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"Hindsight is 20/20" encapsulates the idea that things are easier to see or understand after they have already happened. 20/20 hindsight will be the theme of this ethics CLE, which will include looking back with 20/20 hindsight on the year 2020 and how its extraordinary events intersect with lawyer ethical obligations. With the benefit of hindsight, this CLE will address:

- Lawyers in trouble in the headlines and the related ethics issues;
- Ethics issues underlying 3 of the top causes of loss according to lawyer malpractice insurers (mistakes, fraud and misrepresentation, and conflicts of interest);
- Ethical obligations considered relative to the social justice movements (harassment and discrimination as misconduct and pro bono obligations); and
- Ethics issues at the forefront of the pandemic (teleworking, confidentiality, and UPL issues).

**Note that generally the references to the "Rules" or a "Rule" number below refers to the ABA Model Rules of Professional Responsibility unless otherwise indicated.*

I. Lawyers in Trouble in the Headlines + Related Ethics Issues

A. Ignoring Bar Subpoena

Focus: Suspension apart from "misconduct" finding; operation of the procedure for disciplining, suspending, and disbarring attorneys.

In a March 12, 2020 article by Peter Vieth, VIRGINIA LAWYERS WEEKLY reported that Fairfax lawyer Randall Sousa was suspended for three years for ignoring a bar subpoena in the following chain of events:

Feb. 2019: Sousa was sanctioned by Fairfax Circuit Judge David Bernhard ($11,000 fine) for what the judge called a "river of neglect" in the subject case. Judge Bernhard files two bar complaints.

Sousa fails to respond to the bar complaints; Virginia State Bar Disciplinary Board (VSBDB) issues subpoena.

Oct. 2019: Sousa claims 'privilege' prevents his response.

Nov. 2019: VSBDB suspended Sousa's license pending compliance with subpoena; orders Sousa to give notice of suspension to his clients.

Dec. 2019: VSBDB issues "show cause" related to Sousa's continued practice contrary to suspension.

Jan. 24, 2020: VSBDB hearing (article reports evidence of continuing practice admitted; evidence of other neglected case, contempt findings, and failure to appear convictions; Sousa claims he had a lot of clients and did not have sufficient staff to comply with the order calling for notifications of suspensions; says he has a moral duty to continue to represent the clients).

The VSBDB noted that Sousa had no prior disciplinary action and that the disciplinary case was not a "misconduct" case. It arose from the failure to heed an interim suspension order. *See* "Lawyer who defied bar order gets 3-year suspension," by Peter Vieth, VIRGINIA LAWYERS WEEKLY, March 12, 2020.

The reference to a "misconduct" case is a reference to Rule 8.4 of the Virginia Rules of Professional Responsibility setting forth what has been defined as "misconduct." The text of Rule 8.4 of the ABA Rules of Professional Conduct and the Virginia Rules of Professional Conduct is set forth side by side below:

Rule 8.4, ABA Rules of Professional Conduct	**Rule 8.4, Virginia Rules of Professional Conduct**
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;	(b) commit a criminal *or deliberately wrongful* act that reflects adversely on the lawyer's honesty, trustworthiness or fitness *to practice law*;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;	(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation *which reflects adversely on the lawyer's fitness to practice law*;
(d) engage in conduct that is prejudicial to the administration of justice;	*(Not adopted)*
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;	(d) state or imply an ability to influence improperly *or upon irrelevant grounds* any *tribunal, legislative body*, or public 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; or	(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.	*(Not adopted)*

The "misconduct" categories in the Virginia rule are an unclear fit for covering the failure to respond to a subpoena. It is possible that the broad category involving violation of a Rule of Professional Conduct could apply with reference to Virginia Rule 3.4(d), which prohibits a lawyer from knowingly disobeying a "standing rule or a ruling of a tribunal made in the course of a proceeding." However, it is unclear whether the VSBDB would qualify as a tribunal and whether the subpoena would qualify as a "rule or ruling" made "in the course of a proceeding." Perhaps it also could be argued as a "deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law under Virginia's Rule 8.4(b). Under the ABA version of the rule, it could be argued as "conduct prejudicial to the administration of justice," and has been so found in some cases. Virginia has not adopted that sub-part of the ABA version of the misconduct rule. If the VSBDB had considered the underlying behavior that provoked Judge Bernhard's sanction, that behavior may have been considered as "misconduct" in violating, for example, Rules 1.1 (competence) and 1.3 (diligence).

The debate about the applicable professional rule is not necessary however, because rather than a professional rule, the VSBDB imposed the suspension under Part Six, § IV, Paragraph 13-6(G)(3) of the Rules of the Supreme Court of Virginia under which it has the power to "impose an interim Suspension if an Attorney fails to comply with a summons or subpoena issued by any member of the Board . . ." Moreover, an attorney suspended pursuant to this provision is further subject to the requirements of Paragraph 13-29 requiring notice of the revocation or suspension to all clients, opposing counsel, and presiding judges on litigation matters and proof of the same to the VSBDB. See Part Six, § IV, Paragraph 13-29.

B. Extortion

Focus: Colossally shocking behavior; scope of Rule 5.6's prohibition against a lawyer agreeing to restrictions on right to practice.

Two Virginia lawyers pleaded guilty to extortion in June 2020. See "Lawyers admit to extortion scheme," by Peter Vieth, VIRGINIA LAWYERS WEEKLY, June 29, 2020. Thereafter, both consented to revocation of their licenses to practice law. See *In the Matter of Timothy Andrew Litzenburg*, August 11, 2020 Consent to Revocation Order, VSB Docket No. 20-070-117650 at https://www.vsb.org/docs/Litzenburg-081220.pdf; and *In the Matter of Daniel Matthias Kincheloe*, July 6, 2020 Consent to Revocation Order, VSB Docket No. 20-000-119103 at https://www.vsb.org/docs/Kincheloe-070720.pdf. In addition, one was sentenced to twenty-four months in prison followed by one year of supervised release and the other to twelve months in prison followed by one year of supervised release. See September 18, 2020 Press Release ("Virginia Attorneys Sentenced for Attempting to Extort a Multinational Chemicals Company") from the Department of Justice at https://www.justice.gov/opa/pr/virginia-attorneys-sentenced-attempting-extort-multinational-chemicals-company.

One of the attorneys was part of the trial team that won a verdict against the manufacturer of a weedkiller. The attorneys thereafter targeted the supplier of a chemical used in the weedkiller. They sent the supplier a draft complaint and offered to delay filing the complaint if the supplier would meet with him. Threatening public statements and damaging lawsuits aimed at the supplier, the attorneys proposed a "consulting arrangement" that would pay them $200 million in purported "consulting fees" and under which a purported conflict-of-interest would effectively stop them from representing their clients as plaintiffs in litigation against the supplier. Plaintiffs set up a corporation to receive the purported "consulting fees" and did not plan to distribute any funds to their existing clients. One of the attorneys said that if he received the "consulting fees" he would not discuss the supplier or its parent company with his current clients, and that he was willing to "take a dive" during a deposition of a toxicology expert to deter potential future claims related to litigation against the supplier. See September 18, 2020 Press Release ("Virginia Attorneys Sentenced for Attempting to Extort a Multinational Chemicals Company") from the Department of Justice at https://www.justice.gov/opa/pr/virginia-attorneys-sentenced-attempting-extort-multinational-chemicals-company. As part of the plea bargains and consent to the licensure revocation, one of the lawyers acknowledged a long-time substance use disorder which had affected his judgment.

A felony conviction results in an automatic suspension of license and a show cause order for a hearing on possible revocation or further suspension under Part Six, § IV, Paragraph 13-22 of the Rules of the Supreme Court of Virginia:

> Whenever the Clerk receives written notification from any court of competent jurisdiction stating that an Attorney (the "Respondent") has been found guilty or convicted of a Crime by a Judge or jury, pled guilty to a Crime or entered a plea wherein the facts found by a court would justify a finding of guilt, irrespective of whether sentencing has occurred, a member of the Board shall forthwith and summarily enter an order of Suspension requiring the Respondent to appear at a specified time and place for a hearing before the Board to show cause why the Respondent's License to practice law should not be further suspended or revoked. A copy of the written notification from the court shall be served upon the Respondent with the Board's order of Suspension.

At the hearing, the lawyer has the burden of proving why the license should not be further suspended or revoked. *Id*. at ¶ 13-22(D). If the conviction is set aside or reversed on appeal, the

license is automatically reinstated. However, nothing precludes further proceedings against the lawyer upon allegations of misconduct arising from the facts leading to the conviction. *Id*. at ¶ 13-22(C).

In the circumstances described above, both lawyers entered plea agreements on the criminal matter and accepted the revocations of their licenses. There would have been little doubt of the outcome had there been a hearing, as the "criminal act" undoubtedly reflects adversely on their honesty, trustworthiness or fitness as lawyers. In addition, focusing on the "facts leading to the conviction," ethical rule violations abound assuming there were actual clients who retained these lawyers to pursue claims:

- Rule 1.2: failing to consult with the client; assisting in criminal or fraudulent conduct; taking action without actual or implied authorization of the client;

- Rule 1.3: failing to act with diligence for the client; intentionally failing to carry out a contract for professional services for a client; intentionally prejudicing and damage a client during the course of the professional relationship;

- Rule 1.4: failing to keep the clients informed;

- Rule 1.7: conflicts of interest relative to the lawyers' own personal interests;

- Rule 1.8: seeking compensation from one other than the client in a manner that would interfere with the lawyer's independence of judgment and the client-lawyer relationship;

- Rule 1.16: failing to withdraw (whether because of the conflict or the substance abuse);

- Rule 3.4: offering to falsify evidence; taking action to harass or maliciously injure another;

- Rule 4.4: using means to embarrass, delay, and burden.

