* over all members of the Washington Bar. However, in considering disciplinary action against an attorney, Washington may look to the substantive ethics rules of another state in appropriate circumstances.
2. For individual attorneys involved in business transactions, as to disciplinary matters, the rules of the bar of their home state—i.e., their principal place of practice—should apply, unless they are also a member of the bar of another jurisdiction and the transaction takes place in that other jurisdiction, in which case the rules of that other jurisdiction will probably apply.
3. The rules that apply to law firms may not be the same as those that apply to individual attorneys. Prudence dictates that for business engagements, the law firm examine the residence of all potential clients in a conflict of interest, the location of the transaction, the states of bar admission and residences of the attorneys who are likely to staff the engagement, and the states in which the firm has its offices, particularly the offices most involved in the engagement. After examining the conflicts rules of these states, the law firm should act in a way that is consistent with the most restrictive rules whenever possible.

## APPENDICES

<b>Appendix</b>	<b>Description</b>	<b>Reference in Text*</b>
A.	Washington Rules of Professional Conduct .....	1.1, 4.1
B.	Bibliography .....	1.1
C.	Sample New Client-Matter Form .....	1.5(1)
D.	Sample Conflict Check Information Sheet .....	1.5(1)
E.	Letter to Unrepresented Person Disclosing Attorney's Role (RPC 4.3) .....	1.1
F.	Letter to Client Confirming Oral Consent to Common Representation .....	1.1
G.	Clients' Consent to Representation (RPC 1.7) .....	1.1
H.	Intermediary Letter to Be Signed by Client (RPC 2.2) .....	3.3(3)
I.	Former Client's Consent to Representation Under RPC 1.9 .....	5.5
J.	Letter to New Client Acknowledging Lawyer's Duties to Existing Client and Securing Advance Consent .....	5.8

*\*References are to section numbers.*



## **APPENDIX A**

### **WASHINGTON RULES OF PROFESSIONAL CONDUCT (RPC)**

*(Current as of February 22, 2000)*

#### **PREAMBLE**

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which a lawyer may encounter can be foreseen, but fundamental ethical principles are always present as guidelines. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Rules of Professional Conduct point the way to the aspiring and provide standards by which to judge the transgressor. Each lawyer must find within his or her own conscience the touchstone against which to test the extent to which his or her actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of the legal profession and the society which the lawyer serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

#### **PRELIMINARY STATEMENT**

The Rules of Professional Conduct are mandatory in character. The rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The rules make no attempt to prescribe either disciplinary procedures or penalties for violation of a rule, nor do they undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a rule should be determined by the character of the offense and the attendant circumstances.

#### **TERMINOLOGY**

“Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

“Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

## **RULE 1.2 / APPENDIX A: WASHINGTON RPC**

“Consents in writing” or “written consent” means either (a) a written consent executed by a client, or (b) oral consent given by a client which the lawyer confirms in writing in a manner which can be easily understood by the client and which is promptly transmitted to the client.

“Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

“Firm” or “law firm” denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization.

“Fraud” or “fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

“Partner” denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

“Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

“Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

“Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

“Secret” see “confidence”.

“Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

### **TITLE 1. CLIENT-LAWYER RELATIONSHIP**

#### **RULE 1.1 COMPETENCE**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

#### **RULE 1.2 SCOPE OF REPRESENTATION**

**(a)** A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to sections (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

**(b)** A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.

**(c)** A lawyer may limit the objectives of the representation if the client consents after consultation.

**(d)** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**(e)** When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

**RULE 1.3 DILIGENCE**

A lawyer shall act with reasonable diligence and promptness in representing a client.

**RULE 1.4 COMMUNICATION**

**(a)** A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

**(b)** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**RULE 1.5 FEES**

**(a)** A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly and the terms of the fee agreement between the lawyer and client;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved in the matter on which legal services are rendered and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

**(b)** When the lawyer has not regularly represented the client, or if the fee agreement is substantially different than that previously used by the parties, the basis or rate of the fee or factors involved in determining the charges for legal services and the lawyer's billing practices shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

**(c)** A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by section (d) or other law.

(1) A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) A contingent fee consisting of a percentage of the monetary amount recovered for a claimant, in which all or part of the recovery is to be paid in the future, shall be paid only (i) by applying the percentage to the amounts recovered as they are received by the client or (ii) by applying the percentage to the actual cost of the settlement or award to the defendant.

**(d)** A lawyer shall not enter into an arrangement for, charge, or collect:

(1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support, or property settlement in lieu thereof (except in postdissolution proceedings); or

(2) A contingent fee for representing a defendant in a criminal case.

## **RULE 1.7 / APPENDIX A: WASHINGTON RPC**

**(e)** A division of fee between lawyers who are not in the same firm may be made only if:

(1) The division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state; or

(2) The division is in proportion to the services provided by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; the client is advised of and does not object to the participation of all the lawyers involved; and the total fee is reasonable.

### **RULE 1.6 CONFIDENTIALITY**

**(a)** A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

**(b)** A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) 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, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

**(c)** A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary.

### **RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE**

**(a)** A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

**(b)** A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

**(c)** For purposes of this rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) Otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or

(2) The broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.



**RULE 1.8 CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS; CURRENT CLIENT**

A lawyer who is representing a client in a matter:

**(a)** 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 to the client in a manner which can be reasonably understood by the client;

(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client consents thereto.

**(b)** Shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing after consultation.

**(c)** Shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

**(d)** Shall not, prior to the conclusion of representation of a client, 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)** Shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to his or her client, except that:

(1) A lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(2) In matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.

**(f)** Shall not accept compensation for representing a client from one other than the client unless:

(1) The client consents after consultation;

(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)** Shall not, while representing two or more clients, 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 consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and the participation of each person in the settlement.

**(h)** Shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

**(i)** Shall not, if related to another lawyer as parent, child, sibling or spouse, represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

**(j)** 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 granted 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.

## **RULE 1.11 / APPENDIX A: WASHINGTON RPC**

### **RULE 1.9 CONFLICT OF INTEREST; FORMER CLIENT**

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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 consents in writing after consultation and a full disclosure of the material facts; or

(b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

### **RULE 1.10 IMPUTED DISQUALIFICATION; GENERAL RULE**

(a) Except as provided in section (b), 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, 1.8(c), 1.9, or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer ("the personally disqualified lawyer"), or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired confidences or secrets protected by rules 1.6 and 1.9(b) that are material to the matter; provided that the prohibition on the firm shall not apply if:

(1) The personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;

(2) The former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of confidential or secret information;

(3) The firm is able to demonstrate by convincing evidence that no confidences or secrets that are material were transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

Any presumption that confidences or secrets of the former client have been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

(c) 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 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 acquired confidences or secrets protected by rules 1.6 and 1.9(b) that are material to the matter.

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

### **RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT**

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer

## **APPENDIX A: WASHINGTON RPC / RULE 1.12**

or employee, unless the appropriate government agency consents after consultation. 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 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.