Rule 5.6 is the rule that the scheming lawyers had – or perhaps should have had – in mind when offering their consultation services as a way to "conflict them out" of further litigation against defendants. Under Rule 5.6, a "lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." If the scheming lawyers were thinking that their consulting agreement plan would get them around a Rule 5.6 prohibition on restrictions in a settlement agreement, there is authority suggesting that they would have been wrong about that. The federal district court in *Adams v. Bellsought Telecomms., Inc*., No. 96-2473-CIV, 2001 WL 34032759 (S.D. Fla. Jan. 29, 2001) sanctioned both the plaintiff and defense lawyers for agreeing that plaintiffs' counsel would receive consulting fees from defendant. According to the court, this was "corporate co-option of plaintiffs' bar." Earlier an Oregon court in a matter of first impression suspended lawyers after finding that an agreement by plaintiff's lawyers to be retained by defendant violated the applicable rule. *In re Brandt*, 10 P.3d 906 (Or. 2000). Case law and ethics opinions reveal a persistent series of attempts to either find a way around or toe the line on this rule, but the following have been considered and rejected:

- Agreements not to sue defendants either at all or on the same claims again;
- Agreements not to use information acquired during the litigation in connection with a future matter;
- Agreement not to advertise the lawyer's practice in that area or type of case;
- Agreement not to solicit others;
- Agreement to withdraw from representing non-settling defendants;
- Agreement restricting rights to "use" information; and
- Agreement to pay plaintiffs' counsel sums for each year that passes without additional case filings or within a certain number of case filings as impermissible incentive for lawyers to refuse new clients.

See Bennett & Gunnarsson, Annotated Model Rules of Professional Conduct (9th ed.) (ABA Center for Professional Responsibility 2019), annotations to Rule 5.6 on pages 567-572. However, these have been found not to violate Rule 5.6:

- Agreement not to criticize a defendant *in a non-litigation context;*
- Representation of "no present intention" to represent others against defendant; and
- Agreement restricting rights to "reveal" information.

Id. Some courts also have distinguished the concept of "enforceability" of the agreement with the issue of whether professional discipline was appropriate. *Id.* at page 569.

ABA Formal Ethics Opinion 93-371 (1993) explains the rule's purpose:

> First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals . . . . Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of future clients.

The conflict does not seem limited only to a conflict between the interests of present and future clients but also between the lawyer's own interest in conflict with the interests of current clients. A lawyer who does not want to agree to any restriction may have a client who cannot achieve a settlement on acceptable to defendant. Or a defense lawyer may believe that restrictions volunteered by a plaintiff's lawyer to garner a higher price on the settlement may conclude that a violation of Rule 5.6 would result, scuttling the defendant's desire to buy peace.

C. Disqualification based on conflict because of a third party payor

Focus: Circumstances in which having a third party payor can be unconsentable and lead to disqualification of counsel.

An October 12, 2020 article in VIRGINIA LAWYERS WEEKLY reports on the decision of U.S. District Judge Raymond A. Jackson to disqualify the lawyers of a criminal defendant in an organized narcotics trafficking case. See "Two lawyers disqualified in drug case," by Peter Vieth, VIRGINIA LAWYERS WEEKLY (October 12, 2020). The article cites the judge's view that the fee arrangements suggested "dubious circumstances."

More specifically, the lawyer for the criminal defendant had received $55,000 (73%) of his fee to date from a potential co-conspirator who was the criminal defendant's employer and long-time friend. The lawyer, moreover, spoke with the potential co-conspirator about others suspected of involvement in the alleged crimes and shared a copy of the indictment with another alleged co-conspirator. Judge Jackson wrote that the potential co-conspirator's substantial contributions to the Defendant's counsel fees coupled with being identified as a potential co-conspirator "raises serious concern of a present actual conflict and potential future conflicts as more evidence comes to light." *Id.* According to Judge Jackson, this was not a conflict that the criminal defendant could waive due to its "present severity and potential for more serious conflicts." *Id.* Although the lawyer had contact with the potential co-conspirators, the lawyer for the criminal defendant did not also represent the potential co-conspirators.

Judge Jackson rejected Rule 3.7 concerns about the potential for the lawyer to be a witness or about the lawyer's ability to cross-examine a witness who had paid his fees. In addition, Judge Jackson found "no indication that [the lawyer's] contact with [the alleged co-conspirator paying the fees] had interfered with his independent professional judgment or otherwise affected his attorney-client relationship with [the criminal defendant]." *Id. (referencing Rule 1.8(f)).*

Under Rule 1.8(f), a "lawyer shall not accept compensation for representing a client from one other than the client unless:

> (1) the client gives informed consent [* in Virginia's Rules: "*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."

However, the judge disclaimed any actual ill effect on the lawyer's independence or client relationship. There also is no mention of any other client relationship. The comments to Rule 1.8(f) speak to the frequency of "third party payor" circumstances and the potential for conflicts.

> [14] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third

> person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).
>
> [15] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

The comments to Rule 1.8(f) reference Rule 1.7 and the potential for a conflict issue arising from the lawyer's own interest in payment or accommodating the interest of the payor. This concern is echoed in the comments to Rule 1.7 as well:

> [13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Both the comments to Rule 1.8(f) and the comments to Rule 1.7 reference the potential for a conflict to be "unconsentable," which is what Judge Jackson concluded in the circumstances discussed above. Nevertheless, although the judge does not cite or discuss the specific application of Rule 1.7, merely concluding that the client could not give consent in these

"dubious circumstances." Unfortunately, neither the comments nor the judge's rationale offer much guidance on where the line between "consentable" and "unconsentable" might be.

The third party payor arrangements are fairly common. In N.Y. Bar Ass'n Comm. On Prof'l Ethics, Op. 1063 (2015) [hereinafter Op. 1063], https://nysba.org/ethics-opinion-1063/ [https://perma.cc/G3K8-7JU8], the New York Bar Association Committee on Professional Ethics consider the context of an attorney simultaneously representing multiple family members in unrelated matters. *Id.* Initially the attorney represented the eighteen-year-old son ("Son") of two parents ("Mother" and "Father") in a criminal defense matter. *Id.* Each of the parents agreed to pay one-half of the retainer for Son's representation. *Id.* The attorney, who still represented Son, asked the bar whether he could represent Mother in multiple support actions against Father—including one matter in which Son was among the subjects of support sought. *Id.*

After recounting the text of Rule 1.8 and the associated official comments, the opinion noted the potential for a conflict of interest under Rule 1.7 "if a reasonable lawyer would conclude that the [attorney's] interest in continuing to receive fees from the Father for representing the Son would create a 'significant risk' of adversely affecting the [attorney's] professional judgment on behalf of the Mother." *Id.*; *see* N.Y. Rules of Prof'l Conduct R. 1.7 (2018). Even so, the opinion continued,

> if such a personal interest conflict exists, which depends on questions of fact, the inquirer could still represent the Mother if he reasonably believes within the meaning of Rule 1.7(b)(1) that he could provide competent and diligent representation to the Mother, and if he obtains informed consent from the Mother, confirmed in writing, pursuant to Rule 1.7(b)(4).

Op. 1063. Thus, applicable law clarifies that even where an actual conflict arises, often an attorney will be able to continue the representation after obtaining the client's informed consent.

A federal magistrate judge's decision further clarifies that potential adversity between third-party payer and client are not necessarily fatal. *Bell v. Ramirez*, No. 13 Civ. 7916 (PKC) (HBP), 2017 U.S. Dist. LEXIS 157702 at *3–4 (S.D.N.Y. Sept. 26, 2017). In that civil matter, plaintiff moved to disqualify defendant's counsel, in part, because a co-defendant was paying for the representation. *Id.* Even where defendant's counsel highlighted his assertion of a cross-claim against the third-party payer on behalf of his client, the court found the representation proper. *Id.*

Creating some confusion, in 2009 the Supreme Court of New Jersey interpreted its state's similarly worded third-party payer rule in a radically different way. *See In re State Grand Jury Investigation*, 983 A.2d 1097, 1106 (N.J. 2009); N.J. Rules of Prof'l Conduct R. 1.8(f) (2019). That case concerned a grand jury investigation of a company where multiple employees of the target were to serve as grand jury witnesses. *In re State Grand Jury Investigation*, 983 A.2d at 1099. Leading up to the inquiry, the company "elected to provide and pay for counsel to those employees for purposes of that investigation." *Id.* Later, the trial court granted prosecutors' motion to disqualify the witness's counsel because the representation violated New Jersey's third-party payer rule. *Id.* The New Jersey Supreme Court affirmed. *Id.*

In its opinion, the court opined in dicta that New Jersey Rule of Professional Conduct 1.8(f), along with New Jersey Rules of Professional Conduct Rules 1.7(a)(2) and 5.4(c), prohibited "*any* current attorney-client relationship between the lawyer and the third-party payer." *Id.* at 1106 (emphasis added) (citing *In re Garber*, 472 A.2d 566 (N.J. 1984) ("It is patently unethical for a lawyer in a legal proceeding to represent an individual whose interests are adverse to another party whom the lawyer represents in other matters, even if the two representations are not related.")).[1] Only one court—a federal district court in Louisiana—cited the per se rule set forth in *In re State Grand Jury Investigation*, though the court did not rely on it to disqualify an attorney. *United States v. Fazzio*, No. 11-157, 2011 U.S. Dist. LEXIS 142029 at *7–8 (E.D. La. Dec. 9, 2011).