**(b)** 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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

**(c)** Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) Participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

**(d)** 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.

**(e)** As used in this rule, the term "confidential government information" means information which 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.

### **RULE 1.12 FORMER JUDGE, ARBITRATOR, OR MEDIATOR**

**(a)** Except as stated in section (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, arbitrator, mediator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

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

**(c)** If a lawyer is disqualified by section (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 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 tribunal to enable it to ascertain compliance with the provisions of this rule.

## **RULE 1.14 / APPENDIX A: WASHINGTON RPC**

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

### **RULE 1.13 CLIENT UNDER A DISABILITY**

**(a)** When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

**(b)** When the lawyer reasonably believes that the client cannot adequately act in the client's own interest, a lawyer may seek the appointment of a guardian or take other protective action with respect to a client.

### **RULE 1.14 PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT**

**(a)** All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein;

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

**(b)** A lawyer shall:

(1) Promptly notify a client of the receipt of his or her funds, securities, or other properties;

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them;

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

**(c)** Each trust account referred to in section (a) shall be an interest-bearing trust account in any bank, credit union or savings and loan association, selected by a lawyer in the exercise of ordinary prudence, authorized by federal or state law to do business in Washington and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, the Washington Credit Union Share Guaranty Association, or the Federal Savings and Loan Insurance Corporation, or which is a qualified public depository as defined in RCW 39.58.010(2), which bank, credit union, savings and loan association or qualified public depository has filed an agreement with the Disciplinary Board pursuant to rule 13.4 of the Rules for Lawyer Discipline. Interest-bearing trust funds shall be placed in accounts in which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to reserve by law or regulation.

(1) A lawyer who receives client funds shall maintain a pooled interest-bearing trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to The Legal Foundation of Washington, as established by the Supreme Court of Washington. All other fees and transaction costs shall be paid by the lawyer. A lawyer may, but shall not be required to, notify the client of the intended use of such funds.

(2) All client funds shall be deposited in the account specified in subsection (1) unless they are deposited in:

(i) a separate interest-bearing trust account for the particular client or clients matter on which the interest will be paid to the client; or

## **APPENDIX A: WASHINGTON RPC / RULE 1.15**

(ii) a pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client.

(3) In determining whether to use the account specified in subsection (1) or an account specified in subsection (2), a lawyer shall consider only whether the funds to be invested could be utilized to provide a positive net return to the client, as determined by taking into consideration the following factors:

(i) the amount of interest that the funds would earn during the period they are expected to be deposited;

(ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client's benefit; and

(iii) the capability of financial institutions to calculate and pay interest to individual clients.

(4) As to accounts created under subsection (c)(1), lawyers or law firms shall direct the depository institution:

(i) to remit interest or dividends, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, on the average monthly balance in the account, or as otherwise computed in accordance with an institutions standard accounting practice, at least quarterly, to The Legal Foundation of Washington. Other fees and transaction costs will be directed to the lawyer;

(ii) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and the amount of service charges deducted, if any, and the account balance(s) of the period in which the report is made, with a copy of such statement to be transmitted to the depositing lawyer or law firm.

(5) The Foundation shall prepare an annual report to the Supreme Court of Washington that summarizes the Foundation's income, grants and operating expenses, implementation of its corporate purposes, and any problems arising in the administration of the program established by section (c) of this rule.

(6) The provisions of section (c) shall not relieve a lawyer or law firm from any obligation imposed by these rules with respect to safekeeping of clients' funds, including the requirements of section (b) that a lawyer shall promptly notify a client of the receipt of his or her funds and shall promptly pay or deliver to the client as requested all funds in the possession of the lawyer which the client is entitled to receive.

**(d)** Escrow and other funds held by a lawyer incident to the closing of any real estate or personal property transaction are client funds subject to this rule regardless of whether the lawyer, the law firm, or the parties view the funds as belonging to clients or nonclients. Comment by the Court Escrow or other funds incident to the closing of real or personal property transactions are subject to this rule regardless of whether the lawyer views the funds as belonging to clients.

### **RULE 1.15 DECLINING OR TERMINATING REPRESENTATION**

**(a)** Except as stated in section (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, 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 his ability to represent the client;

or

- (3) The lawyer is discharged.

**(b)** Except as stated in section (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

- (2) The client has used the lawyer's services to perpetrate a crime or fraud;

## **RULE 2.3 / APPENDIX A: WASHINGTON RPC**

(3) The client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) 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;

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

### **TITLE 2. COUNSELOR**

#### **RULE 2.1 ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

#### **RULE 2.2 INTERMEDIARY**

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in section (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

#### **RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS**

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) The client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by rule 1.6.

**TITLE 3. ADVOCATE**

**RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

**RULE 3.2 EXPEDITING LITIGATION**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

**RULE 3.3 CANDOR TOWARD THE TRIBUNAL**

**(a)** A lawyer shall not knowingly:

- (1) Make a false statement of material fact or law to a tribunal;
- (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6;
- (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
- (4) Offer evidence that the lawyer knows to be false.

**(b)** The duties stated in section (a) continue to the conclusion of the proceeding.

**(c)** If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by rule 1.6.

**(d)** If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with rule 1.15.

**(e)** A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

**(f)** In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

**(g)** Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule.

**RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

**(a)** Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

**(b)** Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

**(c)** Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

**(d)** In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

**(e)** In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, or assert personal knowledge of facts in issue except when testifying as a witness; or

## **RULE 3.6 / APPENDIX A: WASHINGTON RPC**

**(f)** In trial, state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but the lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

### **RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

A lawyer shall not:

- (a)** Seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b)** Communicate ex parte with such a person except as permitted by law; or
- (c)** Engage in conduct intended to disrupt a tribunal.

### **RULE 3.6 TRIAL PUBLICITY**

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

#### **GUIDELINES FOR APPLYING RPC 3.6**

##### **I. Criminal.**

(A) The kind of statement referred to in rule 3.6 which may potentially prejudice criminal proceedings is a statement which relates to:

- (1) The character, credibility, reputation or criminal record of a suspect or defendant;
- (2) The possibility of a plea of guilty to the offense or the existence or contents of a confession, admission or statement given by a suspect or defendant or that persons refusal or failure to make a statement;
- (3) The performance or results of any investigative examination or test such as a polygraph examination or a laboratory test or the failure of a person to submit to an examination or test;
- (4) Any opinion as to the guilt or innocence of any suspect or defendant;
- (5) The credibility or anticipated testimony of a prospective witness; and
- (6) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial.

(B) The public has a legitimate interest in the conduct of judicial proceedings and the administration of justice. Lawyers involved in the litigation of criminal matters may state without elaboration:

- (1) The general nature of the charge or defense;
- (2) The information contained in the public record; and
- (3) The scheduling of any step in litigation, including a scheduled court hearing to enter a plea of guilty.