Although the New Jersey decision may not be the prevailing view, it at least is clear in stating that the key consideration is whether the attorney also has an attorney-client relationship with the payor. In the circumstances described above, there is no indication that the disqualified lawyer had an attorney-client relationship with the payor.

Rule 3.4(b) also provides some context for understanding the reference to the "dubious circumstances" leading to the disqualification discussed above. Under Rule 3.4(b), a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law". State versions of this rule typical clarify in the rule text itself or in comments that the rule excludes reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify, or otherwise assigning counsel, and reasonable related expenses from this proscription. State law must be consulted to determine when an inducement to a witness amounts to illegal bribery. Again, the article did not report that Judge Jackson cited this rule or a specific concern about bribery as the basis for the disqualification. Perhaps the judge was more concerned about the potential co-conspirator's motives and practical ability to influence the criminal defendant than the lawyer's ethics. Nevertheless, it was a "conflict" that the judge cited and not specifically bribery concerns.

The moral of the story here is that a third party payor situation can be deemed to present an "unconsentable" conflict issue and that might only be something that can be judged with "20/20 Hindsight."

II. Ethics issues underlying top causes of loss (mistakes, dishonest clients, fraud and misrepresentation, and conflicts of interest)

Lawyer professional malpractice insurers' claims data reveals that, for the time period from 2004 through 2018, the top cause of paid claims by far is mistakes, accounting for just over half of paid claims. After that in descending order and falling off rapidly in terms of percentage

[1] While not at issue in the case before it, the court also explained that "[o]nce an employer commits to paying the legal fees and expenses of its employees, it scrupulously must honor that commitment," stopping only if the court grants leave to do so. *In re State Grand Jury Investigation*, 983 A.2d at 1107. Attorneys operating under that standard should carefully word any engagement letter to make clear that the client, not the payer, controls his representation. *See A.R. v. N.Y.C. Dep't of Education*, No. 12 Civ. 7144, 2014 U.S. Dist. LEXIS 153103 at *8–9 (S.D.N.Y. Oct. 28,1014) (arrangement acceptable under Rule 1.8(f) where client's agreements with payer "authorize[d] [payer] to withdraw 'midstream'" but payer never did so).

of total paid are dishonest clients (22%), fraud and misrepresentation (11%), conflicts of interest (9%), dishonest lawyers (3%), malicious prosecution (3%), and impaired lawyer (0%). The ethics issues underlying the top causes are discussed below.

A. Mistake

The Preamble to the Model Rules of Professional Responsibility identifies the roles or functions of a lawyer:

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

Preamble, comment [2]. The Preamble goes on to state the overarching charge that in "all professional functions a lawyer should be competent, prompt and diligent." Preamble, comment [4]. Competence is the first rule articulated: "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 1.1 of the Model Rules of Professional Responsibility.

The comments to the rule amplify that competence is established by general experience, training and experience in the field in question, preparation and study, and access to someone with requisite expertise. The lack of familiarity or experience is not a disqualifier to attaining competence, but the lawyer must possess the ability to identify and analyze applicable law, evaluate evidence, draft legal documents, and spot issues. Where familiarity or experience are lacking, a lawyer must study and may associate a lawyer of established competence in particular field. Comments to Rule 1.1.

Competence requires inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. The required attention and preparation are determined in part by what is at stake: major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. Comment [5].

Although associating an experience lawyer is appropriate, delegation to a subordinate will not satisfy the duty of competence because a lawyer is required to supervise a subordinate lawyer. See Rule 5.1.

In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be

limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest. Rule 5.1, comment [3].

Although competence is required under the rules, a violation of this rule (or any other) "should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Nevertheless, claimants against lawyers need not look to the rules for vindication because competence is also the standard as a matter of the common law of negligence and fiduciary duty. Note that "competence" focuses on the knowledge, skill, and preparation rather than results achieved, though the results may reflect the former.

Lawyers who make a mistake likely fear malpractice claims more so than professional discipline. The insurers' report that mistakes account for just over 50% of paid claims show that such a fear is well founded. But lawyers who ignore disclosure obligations will materially increase their odds that professional discipline will follow with the malpractice claims for the mistake.

ABA Formal Opinion 481 explains the simple proposition that ABA Rule 1.4 requires the lawyer to inform a current client – but not a past client – that the lawyer may have materially erred in the client's representation. According to the opinion, an error is material if "a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice." The two predictable areas for ambiguity lie in determining materiality and whether a client is current or past.

As to materiality, Opinion 481 acknowledges the continuum from that which prejudices the client's rights or claims on one end to non-substantive mistakes on the other, with the bulk falling into the "middle ground." Although the opinion does not say this, the "materiality" standard pushes a lawyer toward disclosure in the "middle ground" for two reasons. First, the "likely to harm or prejudice" standard can be very difficult to evaluate and could be dependent on future contingencies. Couple this with Opinion 481's admonition that a lawyer must notify a client "promptly under the circumstances," and the end result is that the lawyer cannot await the contingencies. Second, the best way to determine whether something would cause a client to consider terminating the representation is to disclose it and ask. In short, what if the lawyer turns out to be wrong as to the likely effect or the likely client reaction? Both tests favor disclosure in the middle ground.

As to the status of a client as current or past, Opinion 481 makes clear that "the termination of representation in one or more matters does not transform a client into a former client if the lawyer still represents the client in other matters." For the episodic client whose legal needs are not constant or continuous but who engages the lawyer when the client needs legal representation, the opinion advises to consider the client as current if the client "reasonably expects that the professional relationship will span [those] intervals."

For the clearly past client – as determined by substantive law and not the ethics rules – Opinion 481 clearly states that ABA Rule 1.4(b) imposes no duty to disclose mistakes. Again,

the opinion does not say this, but it seems no more likely that a lawyer can transform a current client into a past client to evade a duty of disclosure than a lawyer can transform a current client into a past client in order to take advantage of different conflict rules under the "hot potato" doctrine. Under that doctrine – named for the court's statement in *Picker Int'l. v. Varian Assoc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987) that "a firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client" – a client becomes a "former client" for disqualification purposes if the representation ends normally or if grounds for permissive withdrawal exist and the "lawyer is not motivated primarily by a desire to represent the **new client**." *See* Restatement of the Law Governing Lawyers 3d § 132. It is not hard to imagine this doctrine restated relative to the duty to disclose a mistake as follows: a client becomes a "former client" for *disclosure* purposes if the representation ends normally or if grounds for permissive withdrawal exist and the lawyer is not motivated primarily by a desire to avoid a disclosure to a client. In short, the duty arises upon discovery of the mistake. Following disclosure, a lawyer can assess whether withdrawal is also required or permitted under ABA Rule 1.16.

Regardless of an ABA Rule 1.4 duty, Opinion 481 acknowledges that "[g]ood business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules."

B. Dishonest Clients + Fraud and Misrepresentation

Lawyers are likely well aware that they cannot counsel a client to engage, or assist a client, in conduct that the lawyer **knows** is criminal or fraudulent under Rule 1.2 just as they know that they 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." Moreover, a lawyer can be disciplined pursuant to Rule 8.4(c) for misconduct, which includes "conduct involving dishonesty, fraud, deceit or misrepresentation." Lawyers cannot, however, use the knowledge standard of Rule 1.2 to bury their heads in the sand regarding the client's objectives. In ABA Formal Opinion 491 (April 29, 2020), "Obligations Under Rule 1.2(d) to Avoid Counseling or assisting in a Crime or Fraud in Non-Litigation Settings," the ABA made clear what some cases and ethics opinions had already concluded: a lawyer has a duty to inquire. According to Opinion 491, a lawyer's obligation to inquire in certain circumstances is "well-grounded in authority interpreting Rule 1.2(d) and in the rules on competence [Rule 1.1], diligence [Rule 1.3], communication [Rule 1.4], honesty [Rule 8.4(b and c), among others], and withdrawal [Rule 1.16(a)]."

As is fairly typical of the professional rules – and likely the law in general – whether or not the lawyer has a duty to make further inquiry "will depend on the circumstances." Opinion 491. More specifically, a "lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d)." *Id.* Opinion 491 points out that "actual knowledge" is defined in Rule 1.0(f), which provides that "[a] person's knowledge may be inferred from circumstances." If a client refuses to provide information or if

the information confirms that providing services would assist in a crime or fraud, Opinion 491 states that the lawyer must decline or withdraw from the representation. Finally, Opinion 491 discusses five hypothetical scenarios to clarify when circumstances might require further inquiry, although in three of the five scenarios, Opinion 491 advises that the "duty to inquire depends on contextual factors, most significantly, the lawyer's familiarity with the client and the jurisdiction."