(C) The public also has a right to know about threats to its safety and measures aimed at assuring its security. Toward that end a public prosecutor or other lawyer involved in the investigation of a criminal case may state:

- (1) That an investigation is in progress, including the general scope of the investigation and, except when prohibited by law, the identity of the persons involved;
- (2) A request for assistance in obtaining evidence and information;
- (3) A warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (4) (i) The identity, residence, occupation and family status of the accused;
- (ii) information necessary to aid in apprehension of the accused;
- (iii) the fact, time and place of arrest; and
- (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.



**II. Civil.**

The kind of statement referred to in rule 3.6 which may potentially prejudice civil matters triable to a jury is a statement designed to influence the jury or to detract from the impartiality of the proceedings.

**RULE 3.7 LAWYER AS WITNESS**

A lawyer shall not act as advocate at a trial in which the lawyer or another lawyer in the same law firm is likely to be a necessary witness except where:

- (a) The testimony relates to an issue that is either uncontested or a formality;
- (b) The testimony relates to the nature and value of legal services rendered in the case; or
- (c) The lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate; or
- (d) The trial judge finds that disqualification of the lawyer would work a substantial hardship on the client and that the likelihood of the lawyer being a necessary witness was not reasonably foreseeable before trial.

**RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR**

The prosecutor in a criminal case shall:

- (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (e) Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

**RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of rules 3.3(a) through (e), 3.4(a) through (c), and 3.5.

**TITLE 4. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS**

**RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**

In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.

**RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL**

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

## **RULE 5.4 / APPENDIX A: WASHINGTON RPC**

### **RULE 4.3 DEALING WITH UNREPRESENTED PERSON**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

### **RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSON**

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

## **TITLE 5. LAW FIRMS AND ASSOCIATIONS**

### **RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER**

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### **RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER**

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

### **RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the persons conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the persons conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;

or

(2) The lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

### **RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER**

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

## **APPENDIX A: WASHINGTON RPC / RULE 6.2**

(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 undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(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.

**(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.

**(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.

**(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, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A nonlawyer is a corporate director or officer (other than as secretary or treasurer) thereof; or

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

### **RULE 5.5 UNAUTHORIZED PRACTICE OF LAW**

A lawyer shall not:

**(a)** Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

**(b)** Assist a person who is not a member of the Bar in the performance of activity that constitutes the unauthorized practice of law.

### **RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE**

A lawyer shall not participate in offering or making:

**(a)** A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

**(b)** An agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

## **TITLE 6. PUBLIC SERVICE**

### **RULE 6.1 PRO BONO PUBLICO SERVICE**

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

### **RULE 6.2 ACCEPTING APPOINTMENTS**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

**(a)** Representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

## **RULE 7.2 APPENDIX A: WASHINGTON RPC**

- (b)** Representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c)** The client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

### **RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a)** If participating in the decision would be incompatible with the lawyer's obligations to a client under rule 1.7; or
- (b)** Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

### **RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS**

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

## **TITLE 7. INFORMATION ABOUT LEGAL SERVICES**

### **RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a)** Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b)** Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
- (c)** Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

### **RULE 7.2 ADVERTISING**

**(a)** Subject to the requirements of rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication.

**(b)** A copy or recording of an advertisement or written communication shall be kept by the lawyer for 2 years after its last dissemination along with a record of when and where it was used. Upon written request by the State Bar, either instigated by the State Bar or as the result of any inquiry from the public, the lawyer shall make any such copy or recording available to the State Bar, and shall provide to the State Bar evidence of any relevant professional qualifications and of the facts upon which any factual or objective claims contained in the advertisement or communication are based. The State Bar Association may provide the lawyer's response to any person making inquiry.

**(c)** A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

**(d)** Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

**RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

**(a)** A lawyer shall not directly or through a third person solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship in person or by telephone, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

**(b)** A lawyer shall not send a written communication to a prospective client for the purpose of obtaining professional employment if the person has made known to the lawyer a desire not to receive communications from the lawyer.

**RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE**

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

**(a)** A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation.

**(b)** Upon issuance of an identifying certificate, award, or recognition by a group, organization, or association, a lawyer may use the terms "certified", "specialist", "expert", or any other similar term to describe his or her qualifications as a lawyer or his or her qualifications in any subspecialty of the law. If the terms are used to identify any certificate, award, or recognition by any group, organization, or association, the reference must meet the following requirements:

(1) the reference must be truthful and verifiable and may not be misleading in violation of rule 7.1;

(2) the reference must identify the certifying group, organization, or association; and

(3) the reference must state that the Supreme Court of Washington does not recognize certification of specialties in the practice of law and that the certificate, award, or recognition is not a requirement to practice law in the state of Washington.

**RULE 7.5 FIRM NAMES AND DESIGNATIONS**

**(a)** A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1 or Rule 7.4. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or charitable legal services organization and is not otherwise in violation of Rule 7.1 or Rule 7.4.

**(b)** A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

**(c)** The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

**(d)** Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact. Lawyers practicing out of the same office who are not partners, shareholders of a professional corporation, or members of a professional limited liability company may not join their names together. Lawyers who are not (1) partners, shareholders of a professional corporation, or members of a professional limited liability company, or (2) employees of a sole proprietorship, partnership, professional corporation, or members of a professional limited liability company or other organization, or (3) in the relationship of being "Of Counsel" to a sole proprietorship, partnership, professional corporation, or members of a professional limited liability company or other organization, shall have separate letterheads, cards and pleading paper, and shall sign their names individually at the end of all pleadings and correspondence and not in conjunction with the names of other lawyers.

## **RULE 8.5/ APPENDIX A: WASHINGTON RPC**

### **TITLE 8. MAINTAINING THE INTEGRITY OF THE PROFESSION**

#### **RULE 8.1 BAR ADMISSION MATTERS**

An applicant for admission to the Bar, or a lawyer in connection with a bar admission application, shall not:

- (a) Knowingly make a false statement of material fact; or
- (b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions authority, except that this rule does not require disclosure of information otherwise protected by rule 1.6.

#### **RULE 8.2 JUDICIAL AND LEGAL OFFICIALS**

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications, integrity, or record of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.
- (c) A lawyer, in order to assist in maintaining the fair and independent administration of justice, should support and continue traditional efforts to defend judges and courts from unjust criticism.

#### **RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT**

- (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should promptly inform the appropriate professional authority.
- (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should promptly inform the appropriate authority.
- (c) This rule does not require disclosure of information otherwise protected by rule 1.6.

#### **RULE 8.4 MISCONDUCT**

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Engage in conduct that is prejudicial to the administration of justice;
- (e) State or imply an ability to influence improperly a government agency or official; or
- (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- (g) Commit a discriminatory act prohibited by law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities.