The introduction section of Opinion 491 gives some additional insight into the types of concerns to which a lawyer should be alert, citing counter-terrorism and money-laundering laws and related reports, proceedings, and prosecutions.

Although "dishonest clients" can be dishonest in a variety of ways not limited to terrorist or money laundering schemes, the professional rules mentioned above are still the relevant rules to consider. The recent Opinion 491 should wake lawyers up to the fact that "I didn't know" will not be a sufficient defense even if the standard is "knowledge." More is expected of a profession considered to be a "gatekeeper" profession. And in terms of managing liability risk arising from dishonest clients, conducting diligence "further inquiries" will go a long way toward eliminating 20/20 hindsight on what the lawyer should have known.

C. Conflicts of Interest

Under Rule 1.7, a lawyer faces a conflict of interest for which consent of the affected current clients is needed if: the lawyer's representation will be (a) "directly adverse" to another client or (b) materially limited by responsibilities to another client, a third person, or the lawyer's own interests. If, notwithstanding the conflict of interest, the lawyer reasonably believes that there will not be an adverse effect on either the relationship or the representation, the lawyer may seek client consent to proceed in the face of the conflict. Consent must be "informed" and generally requires confirmation in writing.

1. Recognizing Adversity

Rule 1.7 defines conflicts of interest relative to current clients. Rule 1.7 defines two categories of conflicts: (a) representation "directly adverse" to another client and (b) representation materially limited by responsibilities to another client, a third person, or the lawyer's own interests. The rule generally prohibits representation in both categories, although the attorney may, nonetheless, undertake representation in the face of a conflict if:

- the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- the representation is not prohibited by law;
- the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- each affected client gives informed consent, confirmed in writing

It should be noted that under this exception, "informed client" consent alone will not be sufficient. There are some nonconsentable conflicts either because they are expressly identified or because the lawyer should not reasonably seek consent. *See* Comments 14-15 to Rule 1.7.

There is minimal elaboration in the commentary to Rule 1.7 on the distinction between direct adversity and representation materially limited by responsibilities to another client. *See* comments 6-8 to Rule 1.7. With respect to direct adversity, comment 6 focuses more on a litigation context, generally noting that clients whose interests "are only economically adverse" in unrelated matters is not ordinarily an ethical conflict. Comment 7 salutes "business negotiations" as a form of direct adversity as well. As to "material limitations," comment 8 focuses on the "significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."

Although the D.C. Rules of Professional Responsibility are different than Model or Virginia Rule 1.7, an opinion of the D.C. bar sets out five factors to consider in deciding whether an "adverse effect" will result from representation:

> (1) the relationship between the two forums in which the two representations will occur; (2) the centrality in each matter of the legal issue as to which the lawyer will be asked to advocate; (3) the directness of the adversity between the positions on the legal issue of the two clients; (4) the extent to which the clients may be in a race to obtain the first ruling on a question of law that is not well settled; and (5) whether a reasonable observer would conclude that the lawyer would be likely to hesitate in either her representations or to be less aggressive on one client's behalf because of the other representation. In sum, we believe that the focus of analysis ought not to be on formalities but should be on the actual harm that may befall one or both clients.

D.C. Bar Opinion 265 (Apr. 17, 1996). The ABA Standing Committee on Ethics and Professional Responsibility stated similarly that in determining whether or not representations of one client in one matter may be "materially undercut" by the lawyer's responsibilities to another client in another matter, the lawyer should consider, among other things, "(a) Is the issue one of such importance that its determination is likely to affect the ultimate outcome of at least one of the cases? [and] (b) Is the determination of the issue in one case likely to have a significant impact on the determination of that issue in the other case?" ABA Formal Opinion 93-377 (Oct. 16, 1993).

As Comment 1 to Rule 1.7 makes clear, the heart of the matter is the lawyer's duty of loyalty to a client and ability to exercise independent judgment. No parsing of the rules or commentary should overlook the paramount importance of the duty of loyalty and need for independence. Conflicts of interest under Rule 1.7, moreover, pose risk to the lawyer's ability to preserve client confidences. A lawyer evaluating whether to pursue consent to a conflict under Rule 1.7(a) or (b) should do so with full focus on loyalty, independence of professional judgment, and confidentiality. A lawyer practicing in association with others also must realize

that the inquiry must be conducted at the law firm, not the individual, level as a result of Rule 1.10's "imputed disqualification" rule.

2. Getting Consents

If consent is required, Rule 1.7(b)(4) specifies "informed consent" that must be "confirmed in writing."

As to the "informed" aspect of consent, Rule 1.0(e) and comment 18 to Rule 1.7 explains that to get informed consent the lawyer must communicate adequate information about the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. When representing multiple clients in a common representation, comment 18 makes clear that the "information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." Accord, Restatement § 202 (lawyer must present the client with adequate information regarding the material risks of representation to the client).

As to the "writing," Rule 1.0(b) and comment 20 to Rule 1.7 make clear that it can be a document either from the client or one transmitted to the client if done promptly to confirm an oral consent. The writing can be a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications.

The informed consent, confirmed in writing, must manifest consent. The RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS ("Restatement") states that the client must affirmatively consent to representation when the lawyer has a conflict of interest:

> The requirement of consent generally requires an affirmative response by each client. Ambiguities in a client's purported expression of consent should be construed against the lawyer seeking the protection of the consent. In general, a lawyer may not assume consent from a client's silent acquiescence.[2]

One court has defined consent as the "'client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question.'"[3] It is also the lawyer's burden to prove that the client has consented before accepting representation.[4]

As with every other general rule in the law, there are exceptions. The Restatement points out:

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[2] RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 122, cmt. c.

[3] *Griva*, 637 A. 2d at 845 (quoting D.C. App. R.X., app. A, Terminology at 1531 (1993)).

[4] *See, e.g., In re Hansen*, 586 P. 2d 413, 415 (Utah 1978) (the lawyer represented a plaintiff in a civil suit and at the same time defended the defendant of the civil suit in a criminal action).

> Consent may be inferred from active participation by a client who has reasonably adequate information about the material risks of the representation after a lawyer's request for consent.[5]

In some circumstances, when faced with motions to disqualify counsel, courts will infer consent or find that the client has waived, if there is an "inordinate and inadequately explained delay. . . ."[6] Applying this exception to the general rule depends upon the particular facts of each case.

In *Brown & Williamson Tobacco Corp. v. Pataki*,[7] the United States District Court for the Southern District of New York held that when the State of New York waited two months to disqualify counsel for Brown & Williamson, this delay was a factor in the court's denial of the State's disqualification motion.[8] The law firm representing Brown & Williamson, Covington & Burley, also represented the State of New York on several unrelated matters. Brown & Williamson hired Covington & Burley to represent it in a lawsuit it filed against New York State. During the course of Covington & Burley's representation of the State in those other matters, it had informed the State that it also represented the Tobacco Institute but the State never raised any objection. In the present lawsuit against New York State, the court established an expedited trial schedule at the State's request. Two months after Brown & Williamson filed its lawsuit, and after the court granted the State's request for an expedited schedule, the State sought to disqualify Covington & Burley because the firm had a conflict of interest. Because Brown & Williamson would be prejudiced by the disqualification, the Court considered the delay factor in denying the State's motion.[9]

Other courts have dismissed motions for disqualification solely on the basis of a waiver caused by delay. In *Alexander v. Primerica Holdings*,[10] plaintiff, the party moving for disqualification, moved to disqualify defense counsel three years after the complaint was filed. The court dismissed plaintiff's motion for disqualification for undue delay.[11] In *Commonwealth*

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[5] *Restatement*. § 122, cmt. c.

[6] *British Airways, PLC v. Port Authority of New York and New Jersey*, 862 F. Supp. 889, 901 (E.D.N.Y. 1994); *see also Forrest v. Baeza*, 58 Cal. App. 4th 65, 77-78, 67 Cal. Rptr. 2d 857, 865 (Cal. Ct. App. 1997); *Trust Corp. of Montana v. Piper Aircraft Corp*, 701 F. 2d 85, 87-88 (9th Cir. 1983) (the objection was deemed waived when the objecting party waited two and a half years before seeking disqualification); *River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1311, 234 Cal. Rptr. 33 (Cal. Ct. App. 1987) (motion to disqualify denied when the former client claimed that plaintiffs' attorney represented him 27-30 years before, waited more than three years to raise the motion in the current litigation, and waited until plaintiffs' counsel amassed over 3,000 hours on the case).

[7] 152 F. Supp. 2d 276 (S.D.N.Y. 2001).

[8] *Id*. at 289.

[9] *Id*. at 288-90.

[10] 822 F. Supp. 1099, 1115-16 (D.N.J. 1993).