#### **RULE 8.5 JURISDICTION**

A lawyer licensed or admitted for any purpose to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

## **APPENDIX B**

### **BIBLIOGRAPHY**

ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (Looseleaf, updated bi-weekly)

ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (ABA 4th ed. 1999)

Aronson, *An Overview of the Law of Professional Responsibility. The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH L. REV. 823 (1986)

Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1976)

Gergacz, ATTORNEY-CLIENT CORPORATE CLIENT PRIVILEGE (John Wiley and Sons, 1987)

Hazard, *Triangular Lawyer Relationships*, 1 GEO. J. LEGAL ETHICS (1987)

G. Hazard & W. Hodes, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2d ed., Prentice Hall Law & Bus. 1985)

Mallen & Levitt, LEGAL MALPRACTICE (3d ed. 1988)

Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980)

Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients—A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982)

Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L. J. 1

Symposium, *Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657 (1995)

Wolfram, MODERN LEGAL ETHICS (West 1986)

Wunnicke, ETHICS COMPLIANCE FOR BUSINESS LAWYERS (John Wiley and Sons, 1987)





## APPENDIX C

### SAMPLE NEW CLIENT-MATTER FORM

Client-Matter No.

Do not assign new client and/or matter numbers yourself. Provide them only if they already exist.

Date

New			Change			Ownership		Existing Matters	
Client	Matter	Submatter	Client	Matter	Submatter	Public	Private	Close	Reopen

CLIENT INFORMATION	Link to Client No.
Full Company/Client Name: _____	

Company Description: \_\_\_\_\_

Type of Industry: \_\_\_\_\_

Primary Client Contact for this Matter \_\_\_\_\_ Salutation (e.g., Mr./Dr./Ms./Mrs./Hon.) \_\_\_\_\_

First Name: \_\_\_\_\_ Middle Initial \_\_\_\_\_ Last Name \_\_\_\_\_ Title \_\_\_\_\_

Primary Contact Address: \_\_\_\_\_

City-State-Zip: \_\_\_\_\_ Country: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_ Email address: \_\_\_\_\_

Website address (URL): \_\_\_\_\_

#### BILLING INFORMATION (IF SAME AS CLIENT INFO. LEAVE BLANK)

Credit Limit (if any): \_\_\_\_\_ Fiscal Year: \_\_\_\_\_

Billing Contact Person \_\_\_\_\_ Title: \_\_\_\_\_

Billing Company (if Different from Client): \_\_\_\_\_

Billing Address: \_\_\_\_\_

City-State-Zip: \_\_\_\_\_ Country: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_ Email address: \_\_\_\_\_

☐ This address is a special billing address for this matter.

#### MATTER INFORMATION

Practice Group: \_\_\_\_\_ Type of Law: \_\_\_\_\_

Full Matter Name: \_\_\_\_\_ Projected Fees: \$ \_\_\_\_\_

Project Description: \_\_\_\_\_

Referral Source: \_\_\_\_\_ Referral Contact \_\_\_\_\_

Orig. Atty.			Orig. Atty.			Orig. Atty.			Orig. Atty.		
No.	Init.	%	No.	Init.	%	No.	Init.	%	No.	Init.	%

Acct. Atty.		Billing Atty.		Supv. Atty.		Hdlg. Atty.		Hdlg. Atty.		Legal Asst.	
No.	Init.	No.	Init.	No.	Init.	No.	Init.	No.	Init.	No.	Init.

Fee Arrangements	Billing Cycle	A/R	Billing Statement Instructions Billing Format	Special Instructions
------------------	---------------	-----	--	----------------------

Task-Based Billing? \_\_\_\_\_ Include the bill in the client summary using a joint bill format.

#### Final Approvals

Account Attorney

Date

Special Fee Approval (Managing Partner)

Date

☛ Please attach to the conflict check form! ☛

## APPENDIX C

### NEW BUSINESS REVIEW/FILE MATERIAL REQUEST

INSTRUCTIONS: This page must be completed and signed by the lawyer accepting the new business. In addition, the signature of a member of the New Business Panel is required: (i) for all new clients; (ii) where disclosure to and consent from any person is required; (iii) where work is undertaken on a special fee basis; or (iv) where new work is undertaken for a client who is delinquent in payment of fees to the firm.

The new business ☐ is ☐ is not required to be approved under the New Business Review Policy. (If approval is required, the signature of the approving person must appear below.)

1. **Conflicts.** A conflicts check has been performed and:
  - a. ☐ No current client, former client, or issue matches appeared on the search.
  - b. ☐ Conflict matches have been identified on the search and resolved. Please check explanatory boxes below:  
☐ Waiver letters have been obtained. ☐ Conflict matches were false positives.  
☐ Apparent conflicts are old or out of date. ☐ Other (verbal or e-mail explanation to panel member required).
  - c. The responsible attorney has considered the possibility of future client conflicts and business development conflicts (e.g., the possibility of difficulties with existing and future clients resulting from the new business) and:
    - i. ☐ Has concluded that there is no reasonable likelihood of a problem.
    - ii. ☐ The potential problems have been discussed with those concerned and do not appear to constitute a reason not to proceed.
2. **Fees.**
  - a. ☐ The firm can reasonably expect to bill and collect fees for the work at least equal to guideline rate.
  - b. ☐ The work is undertaken on a contingency fee, fixed fee or hourly rates below guideline. (Attach explanation.)
3. **Deposit.**
  - a. ☐ An advance deposit will be received. Deposit Amount:  \$
  - b. ☐ No advance deposit is necessary or appropriate.
4. **Firm Involvement. (both required)**  
☐ The responsible attorney, upon inquiry if appropriate, has determined that the firm has practical ability to do the work within the applicable time and other constraints **AND**  
☐ The work does not pose undue risk of firm liability.
5. **Engagement Letter.**
  - a. ☐ An engagement letter will be sent.
  - b. ☐ No engagement letter is necessary or appropriate.

Account Attorney \_\_\_\_\_ Date \_\_\_\_\_

Panel Attorney (if required) \_\_\_\_\_ Date \_\_\_\_\_

#### FILE MATERIALS REQUESTED SIZE AND TYPE OF FILE

Insert Only	Letter Folder	Legal Folder
<input type="checkbox"/> Agreements	<input type="checkbox"/> Documents	<input type="checkbox"/> Working Papers
<input type="checkbox"/> Attorney Notes	<input type="checkbox"/> Drafts	<input type="checkbox"/> OTHER:
<input type="checkbox"/> Auditor's Reports	<input type="checkbox"/> Exhibits	1. _____
<input type="checkbox"/> Billings	<input type="checkbox"/> Extra Copies	2. _____
<input type="checkbox"/> Client's Papers	<input type="checkbox"/> Legal Research	3. _____
<input type="checkbox"/> Closing Documents	<input type="checkbox"/> Miscellaneous	4. _____
<input type="checkbox"/> Correspondence	<input type="checkbox"/> Pleadings	<input type="checkbox"/> Pouch Folder Summary

Please return file to: \_\_\_\_\_

## APPENDIX D

### SAMPLE CONFLICT CHECK INFORMATION SHEET

File Room Only  
ID# \_\_\_\_\_

PLEASE ROUTE: \_\_\_\_\_

PLEASE CALL FOR PICK-UP: \_\_\_\_\_

DATE: \_\_\_\_\_

TO: RECORDS CENTER

FOR:

(Attorney Initials)

RETURN TO:

EXT.

Potential  
New Client

Credit Report

Matches

No Matches

☐☐☐☐

CLIENT: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

POTENTIAL MATTER: \_\_\_\_\_

ADD NAMES TO EXISTING CLIENT/MATTER NUMBER: \_\_\_\_\_

#### PLEASE CHECK THE FOLLOWING NAMES FOR POTENTIAL CONFLICTS:

Name	Relationship (see Codes)	Credit Report (Comment 1)
1. _____	( )	( )
2. _____	( )	( )
3. _____	( )	( )
4. _____	( )	( )
5. _____	( )	( )
6. _____	( )	( )
7. _____	( )	( )
8. _____	( )	( )

For clients and matters new to the office, please complete and attach this Conflict Check Information Sheet and list all related parties, including corporate affiliates, principal officers, and, if an individual, his or her business entities, including partnerships and joint ventures, in which new client is an active participant or owner. For litigation matters, include all related parties, whether adverse, allied, or neutral.

#### OUR SEARCH FOUND THE FOLLOWING:

Matches Found  
(see attached)

No Matches Found

Conflict check completed by: \_\_\_\_\_

I have provided the necessary information for a conflict check.

Attorney Signature \_\_\_\_\_

#### Codes:

(C) Client or Potential Client

(A) Adverse or Potential Adverse Party

(W) Witness or Potential Witness

(D) Director, Officer or Key Employee

(P) Parent or Subsidiary

(DC) Declined Client

(I) Involved

(PN) Protected Nonclient (Comment 2) \_\_\_\_\_

(OO) Other \_\_\_\_\_



**APPENDIX E**

**LETTER TO UNREPRESENTED PERSON DISCLOSING ATTORNEY'S ROLE  
(WRPC 4.3)**

[Date]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_

This letter is to clarify my role in connection with the \_\_\_\_\_ transaction. Our firm has been engaged to represent \_\_\_\_\_. The interests of \_\_\_\_\_ may/do conflict with your interests to some extent in this transaction.

Although it might be possible to work out an arrangement under which I represent both of you, subject to certain restrictions, I do not presently understand that to be my role. Thus, I represent only \_\_\_\_\_ with regard to this matter.

If you have questions about this, please call me.

Very truly yours,

\_\_\_\_\_

cc: [Name of existing client]



## APPENDIX F

### LETTER TO CLIENT CONFIRMING ORAL CONSENT TO COMMON REPRESENTATION

*[A lawyer may obtain the oral consent of a client to common representation, provided the oral consent is followed by written confirmation from the lawyer in a manner that can be reasonably understood by the client and which is transmitted promptly to the client. This interaction between the lawyer and a client may occur in the context of WRPC 1.7, 2.2, or 1.9 situations. The principal contents of an appropriate writing to clients in each of those situations will be found in Appendices G, H, or I. Those forms, however, will require modification when the lawyer wishes to confirm a client's oral consent. The following letter illustrates how language confirming the oral consent of a client might be integrated into the "intermediary letter" suggested for WRPC 2.2 situations which is found at Appendix H. Similar changes might be made to the forms found at the other appendices referred to above.]*

[Date]

[Address]

Re:

Dear \_\_\_\_\_ and \_\_\_\_\_:

You have requested that I represent both of you in connection with *[formation of your corporation, preparation of a shareholders' agreement, etc.]*. Although it appears to me that the matter can be resolved on terms compatible with each of your interests, the Washington Rules of Professional Conduct (WRPC) require me to consult with each of you to explain the implications of common representation and the advantages and risks involved.

The Rules also require me to obtain your consent to the common representation.

On \_\_\_\_\_ I talked with *[both of you, each of you, etc.]* at some length regarding the implications of my common representation of you. I specifically explained to you that *[describe substance of matters explained]*. At the end of our discussion you *[both, each, etc.]* authorized me to proceed.

One purpose of this letter is to confirm your previous oral consent to the representation. In addition, I wish to summarize in writing the primary points of our discussion about the implications of my work as intermediary. If you have any new questions after reviewing this

## APPENDIX F

information once again, please do not hesitate to call me. As you know, I also recommend that you review this matter with other counsel before reaching a decision, but you are not obligated to do so if you do not wish to.

Very truly yours,

*[attorney's signature]*

*[Though not required by the rule, an attorney may wish to include the following or some similar affirmation that the client received written confirmation of consent in order to guard against future misunderstanding and problems of proof.]*

If you still wish me to act as intermediary in the transaction, please confirm your previous consent by signing the enclosed copy of this letter, which should be returned to me for my files.

CONSENTED TO this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
*[Name of client #1]*

CONSENTED TO this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
*[Name of client #2]*



## APPENDIX G

### CLIENTS' CONSENT TO REPRESENTATION (WRPC 1.7)

Date: \_\_\_\_\_

*[name and address of existing client]*

*[name and address of proposed client]*

Re: \_\_\_\_\_

Dear \_\_\_\_\_ and \_\_\_\_\_

We have been asked to represent *[proposed client]* in connection with *[describe transaction that creates WRPC 1.7 potential conflict in sufficient detail that each addressee is aware of the material facts of both the proposed representation and the conflict itself.]*

Because of the actual or potential conflicting interests between the two of you, the Washington Rules of Professional Conduct (WRPC) require that we consult with each of you regarding such conflicts and obtain the consent of both of you to the representation. *[Describe pros and cons of granting/withholding consent.]*

I have discussed this matter with each of you briefly by phone, and each of you have authorized the disclosures set forth in this letter.

*[OPTION A—To be used in WRPC 1.7(a) situation]*

Although our representation of *[name of proposed client]* could be construed to be directly adverse to *[name of existing client]*, we reasonably believe that the representation of *[name of proposed client]* will not adversely affect our relationship with *[name of existing client]* because *[explain]*.

*[OPTION B—To be used in WRPC 1.7(b) situation]*

Our representation of *[name of proposed client]* could be materially limited by our responsibilities to *[name of existing client]*, or our responsibilities to *[name of third person]*, or our own interests. These material limitations include:*[list material limitations]*.

## APPENDIX G

Despite the possibility that these material limitations on our representation of [*name of proposed client*] may arise, we reasonably believe that our representation of [*name of proposed client*] will not be adversely affected because [*explain*].

This letter discloses to you the facts of which I am presently aware in connection with this potential conflict. If, however, one of you needs additional information, provided the other consents to the disclosure, we will promptly provide it. If you believe my statements of fact or analysis to be incorrect in whole or in part, please let me know immediately. I recommend that you consult another attorney before signing this consent, but you are not obligated to do so.

If you are willing to consent, please indicate your consent to this representation by signing below and returning this letter to me. If you have questions about this, please call me. Thank you.

Very truly yours,

\_\_\_\_\_

CONSENTED TO this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_.