[11] *Id*

Ins. Co. v. Graphix Hot Line, Inc.,[12] the court dismissed the disqualification motion because it was brought two years after the action was filed.[13] In another waiver/delay case, *Piper Aircraft*, the United States Court of Appeals for the Ninth Circuit ruled that a two and a half year delay constituted a waiver.[14] The court held that the Trust Corporation's failure to object timely to the law firm's prior representation of the deceased in an unrelated matter, along with the long delay in filing a motion to disqualify, constituted a "*de facto* consent" to the firm's continued representation of Piper Aircraft.[15]

The courts' treatment of this issue indicates that the party opposing the motion to disqualify on the theory that the conflict has been waived because of delay must make some showing that it will be prejudiced if the motion is granted. For instance, in *British Airways, PLC v. Port Authority of New York and New Jersey*,[16] the United States District Court for the Eastern District of New York held that although there was a delay in bringing the motion to disqualify, the delay was not prejudicial.[17] Indeed, other courts would not consider the waiver/delay argument unless the lawyer provided full disclosure to the client.[18] Thus, the lawyer who argues that the client impliedly consented to the conflict through waiver must show (i) that the delay was inadequately explained, (ii) disqualification would be prejudicial to the other client, and (iii) the lawyer provided a full disclosure of the conflict.

3. Advance consents

An advance consent – or prospective waiver – is one that seeks a client's consent to a conflict situation that may or may not arise in the future. Courts and the Standing Committee on Ethics and Professional Responsibility have recognized that advance consents are permissible and enforceable, though they are typically carefully scrutinized with mixed results on enforceability depending on the circumstances.

Formal Opinion 93-372 concluded that:

> [A prospective waiver] must meet all the requirements of a waiver of a contemporaneous conflict of interest, and if the waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when it was given.[19]

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[12] 808 F. Supp. 1200 (E.D. Pa. 1992).

[13] *Id*. at 1208-09.

[14] *Piper Aircraft*, 701 F. 2d at 87.

[15] *Id*. at 87-88. For a similar outcome, see *Unified Sewerage Agency v. Jelco, Inc.*, 646 F. 2d 1339 (9th Cir. 1981).

[16] 862 F. Supp. 889 (E.D.N.Y. 1994).

[17] *See id*. at 901; *see also Montgomery Academy v. Kohn*, 82 F. Supp. 2d 312 (D.N.J. 1999).

[18] *See Griva v. Davison*, 637 A. 2d 830, 845 (D.C. 1994).

[19] Formal Opinion 93-372, Waivers of Future Conflicts of Interest, American Bar Association, Standing Committee on Ethics and Professional Responsibility (April 16, 1993).

Even though the Committee recognized the utility of such prospective waivers, especially with larger law firms catering to corporate clients that sometimes employ more than one law firm to handle their legal matters, the Committee nonetheless emphasized the need to meet the "informed consent" standard.[20] The existence of the prospective waiver (i) will not determine conclusively if the waiver is effective, (ii) does not excuse the lawyer from deciding if the representation will be adversely affected, and (iii) will not be effective unless the future conflict was contemplated at the time the client signed the agreement.[21]

In *Worldspan L.P. v. Sabre Group Holdings, Inc.,*[22] the United States District Court for the Northern District of Georgia held that a prospective consent must be "'exceedingly explicit.'"[23] In *Worldspan*, the law firm representing Sabre Group Holdings ("Sabre"), also represented Worldspan in tax matters in the States of Georgia and Tennessee. The current litigation, as well as the tax matters, involved the different ways in which plaintiffs' airline reservations system operated. Sabre consented to the law firm's representation of Sabre in the lawsuit filed by Worldspan; Worldspan, however, did not.[24] The law firm relied on its engagement letter with Worldspan to argue that Worldspan prospectively waived any future conflict.

The court rejected the law firm's argument that the engagement letter provided a form of "standing consent." The court held that:

> [F]uture directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information.[25]

Thus, for counsel seeking to utilize "standing consent" agreements, counsel should (i) inform the client of potential conflicts, (ii) outline those potential conflicts in the agreement in plain language, (iii) advise the client that it should seek independent legal advice before entering into the standing consent agreement, and (iv) reduce the agreement to writing.

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[20] *Id*. at 1-2.

[21] *Id.* at 1-2.

[22] 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

[23] *Id*. at 1357 (quoting *Florida Ins. Guaranty Assn. v. Carey Canada*, 749 F. Supp. 255, 260 (S.D. Fla. 1990)).

[24] *See id.* at 1358.

[25] *Id*. at 1359 (citations omitted).

D.C. Ethics Opinion 309 also addressed "advance waivers of conflicts of interest," echoing the requirements that they nevertheless conform with the "overarching requirement of informed consent." Ethics Opinion 309 noted that "the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character." See D.C. Ethics Opinion at https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion309.cfm. Consent to a type of conflict with which the client is familiar is more likely to be effective than a general or open-ended consent. Commission on Evaluation of the Rules of Professional Conduct, Report to House of Delegates (May 2001 rev.) ("Ethics 2000 Report"), prop. Model Rule 1.7, comment 22.

In Opinion 309, the D.C. Ethics Committee recognized two trends in the practice of law that make advance waivers an important tool to manage conflict issues. The first is the trend toward larger law firms: "Increasingly, though, law firms have hundreds or even thousands of lawyers, with multiple offices across the country and around the globe. In such firms, individual partners or associates may not even know one another, let alone the identities of the clients their colleagues represent or the details of the matters their colleagues are pursuing for such clients." The second trend, also highlighted by the ABA Formal Op. 93-372, related to the manner in which commercial clients hire lawyers: "The days when a large corporation would send most or all its legal business to a single firm are gone. Today, when corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm's New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers." D.C. Ethics Opinion 309, citing ABA Formal Op. 93-372 (1993) ("ABA Opinion"), in American Bar Association, Formal and Informal Ethics Opinions, 1983-1998, at 167-68. The D.C. Ethics opinion went on to explain: "This means, for example, that if the law firm hypothesized in the ABA Opinion is looking out for its own interests, it might decline the Miami representation. This in turn would deny the client's choice of a lawyer and would reduce its potential choice of lawyers generally."

D.C. Ethics Opinion 309 recounted cases in which advance consents were sustained as well as when they have been found ineffective:

> Most courts that have considered this issue have ruled along the lines set out by the ABA Opinion, the Restatement, and the proposal of the Ethics 2000 Commission. Advance conflict waivers have been sustained where the potential adverse party was known and identified, the client giving the waiver was sophisticated, and the waiver had been reviewed by the client's in-house counsel. E.g., United Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1981); Fisons Corp. v. Atochem North Amer., Inc., 1990 U.S. Dist. LEXIS 15284, 1990 WL 180551 (S.D.N.Y. 1990); Interstate Properties v. Pyramid Co. of Utica, 547 F. Supp. 178 (S.D.N.Y. 1982). The Fisons court stated that where the waiving client is sophisticated, notification of the potential conflict itself is sufficient to

> satisfy the requirement. Fisons Corp., 1990 WL 180551, at *5. Moreover, at least one court has held that an advance waiver may be implied where the objecting client, including its in-house counsel, had extensive knowledge of the law firm's longtime representation of the other client. City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1976), aff'd mem., 573 F.2d 1310 (6th Cir. 1977).
>
> On the other hand, advance waivers have been struck down where they are unduly general and unsophisticated clients are involved. Correspondence with the objecting client's nonlawyer employees (claims adjusters), for example, was held insufficient to constitute "consultation" or "full disclosure." Florida Ins. Guaranty Ass'n, Inc. v. Carey Canada, Inc., 749 F. Supp. 255 (S.D. Fla. 1990); see Marketti v. Fitzsimmons, 373 F. Supp. 637 (W.D. Wisc. 1974) (where client a labor union local, mere knowledge of second representation insufficient to constitute waiver). Similarly, an open-ended release of the lawyer from "all rights, burdens, obligations, and privileges which appertain to his [former] employment," coupled with consent for the lawyer to "engage his services pro and con, as he may see fit," was held (notwithstanding the relative sophistication of the client) grossly insufficient to justify the lawyer's subsequent activity—including disclosure of confidential information—adverse to the former client. In re Boone, 83 F. 944 (N.D. Calif. 1897). Instead, said the court, the release would be effective only if it were "positive, unequivocal, and inconsistent with any other interpretation." Id. at 956. A more recent decision held that a general advance consent covering all unrelated matters is insufficient to waive adversity in litigation unless it expressly refers to "litigation." Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

The bottom line is that advance consents are an available tool, but a lawyer should be mindful of the "it depends" nature of their enforceability. Not only should the lawyer ensure "informed consent" of the client giving the advance consent but likewise the client on whose behalf the lawyer obtained and plans to rely on the informed consent.

- **Thrust Upon Conflict Issues**

If a lawyer representing an industry or group can identify current or even specifically anticipate future conflict issues, the lawyer can and should address those issues with informed consent of affected clients. However, conflict issues that may arise with respect to third parties whose interests may be adverse to the group or members of the group or otherwise materially limit the lawyer's representation of the group can be harder to predict and thus harder to proactively manage. This is particularly true in representations that involve issue advocacy, because "involved parties" may not be apparent from the outset. Even if participation of particular parties or types of parties is foreseeable, it is also not always apparent from the outset what those participants' respective positions or goals may be and whether they materially diverge from the positions or goals of the group or its members.