\_\_\_\_\_  
[*name of existing client*]

\_\_\_\_\_  
[*name of proposed client*]

## APPENDIX H

### INTERMEDIARY LETTER TO BE SIGNED BY CLIENT (WRPC 2.2)

[Date]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re:

Dear \_\_\_\_\_ and \_\_\_\_\_:

You have requested that I represent both of you in connection with [*formation of your corporation, preparation of a shareholders' agreement, etc.*]. Although it does appear to me that the matter can be resolved on terms compatible with each of your interests, the Washington Rules of Professional Conduct (WRPC) require me to consult with each of you to explain the implications of common representation and the advantages and risks involved. The Rules also require me to obtain your written consent to the common representation.

This letter summarizes my discussions with you regarding common representation. After reviewing this information once again, if you still wish me to act as an intermediary in the transaction, you should provide me with your written consent to proceed, by signing the enclosed copy of this letter which should be returned to me for my files.

#### I.

#### ADVANTAGES OF COMMON REPRESENTATION

The primary advantage of common representation in connection with [*formation of the corporation or preparation of applicable agreement*] is that you will probably save time and legal fees in having one lawyer prepare the documents. In preparing the documents, I will be acting, in effect, as an intermediary. I will attempt to advise each of you about your options and will assist each of you in seeking a common ground of agreement rather than pressing fully a position that might be advantageous only to one party. Because you are seeking to establish a business relationship on an amicable and mutually advantageous basis, you may find that having one lawyer will enhance the likelihood of efficiently establishing the terms of this relationship.

[*List any other advantages of common representation, describing such matters as the lawyer's familiarity with one or more of the parties, the fact that the lawyer will be acting primarily as a scrivener if the parties intend to negotiate, and are capable of negotiating, material terms of the business relationship without the lawyer's assistance, etc.*]

## APPENDIX H

### II. RISKS OF COMMON REPRESENTATION

#### A. GENERAL.

You have told me that there do not appear to be any substantial differences of opinion [*between/among*] you regarding major legal issues involved in preparation of the documents. In the capacity of an intermediary, I may, however, unintentionally fail to advise one of you of a risk or possible benefit that is peculiar to your own situation. [*Describe how each client's interest may differ in the context of the applicable situation.*]

There are a multitude of alternative provisions that you may include in these documents. As an intermediary in preparing them, I will do my best to advise you, fairly and in an evenhanded fashion, of the key options that you have, and I will assist you in reaching a common ground for agreement on each issue. But our focus on the achievement of this common ground necessarily detracts from advancement of the position of any one party to the relative detriment of the other.

#### B. EACH OF YOU CAN REQUIRE US TO WITHDRAW AT ANY TIME.

Another risk of common representation is that I will be forced to withdraw from further representation if either of you requests me to withdraw for any reason, or if I determine at any time during my representation that: (1) I cannot resolve issues [*between/among*] you on terms compatible with each of your best interests; (2) I believe that one of you is unable to make adequately informed decisions regarding your representation; (3) the failure to complete negotiation of the agreement will materially prejudice the interest of one of you; or (4) for any other reason I conclude that I cannot continue to represent you impartially or without improper effect on my responsibilities to one of you. In any event, you would be responsible for payment of all our accrued legal fees and any outstanding expenses I have advanced on your behalf.

#### C. NO MATERIAL LIKELIHOOD OF OUR REPRESENTING EITHER PARTY IN FUTURE DISPUTES.

It is unlikely I could represent either of you should a subsequent dispute arise regarding the documents that I have prepared on your behalf. In the event of a dispute, all parties would therefore have to incur the additional expense of engaging new counsel. If that should occur, the attorney-client privilege with respect to communications between either of you and members of our law firm in connection with the subject matter of the dispute would be waived as to the other party.

#### D. LIMITATION ON CONFIDENTIALITY WITH RESPECT TO JOINT REPRESENTATION.

I do not believe I can effectively represent each of you if information disclosed to me by one of you in connection with [*formation of the corporation or preparation of applicable documents*] may not be disclosed by me to the other. If at any time one of you discloses to me any information in confidence which, in my opinion, would be material to decisions that might be reached by the other party, I may be forced to withdraw from representation of [*both/all*] of you.

## E. OTHER.

*[List any other material risks or appropriate disclosures, such as the possibility of disparity in the parties' negotiating positions, i.e., minority shareholders versus majority shareholder, or other factors which may affect the lawyer's duty of loyalty to any party. Disclosures should include the fact that the lawyer has represented one party longer than the other, the fact that one of the parties is paying the lawyer's fee, or any other fact that might cause the lawyer's clients to question the ability of the lawyer to act in the best interests of the parties.]*

### III. SUMMARY

Obviously, at any time throughout work on this matter, one or more of you may choose to seek independent counsel. If any party becomes uncomfortable with my representation, I understand that this resort to other counsel both should and will be made. I also recommend that you review this matter with another lawyer before reaching a decision, but you are not obligated to do so if you do not wish to.

I would be more than pleased to discuss further any of the foregoing issues with you. If you consent to my representation of each of you in connection with preparation of [*the shareholders' agreement or formation of your corporation*], please sign the enclosed copy of this letter and return it to us for our files.

If I am authorized to represent both of you, my general billing arrangement after [\_\_\_\_\_] will be charged [*describe billing arrangement, such as 50 percent to each client*].

Very truly yours,

\_\_\_\_\_

CONSENTED TO this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
[name of client #1]

CONSENTED TO this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
[name of client #2]

[See Appendix F if you seek to confirm an oral consent in writing.]



## APPENDIX I

### FORMER CLIENT'S CONSENT TO REPRESENTATION UNDER WRPC 1.9

Re:

Dear \_\_\_\_\_:

[*New client*] wishes to engage our law firm to [*description of transaction that creates WRPC 1.9 potential conflict*].

Our firm previously represented you with regard to [*similar matters or the same matter or a substantially related matter*]. Because of the potentially conflicting interests between you and [*new client*], the Washington Rules of Professional Conduct (WRPC) require us to consult with you to explain the implications of these potential conflicts and to obtain your written consent after consultation and a full disclosure of the material facts.

This letter confirms the subject matter of our consultation with you and the conclusions we reached. It also provides the means for you to give your written consent to our representation.

**1. Not the Same or Substantially Related Matters.**     [*Optional paragraph; use only if applicable*]

With the authorization of [*new client*], we disclose to you that our representation of [*new client*] would involve [*summarize material facts*]. Based upon these facts, in our view the subject matter of our previous work for you and the engagement proposed by [*new client*] are not the same or substantially related. In these circumstances, WRPC 1.9 and its consultation and consent requirements technically do not apply. However, because of the sensitive nature of this situation, and our desire to avoid any misunderstanding about our role, we will proceed as if WRPC 1.9 did apply. We will not accept the representation unless you agree that the matters are not the same or substantially related and you consent to our representation of [*new client*] in writing.