The conflict of interest rules are designed to avoid the situation in which a lawyer may not be able to diligently represent a client due to a conflict of interest. *See* Rules 1.7 & 1.9. Rule 1.7

addresses a lawyer's obligation with respect to **current** clients, while Rule 1.9 addresses a lawyer's obligation with respect to **past** clients. Under Rule 1.7, a lawyer generally may not undertake representation of a new client that will be adverse to an existing client, whether the matter is related or unrelated to the representation of the existing client. Under Rule 1.9, a lawyer generally may undertake representation adverse to a past client if the matter is unrelated to any work the lawyer did for the past client (and subject to duties to protect confidential information).

Even if a lawyer accepts a representation in accordance with these rules at the outset, circumstances may change that "thrust upon" the lawyer a conflict which would violate the client protections against conflicts articulated in Rules 1.7 and 1.9. For example, this may occur because of the addition or realignment of parties in litigation, or when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. See Model Rules of Prof'l Conduct R. 1.7 cmt. 5 and Restatement (Third) of the Law Governing Lawyers § 132 cmt. j (2000). This may also occur in "issue" or "industry" lawyering, for example, when a rule is published for comments and only then do interested parties and their positions appear.

In thrust upon conflict situations like the foregoing, a lawyer may be able to continue in the representation of one or both clients provided that certain factors exist. A thrust upon conflict is a conflict between two or more clients that: "(1) did not exist at the time the representation commenced, but arose only during the ongoing representation of both clients, where (2) the conflict was not reasonably foreseeable at the outset of the representation, (3) the conflict arose through no fault of the lawyer, and (4) the conflict is of a type that is capable of being waived, but one of the clients will not consent to the representation." *See* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2005-05. The District of Columbia is the only jurisdiction to expressly address thrust upon conflicts in its ethics rules, but the issue has also been addressed in cases and legal ethics opinions in various jurisdictions.[26] Under the D.C. Rule, a thrust upon conflict is a conflict not reasonably foreseeable at the outset of representation. *See* D.C. Rule 1.7.

The thrust upon rule and its potential application will vary by jurisdiction. The lawyer assessing the applicability of the thrust upon rule should consult the rules, case law, and legal ethics opinions applicable in the jurisdiction or jurisdictions that may govern the lawyer's conduct (*e.g.*, where the lawyer is licensed, in the forum where the lawyer is appearing on behalf of the client). The lawyer should always be mindful of whether withdrawal from a client's representation will violate applicable professional rules, and/or whether such withdrawal will result in liability or material harm to the client.

When a conflict arises in the course of a representation, whether a lawyer can take advantage of a thrust upon argument depends on several factors, including whether the conflict was reasonably foreseeable at the outset of the representation and if the conflict arose through no fault of the lawyer.

[26] See generally cases and legal ethics opinions listed on Attachment A.

- ✓ Reasonably Foreseeable

The analysis for determining whether a conflict is thrust upon begins with a question of reasonable foreseeability. In determining whether a conflict is reasonably foreseeable, the test is an objective one. *See* D.C. Rule 1.7, Comment [33]. In determining the reasonableness of a lawyer's conduct, such factors as whether the lawyer (or lawyer's firm) has an adequate conflict-checking system in place, must be considered. *Id.*

D.C. Ethics Opinion 292 offers an example of an unforeseeable conflict where a law firm had been representing Client A in ERISA litigation and Clients B and C in ongoing Competitive Access and Direct Access proceedings when Client A announced its intent to acquire a company that had been and continued to be adverse to Clients Band C. The adversity arose from Client A's merger, which gave it for the first time an interest in ongoing proceedings in which the law firm had been representing B and C, and the conflict was thus not reasonably foreseeable. *See* D.C. Bar Legal Ethics Comm., Op. 292. Another example of an unforeseeable conflict is in *Board of Regents of the University of Nebraska v. BASF Corp.*, where a firm client sought to disqualify a firm for representing a defendant in a lawsuit in which it intervened. *Bd. Of Regents of the Univ. of Neb. v. BASF Corp.*, 2006 U.S. Dist. LEXIS 58255,2 (D. Neb. Aug. 17, 2006). In this case, a lawsuit regarding rights to a non-exclusive license was filed in November of 2004 and the firm began representing the defendant in the matter at that time. *Id.* At 31-32. In January of 2005, another firm client entered into a license agreement with the plaintiff in the same lawsuit, thereby thrusting a conflict upon the firm. *Id.* At 32. The court considered the conflict an "unforeseeable development" because when the case was filed, there was no notion that any other party was involved, much less that a current client would take a position adverse to the plaintiff. *Id.* at 31-32.

In *Commonwealth Scientific & Industrial Research Organisation v. Toshiba America Information Systems, Inc.*, a conflict was thrust upon a law firm when its client disclosed the existence of certain indemnity agreements relating to another firm client that it had previously concealed from the firm. *Commonwealth Scientific & Indus. Research Org. v. Toshiba Am. Info. Sys., Inc.*, 297 Fed.App'x 970, 974 (Fed. Cir. 2008). Upon learning of the conflict and after being denied a waiver, the firm terminated its representation of the client who caused the conflict. *Id.* The terminated client accused the firm of violating its ethical obligations, contending that the firm should have known of the existence of the indemnity agreements because they were an industry standard and argued that it was therefore incumbent on the law firm to discover the conflict without its client's assistance. *Id.* The appellate court found this argument unpersuasive and agreed with the lower court that the thrust upon exception applied where unforeseeable developments caused two concurrent clients to become directly adverse. *Id.* While a client is free to choose which facts it does and does not disclose to counsel, the client cannot subsequently assert those purposefully withheld facts as a means to disqualify. *Id*

Alternatively, certain factors will lead a court to determine that a conflict was foreseeable and therefore not considered "thrust upon." In *El Camino Resources, Ltd. v. Huntington Nat. Bank*, two firm clients moved to have the firm disqualified from representing another client as defense counsel in criminal, civil, and bankruptcy actions on the ground that the firm had a conflict of interest arising from its status as counsel for each of the two moving plaintiffs in other litigation. *El Camino Resources, Ltd. v. Huntington Nat. Bank*, 623 F.Supp.2d 863, 866 (2007).

In this case, the moving plaintiffs alleged massive fraud by Cyberco and alleged that the firm's other client, Huntington National Bank, aided and abetted Cyberco's fraud as its principal financial institution and depository. *Id.* at 866. At the time the firm agreed to represent Huntington National Bank in the aiding and abetting matter, it had an active attorney-client relationship with the two moving plaintiffs. *Id.* at 867. The court found that the conflict was eminently foreseeable because Huntington National Bank's deep involvement in bankruptcy proceedings leading up to the aiding and abetting case made it foreseeable that large creditors would assert claims against it, and the record showed that both the client and the law firm *actually foresaw* the conflict and the firm pursued a waiver that would allow it to proceed despite the potential conflict. *Id.* at 886-87 (emphasis in original).

Philadelphia Bar Association Opinion 2009-7 deemed it foreseeable that when a law firm undertook representation of a builder of a proposed office building, that persons could emerge to oppose the project at some point in the future, as is inherent in real estate development projects.[27] This reasoning diverges from the analysis typically used to assess reasonable foreseeability because the Committee did not believe that the conflict was ascertainable at the outset of representation, but it did believe that where the law firm in question is large and has many clients, some of whom can reasonably be expected to live in proximity to the development project, the conflict was not unforeseeable and is a risk that law firms take on in the course of doing business. *Id.*

- ✓ Outset of Representation

In order to be considered thrust upon, the conflict must not have been reasonably foreseeable at the ***outset of representation***. "Representation" is not a defined term in D.C. Rule 1.7(d), but the outset of representation will be deemed to occur when the law firm first begins to provide legal services that involve the same facts, legal theories, claims, defenses and parties. *See* D.C. Bar Legal Ethics Comm., Op. 292. The Committee in this opinion agreed with a law firm asserting that its ongoing representation of clients in various proceedings relating to Competitive Access and Direct Access constituted, for each client, a single and continuing representation in pursuit of a sole objective. *Id.* Where a law firm is providing ongoing representation of a client with respect to an identifiable set of legal issues involving common parties, facts, theories and claims, that representation should be viewed as a single representation for purpose of applying the "thrust upon" conflict provision of 1.7(d), even though multiple legal proceedings may be involved. *Id.* The underlying commonality of facts, issues and parties required to find a single "representation" must be objectively verifiable. *Id.* The thrust upon conflicts analysis does not extend, however, to situations where there is an ongoing general representation of a client but the matter in which adversity develops has not yet begun, such as where a law firm represents two clients on unrelated matters and thereafter one client decides to sue the second client in a new matter. *See* D.C. Bar Legal Ethics Comm., Op. 272.

- ✓ No Fault of the Lawyer

[27] Although based on Pennsylvania Rule 1.7, which is identical to the Model Rule, this Opinion is advisory only and not cited in any case law.

The third component in determining whether a conflict is thrust upon is that the conflict arose through no fault of the lawyer.[28] Courts have generally held that, when a conflict arises which the challenged law firm played no role in creating, counsel may avoid being disqualified by moving swiftly to sever its ties with one client, in such a way as to minimize prejudice to the other. *Flying J Inc. v. TA Operating Corp.*, 2008 U.S. Dist. LEXIS 18459,4 (D. Utah Mar. 10, 2008). In *Flying J*, the court found that the law firm did not meet the thrust upon requirement that "the conflict must truly be no fault of the lawyer," since it did not act immediately to resolve the conflict and instead pursued litigation in the face of a clear conflict of interest without disclosing the conflict, seeking consent, or withdrawing its representation. *Id.* at 5. Similarly, in *El Camino*, the firm claimed that the conflict was thrust upon it due to the plaintiffs' decision to bring an action against the defendant. *El Camino* at 887. The court disagreed and found that the plaintiffs no more created the conflict by bringing the suit than the defendant did by deciding to defend itself and so the firm could not avail itself of the thrust upon argument. *Id.*

1. Withdrawal from Representing One Client (Exception to Hot Potato Rule)

Rule 1.16(a)(1) requires a lawyer to withdraw from representing a client if the continued representation of that client would result in a violation of the Rules of Professional Conduct. *Ex parte AmSouth Bank*, N.A., 589 So.2d 715, 719 (1991). Although Rule 1.16 allows a lawyer to withdraw from representing a client as long as there will be no material adverse effect, a lawyer cannot withdraw under this permissive withdrawal provision in order to turn a current client into a "past client" for conflicts analysis purposes. This is informally known as the "hot potato" rule.[29] Courts generally apply a flexible approach[30] to the hot potato rule in thrust upon situations and will allow withdrawal if appropriate under Rule 1.16(b). An exception to the hot potato rule may be allowed where the undertaking of both client representations was permissible at the time each representation began, and it was only the unexpected objection by one client to the project of another that created the conflict. *See* Massachusetts Bar Association Opinion 02-2 (June 2002).

This flexible approach is reflected in the Comments to ABA Model Rule 1.7: "Unforeseeable developments ... might create conflicts in the midst of a representation. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict." Model Rules of Prof'l Conduct R. 1.7 cmt. 5. The Restatement of the Law Governing Lawyers also notes that a lawyer may withdraw in circumstances attributable to the client's actions: "A lawyer may withdraw in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients." Restatement (Third) of the Law Governing Lawyers § 132 cmt. j (2000). If the conflict of interest was not

[28] Where a conflict exists at the outset of representation and is simply not discovered by the lawyer at that time, it is mere negligence and not a thrust upon conflict. *See Parkinson v. Phonex Corp.*, 857 F.Supp. 1474, 1482 (D. Utah 1994).

[29] *See generally, Superhuman Ethics: The Ethics of Industry and Issue Lawyering: Terminating Client Relationships to Solve Conflicts Problem – a/k/a the "Hot Potato" Doctrine.*

[30] The flexible approach does not eliminate an ethical violation, but merely examines options available to courts in fashioning appropriate remedies where ethical standards have been violated. *El Camino* at 884.

reasonably foreseeable at the outset of the representation, the law firm may be able to continue its representation without client consent even if a conflict with another firm client is triggered by a subsequent legal proceeding. *See* D.C. Bar Legal Ethics Comm., Op. 272.

D.C. Rule 1.7 was revised in 1996 and paragraph (d) was added to eliminate an unfair "veto power" which Rule 1.7(b)(1)[31] could have been understood to give one client where, as a result of events that were not reasonably foreseeable when the representation of another client on a different matter commenced, that representation became adverse to the first client. *See* Legal Information Institute, District of Columbia Legal Ethics, Rule 1.7, https://www.law.cornell.edu/ethics/dc/narr/DC NARR 1 07.HTM. D.C. Rule 1.7(d) provides an exception to the general prohibition against simultaneously representing two clients whose interests are directly adverse, allowing that, "If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4)."

In D.C. Ethics Opinion 292, a conflict was determined not to be reasonably foreseeable at the outset of representation and so, after seeking but failing to obtain Client A's consent, the law firm was permitted under Rule 1.7(d) to continue representing Client A in the ERISA litigation and Clients Band C in the ongoing Competitive Access and Direct Access proceedings. *Id*. If, however, the representation would have been adversely affected by representation of another client, representation of another client would have been adversely affected by such representation, or the lawyer's professional judgment may have been adversely affected, the firm would have been required to withdrawal under the D.C. rule. *See Id*. and D.C. Rules 1.7(b)(2-4).

2. From Which Client May the Lawyer Withdraw?

Ethics rules do not specify from which representation(s) a lawyer should withdraw in order to cure a conflict. However, relevant case law indicates that the flexible approach requires a balancing of factors including (1) prejudice to the parties, including whether confidential information has been conveyed, (2) costs and inconvenience to the party being required to obtain new counsel, (3) the complexity of the various litigations, and (4) the origin of the conflict. *Gould, Inc. v. Mitsui Mining and Smelting Co.*, 738 F.Supp. 1121, 1126 (N.D.Ohio 1990).[32] The most important factor in this balancing test is the prejudice the withdrawal or continued representation would cause the parties, including whether continuing representation of one party would give it an unfair advantage to the detriment of the other party. C. Evan Stewart, *The Legal Profession and Conflicts: Ain't No Mountain High Enough?*, 11 N.Y. Bus. LAW J. 7, 9 (Fall 2007).

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[31] Under D.C. Rule 1.7(b)(1), a lawyer shall not represent a client with respect to a matter if that matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer.

[32] Although typically arising in the context of a disqualification motion, this same analysis is used to determine whether withdrawal from a particular client is appropriate. *See generally* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2005-05.

In *Ex parte AmSouth Bank*, NA., the Alabama Supreme Court found that although a law firm was prohibited under Rule 1.7 from representing both clients in a thrust upon conflict situation, neither Rule 1.7 nor Rule 1.16(a)(1) required the firm to withdraw from both clients. *Ex parte AmSouth Bank*, N .A. at 719. The law firm in this case learned that it faced a conflict of interest, unsuccessfully sought a waiver, and withdrew from the client that it thought would be the least prejudiced by losing its services. *Id*. The court found that the firm did not act improperly by withdrawing from the representation of one client and continuing to represent the other client because the firm did not by its own actions create the conflict of interest and the firm made its decision to withdraw after carefully considering the duties of loyalty that it owed to both clients. *Id.*

In *Eastman Kodak Co. v. Sony Corp.*, where a thrust upon conflict arose in the context of an acquisition, the court sought to find a delicate balance between two competing considerations: the prerogative of a party to proceed with counsel of its choice and the need to uphold ethical conduct in the courts of law. *Eastman Kodak Co. v. Sony Corp.*, 2004 U.S. Dist. LEXIS 29883, 9 (W.D.N.Y. Dec. 27, 2004). The court believed in this case that the flexible approach provided a more practical framework than the hot potato rule but ultimately found that the firm's continued representation of its client was ethically problematic and disqualified the firm, acknowledging that the result would be unfair to whichever client the firm did not represent. *Id.* at 9.

- **No Conflict Under the Rule**

The thrust upon analysis is based on the premise that there is adversity between firm clients, but there are also situations that never reach the thrust upon analysis because it is determined that there is no conflict of interest under the applicable rule, such as matters involving rulemaking, the solicitation of bids, unnamed class members, and some conflicts arising out of changes in corporate structure.

1. Rule-Making

D.C. Rule 1.7(b)(1) is confined to "matter[s] involv[ing] a specific party or parties," a phrase that excludes lobbying, rulemaking and other matters of general government policy. *See* D.C. Rule 1.7(b)(1). As a result, D.C. Rule 1.7(b)(1) rule does not prohibit a lawyer-lobbyist from advancing a position in a lobbying matter that may be opposed in that same lobbying matter by another client of the lawyer-lobbyist (or of the lawyer-lobbyist's law firm) where the other client is unrepresented in the lobbying matter or is represented by a different lobbyist who is not associated with the lawyer-lobbyist's firm." *See* D.C. Bar Legal Ethics Comm., Op. 344. Generally, all potentially affected members of the public are given an opportunity to participate in a rulemaking proceeding, enabling interested persons to participate in the process of formulating the rules that affect them and to which they must conform. *See* D.C. Bar Legal Ethics Comm., Op. 297. As such, a rulemaking of general application is not "particular to a specific party or parties." *Id.*

A lawyer, however, must assess whether the D.C. Rule will govern the situation before relying on it. *See* R. 8.5(b) on 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 matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.").