**2. No Material Adversity.**     [*Optional paragraph; use only if applicable*]

Although our representation of [*new client*] would involve a matter that is the same or is substantially related to the subject matter of our previous representation of you, we do not consider your interests to be materially adverse. With [*new client's*] authorization, we disclosed the following material facts to you during our consultation:

[*Summarize the material facts disclosed.*]

## APPENDIX I

On the basis of these facts, the work [*new client*] wishes us to perform poses no material risk of prejudice to your interests. [*Elaborate how the representation does not involve materially adverse interests.*]

### **3. Interests Are Materially Adverse But Consent to Representation Requested.**      [*Optional paragraph; use only if applicable*]

With the authorization of [*new client*] we disclosed the following material facts to you during our consultation:

[*Summarize the material facts disclosed.*]

We believe the proper test in these situations is whether our advocacy or advancement of the interests of [*new client*] will prejudice or in some way be harmful to your interests. During our consultation, we reviewed the several reasons why we do not believe this new engagement with [*new client*] would compromise your interests. [*Summarize reasons, including risk (if any) of disclosure of former client's confidences and secrets.*] However, as we told you at the time, you need to review this matter yourself and we will not proceed unless you reach the same conclusion and indicate your consent in writing on the signature line at the end of this letter. I recommend that you consult other counsel prior to reaching a decision, but you are not obligated to do so if you do not wish to.

Please contact us if you require any further information to analyze the issues discussed in this letter. If, on the other hand, you wish to consent to our representation of [*new client*], please indicate by signing the consent below.

Very truly yours,

\_\_\_\_\_

CONSENTED TO this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_

[*name of client*]



## APPENDIX J

### LETTER TO NEW CLIENT ACKNOWLEDGING LAWYER'S DUTIES TO EXISTING CLIENT AND SECURING ADVANCE CONSENT

[Date]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Re: Waiver of Potential or Actual Conflicts of Interest

Dear \_\_\_\_\_:

We are grateful that you have offered us the opportunity to represent [*new client*] in connection with [*description of work*]. This letter discusses the basis upon which we would be able to undertake this matter.

As you know, we have for many years served as general counsel to [*existing client*]. [*Existing client*] is in at least indirect competition with [*new client*] and, although perhaps unlikely, it is conceivable that at some time, your interests might become adverse to those of [*existing client*]. In the course of our representation of [*new client*], it is also conceivable that [*firm name*] could gain knowledge or information that might prove useful to [*existing client*] in the event of a future conflict.

Our Rules of Professional Conduct (the State standards governing our ethical obligations) prohibit us from representing [*new client*] in these circumstances unless consent is received from [*new client*] and [*existing client*] after disclosure. [*Existing client*] has informed us that its policy is, in general, to consent to multiple representation as long as its ability to fully utilize the services of [*firm name*] in the future is not impaired. If you wish us to undertake representation of [*new client*] in connection with this matter, we must ask that you agree to the following conditions and waivers:

First, by executing this letter and returning a copy to us, you acknowledge our continuing representation of [*existing client*] and waive any objection that you might have to it.

In addition, you agree that in the event any actual and present conflict between [*new client*] and [*existing client*] arises, [*Firm name*] will withdraw from further representation of [*new client*] and continue to represent [*existing client*]. Obviously, we will at all times take all reasonable steps to safeguard the confidentiality of both your affairs and the affairs of [*existing client*].

## APPENDIX J

We do not believe that our ability to represent [*new client*] in connection with this matter will be adversely or materially affected by our representation of [*existing client*]. We will, however, be happy to discuss any reservations you may have regarding these matters. I also recommend that you review this letter with other counsel before making a decision, but you are not obligated to do so if you do not wish to.

If the conditions contained in this letter meet with your approval, we ask that you execute the enclosed copy of this letter, date it, and return it to us for our files.

Sincerely,

*firm name*

---

[*new client*]

---

By: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

## INDEX

Entries are indexed to section numbers.

### A

#### **ADVERSITY**

Direct, *see* DIRECT ADVERSITY  
Material, 5.4

#### **ATTORNEY-CLIENT RELATIONSHIP**

*See also* IDENTIFICATION AS CLIENT  
Beauty contests, 2.3  
Business transaction with client, 4.2(1)  
Duties under conflicts rules  
    Confidentiality, 1.3, 5.1  
Generally, 1.3, 1.6, 1.7  
    Independent judgment, 1.3  
    Loyalty, 1.1, 1.3, 5.1, 5.3  
End of, determination of, 5.2  
Formation of, 2.3  
Former client, 5.1-5.2  
Inactive but ongoing, 5.2  
Reasonable-expectations test, 2.2  
Termination of, 5.2

### B

#### **BUSINESS**

Entity as client, 2.4  
Generally, 1.2  
Transaction with client  
    Consent, 4.2(4)  
    Corporate/partnership arrangements, 4.3(2), 4.4  
    Disclosure, 4.2(3)  
    Example, 4.4  
    Fair and reasonable terms, 4.2(2)  
    Fraud, 4.2  
    Generally, 4.1-4.2, 4.5  
    Independent counsel, 4.2(5), 4.3(5)  
    Investments, 4.3(4)  
    Loans, 4.3(1)  
    Purchase of real property, 4.3(3)  
    Rule, 4.1, 4.2

### C

#### **CHECKING FOR CONFLICTS**

*See* SCREENING

#### **CLIENT**

Attorney-client relationship, *see*  
ATTORNEY-CLIENT RELATIONSHIP

Business entity as, 2.4  
Business transaction with, *see* BUSINESS  
Current, *see* CURRENT CLIENT  
Former, *see* FORMER CLIENT  
Identification as, *see* IDENTIFICATION  
    AS CLIENT  
Multiple, *see* MULTIPLE CLIENTS  
Non-client, *see* PROSPECTIVE CLIENT  
Prospective, *see* PROSPECTIVE CLIENT  
Screening, *see* SCREENING  
Status as, *see* IDENTIFICATION AS  
    CLIENT  
Who is, *see* IDENTIFICATION AS  
    CLIENT

#### **CONFIDENTIALITY**

Former client, 5.1, 5.6  
Generally, 1.3  
Presumption of shared client confidences, 6.3, 6.4, 6.8

#### **CONSENT**

*See also* DISCLOSURE  
Advance, 3.2(1)(c)  
Business transaction with client, 4.2(4)  
Former client, *see* FORMER CLIENT  
Generally, 3.2(1)(a)  
Imputed disqualification of firm, waiver of, 6.6  
Informed, 3.2(1)(b)  
Reasonable belief representation is proper, 3.2(1)(a)  
Waiver, 3.2(1)(b), 3.2(1)(c), 6.6  
Written, 3.2(1)(d)

#### **CONSEQUENCES OF CONFLICTS**

Generally, 1.4, 1.7  
Disqualification of firm, *see* IMPUTED  
    DISQUALIFICATION

#### **CURRENT CLIENT**

Business transaction with, *see* BUSINESS  
Consent, *see* CONSENT  
Direct adversity, 3.2-3.2(1)  
Disclosure, 3.2, 3.2(1)(b)  
Example, 3.4  
Generally, 1.3, 3.1, 3.5

## INDEX

Imputed disqualification of firm, *see*  
IMPUTED DISQUALIFICATION  
Intermediary, attorney as, *see*  
INTERMEDIATION  
Limited representation, 3.2(2)  
Multiple clients, *see* MULTIPLE CLIENTS  
Non-waiveable conflicts, 3.2(1)(b), 3.2(3)  
Reasonable belief representation is proper,  
3.2(1)(a)  
Rules, 3.1, 3.2, 3.3  
Simultaneous representation, *see*  
MULTIPLE CLIENTS

## D

---

### DEFENSE

Sufficiency of, 1.3

### DIRECT ADVERSITY

Consent, *see* CONSENT  
Disclosure, 3.2, 3.2(1)(b)  
Generally, 3.2-3.2(a)  
Material adversity, 5.4  
Reasonable belief representation is proper,  
3.2(1)(a)  
Rule, 3.2, 3.2(1)

### DISCLOSURE

*See also* CONSENT  
Business transaction with client, 4.2(3)  
Former client, 5.5  
Generally, 3.2, 3.2(1)(b)

### DISQUALIFICATION

*See* IMPUTED DISQUALIFICATION OF  
FIRM

## F

---

### FAILURE TO DETECT CONFLICT

Consequences of, 1.4, 1.7  
Defense, sufficiency of, 1.3  
Generally, 1.4

### FIRM

Beauty contest, 2.3  
Imputed disqualification of, *see* IMPUTED  
DISQUALIFICATION  
Multi-state conflicts, 7.6

### FORMER CLIENT

Adverse interest, 5.4  
Attorney-client relationship, 5.1-5.2  
Confidentiality, 5.1, 5.6

### Consent

Former client, 5.5, 5.6  
New client, 5.7

### Disclosure, 5.5

End of representation, determination of,  
5.2

Examples, 5.3(1), 5.3(2), 5.8

Generally, 1.3, 5.1, 5.9

Imputed disqualification of firm, 5.1, 5.2,  
5.9

Loyalty, 5.1, 5.3

Materially adverse interest, 5.4

Rule, 5.1

Sequential representation, 5.3(1), 5.8

Subsequent representation of one of two  
clients, 5.3(2)

Substantially-related matters, 5.3

Waiver, 3.2(1)(b), 5.5

## FRAUD

Business transaction with client, 4.2  
Generally, 1.1

## FULL DISCLOSURE

*See* DISCLOSURE

## I

---

### IDENTIFICATION AS CLIENT

Attorney-client relationship  
Formation of, 2.3  
Reasonable-expectations test, 2.2

Business entity, 2.4

Generally, 2.1

Multiple clients, 2.1

Multiple parties, 2.1

Prospective client, *see* PROSPECTIVE  
CLIENT

Reasonable-expectations test, 2.2

### IMPUTED DISQUALIFICATION OF FIRM

Consent as waiver, 6.6

Curing, 6.6

Example, 6.7

Former client, 5.1, 5.2, 5.9

Former firm, 6.5, 6.8

Generally, 3.1, 6.1, 6.8

Multiple clients, 2.1

Knowingly representing a client, 6.2

New lawyer joins firm, 6.3

- Non-lawyer joins firm, 6.4
- Ongoing association with firm, 6.2
- Presumption of shared client confidences, 6.3, 6.4, 6.8
- Rule, 6.1
- Waiver, 6.6

## **INDEPENDENT JUDGMENT**

- Business transaction with client, 4.2(5), 4.3(5)
- Generally, 1.3

## **INTERMEDIATION**

- Generally, 3.3
- Intermediary, attorney as
  - Appropriateness, 3.3(2)
  - Danger signals, 3.3(4)
  - Duty to consult with all parties, 3.3(3)
  - Duty to withdraw, 3.3(4)
  - Factors, 3.3(2), 3.3(4)
  - Role, 3.3(1)
- Rule, 3.3

## **L** \_\_\_\_\_

### **LIMITED REPRESENTATION**

- Generally, 3.2(2)

### **LITIGATION**

- Generally, 1.2

### **LOYALTY**

- Former client, 5.1, 5.3
- Generally, 1.1, 1.3
- Undivided, 1.3

## **M** \_\_\_\_\_

### **MALPRACTICE**

- Generally, 1.1

### **MONITORING FOR CONFLICTS**

- See* SCREENING

### **MULTIPLE CLIENTS**

- Direct adversity, 3.2-3.2(a)
- Example, 3.4
- Former client, *see* FORMER CLIENT
- Generally, 1.3, 3.5
- Identification as client, 2.1
- Intermediary, attorney as, *see* INTERMEDIATION
- Non-waiveable conflicts, 3.2(3)

## **MULTI-STATE CONFLICTS**

- Choice of law
  - Contractual, 7.5
  - Generally, 7.2
  - Home state of attorney, 7.2, 7.6
  - Policy considerations, 7.4
- Discipline by another state, 7.3
- Ethics rules, multi-jurisdictional, 7.1
- Examples, 7.1
- Firms vs. individual attorneys, 7.6
- Generally, 7.1, 7.6
- Home state of attorney, 7.2, 7.6
- Policy considerations, 7.4
- Rule, 7.2

## **N** \_\_\_\_\_

### **NON-CLIENT**

- See* PROSPECTIVE CLIENT

## **P** \_\_\_\_\_

### **PROSPECTIVE CLIENT**

- Beauty contest, 2.3
- Duties to, 2.1-2.2
- Interviews, 2.3
- Reasonable-expectations test, 2.2

## **R** \_\_\_\_\_

### **REASONABLE-EXPECTATIONSTEST**

- Generally, 2.2

### **RULES**

- Business entity as client, 2.4
- Business transaction with client, 4.1, 4.2
- Choice of law, 7.2
- Current client, 3.1, 3.2, 3.3
- Direct adversity, 3.2
- Duties of attorney under
  - Confidentiality, 1.3, 5.1
  - Generally, 1.3, 1.6, 1.7
  - Independent judgment, 1.3
  - Loyalty, 1.1, 1.3, 5.1, 5.3
- Former client, 5.1
- Generally, 1.1, 1.3, 1.6, 1.7
- Intermediation, 3.3
- Multi-state conflicts, 7.2

## INDEX

### S

---

#### SEARCHES

*See* SCREENING

#### SCREENING

Assigned staff person, search by, 1.5(1)  
Computerized search, 1.5(1)  
Continuous monitoring, 1.3, 1.5(2)  
Failure to detect conflict, *see* FAILURE TO  
DETECT CONFLICT  
Form, intake, 1.5(1)  
Generally, 1.3, 1.5, 1.7  
Imputed disqualification of firm, *see*  
IMPUTED DISQUALIFICATION  
Intake procedures, 1.5(1)  
Prospective client interviews, 2.3

### SIMULTANEOUS REPRESENTATION

*See* MULTIPLE CLIENTS

### W

---

#### WAIVER

Consent, 3.2(1)(b), 3.2(1)(c), 6.6  
Former client, 3.2(1)(b), 5.5  
Generally, 1.3, 3.2(1)(b), 3.5  
Imputed disqualification of firm, 6.6  
Letter, 3.2(1)(b), 3.5  
Non-waiveable conflicts, 3.2(1)(b), 3.2(3)  
Oral, 3.2(1)(d)