2. Bids

A lawyer may be asked to undertake the representation of a client in a specific matter when the lawyer has reason to believe that another client will take a position adverse to that client in that matter, but cannot identify the nature of the conflict or the specific clients who might be affected. *See* D.C. Bar Legal Ethics Comm., Op. 356. D.C. Ethics Opinion 356 responds to a lawyer's inquiry concerning a client who has asked for advice in connection with a proposed acquisition which would be subject to regulatory approval and might generate scrutiny and opposition from the business and political communities. *Id*. Based solely on her industry expertise and experience (and not confidential information from any of her clients), the lawyer believed that one or more of her other clients might offer competing bids, but this did not impact the D.C. Bar's reading of Rule 1.7(b)(1): "The prohibition under Rule 1.7(b)(1) cannot depend on whether a lawyer's speculation about certain industry events, which are often based on unpredictable business judgments, is proven correct. Such expertise and instinct may serve clients well in transactional negotiations and litigation strategy, but it does not inform the test of what constitutes a conflict of interest under Rule 1.7(b)(1)." *Id.* The rule prohibits only those representations in which the lawyer can identify (i) the nature of the conflict and (ii) the specific client or clients who might be affected. Simply put, if the lawyer cannot know which clients to talk to and what conflicts to disclose, then there is no conflict of interest under Rule 1.7(b)(1). *Id.*

3. Unnamed Class Members

The *In re Rail Freight Fuel* court found that no violation of Rule 1.7(b)(1) was found for two separate reasons: First, the law firm's representation of a client in multidistrict litigation was not adverse to another client in a related case because they were not the "same matter" under Rule 1.7(b)(1). Second, the representation of one client in the multidistrict litigation was not adverse to the second client in the same matter because the second client was only an unnamed class member in the litigation. In re Rail Freight Fuel Surcharge Antitrust Litigation, 965 F.Supp.2d 104, 112 (D.D.C. 2013). In this case, both sides agreed that, typically, a firm seeking to represent a defendant in a class action is not required to clear potential conflicts with unnamed class member clients, and that a contrary rule would be "virtually impossible to satisfy" and "patently unworkable." *Id.* at 115. This case also found that D.C. Rule 1.7(b)(1) should be read to include the limitation made explicit in Comment 25 to Rule 1.7 of the Model Rules:

> When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a

> person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

See Model Rule 1.7, Comment [25]. *In re Rail Freight* at 116. The court in In re Rail Freight did recognize, however, that there may be situations in which a law firm's attorney-client relationship with an unnamed class member may create a conflict that would prevent that firm from representing a named defendant, such as where the law firm's relationship with the class member is so substantial that it raises questions about the firm's ability to zealously represent the defendant, or where there is a risk that the class member's confidential information could be used by the firm in preparing the defendant's legal strategy. *Id.* at 118.

- **Positional or Issue Conflicts**

Positional or issue conflicts are those in which the law firm represents two different clients in two unrelated matters but in which arguments may be advanced on opposite sides of the same issue in those separate cases. For example, a lawyer for one client may argue to invalidate an agency's new rule on the theory that the agency failed to give deference to an administrative law judge's factual findings. On the other hand, another lawyer from the same firm may argue to invalidate an agency's new rule on the theory that agency should not have given deference to an administrative law judge's factual findings.

The conflicts rules do not expressly address positional or issue conflicts as such. Rather, the issue generally falls under Rule 1.7(a)(2) definition of a conflict as the circumstance in which there is "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." On the one hand, the law firm owes a duty to advance the argument for deference on behalf of one client. In doing so, however, the law firm's effectiveness in advancing the contrary argument for another client could be materially limited. The same could be true in reverse. Imagine having your firm's brief cited against your client to contradict or undermine the advocacy. Had the client known of this risk and potential limitation, the client may have selected other counsel.

As ABA Formal Ethics Op. 93-377 (1993) described this ethical issue as follows:

> …[A]rguing a position on behalf of one client that is adverse to a position that the lawyer, or her firm, is arguing on behalf of another current client raises a number of concerns. For example, if both cases are being argued in the same court, will the impact of the lawyer's advocacy be diluted in the eyes of the judge(s)? Will the first decision rendered be persuasive (or even binding) precedent with respect to the other case, thus impairing the lawyer's effectiveness–and, if so, can the lawyer (or firm) avoid favoring one client over the other in the "race" to be first? And will one or the other of the clients become concerned that the law firm it has employed may have divided loyalties?
>
> . . . .

> The Committee is therefore of the opinion that if the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create a legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters.

Even in cases that are not being litigated in the same jurisdiction, this opinion notes that a lawyer should consider the relative importance of the positional conflict issue and the likelihood that it may affect the outcome of one or both of the cases, the extent to which a decision in one case might influence the decision in the other and the extent to which the lawyer might "pull his punches" in one case so as to minimize any adverse effects on the client in the other case. See generally, Peter Geraghty, "Ethics of positional conflicts," Eye on Ethics (American Bar Association, May 2017) at https://www.americanbar.org/publications/youraba/2017/may-2017/the-ethical-issues-surrounding-positional-conflicts.html; Rotunda and Dzienkowski, Positional Conflicts § 1.7–6(o), The Lawyers' Deskbook on Professional Responsibility (2016-17).

Although the ABA guidance on positions or issue conflicts sets forth a fairly narrow circumstance for an ethical conflict, clients often warn lawyers against a broader notion of "issue conflicts." Specifically, clients attempt to broaden this notion to any advocacy that might cut against their business interests or otherwise amount to contrary positions to those taken by the client through other firms. While this does not transform the standard for an ethical conflict, clients are putting lawyers on notice of what might draw consternation if not discharge from the client. If the client relationship would cause the lawyer to steer clear of advocacy that a client may not like, the lawyer may then indeed have a "material limitation" as a result of the client relationship on what the lawyer can do for other clients.

Just like more traditional ethical conflicts may be hard to foresee when representing a group on an industry or issue basis, these types of issues or positional conflict issues may not be apparent at the outset of a representation. Positional or issue conflicts are not likely to be identified as a result of traditional searching of involved parties nor is there likely sufficient information in a firm's client/matter database to "search" for such conflicts. As a result, these types of issues are less amenable to management at the "business intake" stage.

III. Ethical obligations considered relative to the social justice movements (pro bono obligations and harassment and discrimination as misconduct)

Here is what Wikipedia recounts about the death of George Floyd:

> On May 25, 2020, George Floyd, a 46-year-old African-American man, was killed in Minneapolis, Minnesota, while being arrested for allegedly using a counterfeit bill. During the arrest Derek Chauvin, a white police officer with the Minneapolis Police Department, knelt on Floyd's neck for several

> minutes[a] after he was already handcuffed and lying face down.[7][8][9] Two police officers, J. Alexander Kueng and Thomas Lane, assisted Chauvin in restraining Floyd, while a further officer Tou Thao prevented bystanders from interfering with the arrest and intervening as events unfolded.
>
> Floyd had complained about being unable to breathe prior to being on the ground, but after being restrained he became more distressed, and continued to complain about breathing difficulties, the knee in his neck, and expressed the fear he was about to die and called for his mother. After several minutes passed Floyd stopped speaking. For a further two minutes, he lay motionless and officer Kueng found no pulse when urged to check. Despite this Chauvin refused pleas to lift his knee until medics told him to.
>
> The following day, after videos made by witnesses and security cameras became public, all four officers were dismissed. Two autopsies found Floyd's death to be a homicide. Chauvin was initially charged with third-degree murder and second-degree manslaughter, to which was later added second-degree murder. The three other officers were charged with aiding and abetting second-degree murder.
>
> Floyd's death triggered worldwide protests against police brutality, police racism, and lack of police accountability. In early June, the Minneapolis City Council voted an intent to restructure the police department as a "new community-based system of public safety". The Minneapolis Police Chief cancelled contract negotiations with the police union and announced plans to bring in outside experts to examine how the union contract can be restructured to provide transparency and "flexibility for true reform".

"Killing of George Floyd," Wikipedia at https://en.wikipedia.org/wiki/Killing_of_George_Floyd. With 20/20 hindsight, this seems like the understatement of the year: "Floyd's death triggered worldwide protests against police brutality, police racism, and lack of police accountability." It did not take long for commentary to focus on the "perfect storm" created by the pandemic-related closures, the joblessness, and the viral circulation of the video of George Floyd's death, which gave rapid momentum to social protests and pressure for attention and change. See, e.g., "'Perfect storm': Coronavirus lockdown, joblessness fuel longstanding grievances," by Allan Smith and Lauren Egan, June 5, 2020 at NBCnews.com, https://www.nbcnews.com/politics/politics-news/perfect-storm-coronavirus-lockdown-joblessness-fuel-longstanding-grievances-n1222546.

The protest-spurrred conversations about reforms in policing quickly broadened to include focus on the effectiveness or lack thereof of diversity and inclusion initiatives. The legal community likewise examined its role in improving access to justice for disadvantaged communities on a pro bono basis as well as its scorecard on diversity and inclusion goals. The Rules of Professional Responsibility envision a special role for lawyers as leaders on both of these topics.

The vision for the legal profession as set out in the Preamble to the Model Rules of Professional Responsibility is one of leadership. Preamble cmt. 1 states that as a member of the

legal profession, a lawyer "is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." The Preamble, cmt. 6, makes clear that a lawyer's role should go beyond practicing law:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

The ABA Rules' predecessor, the Model Code of Professional Responsibility, likewise articulated a leadership role for lawyers as guardians of the rule of the law and the justice system:

> 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 his 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 his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. 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.

Accord Preamble, cmt. 13 ("Lawyers play a vital role in the preservation of society."). This is a lofty vision of leadership indeed.

The leadership vision transcends that of a lawyer's role inside an attorney-client relationship, making clear that a license to practice law is a much broader pact. That broader pact includes conforming conduct "to the requirements of the law, both in professional service to clients and in the lawyer's business ***and personal affairs***." Preamble, cmt. 5 (emphasis added).

The parameters for fulfilling professional duties within an attorney-client relationship, however, are not always harmonious with a lawyer's responsibilities as an officer of the legal system and a public citizen. When responsibilities conflict, a lawyer must look to the professional rules to reconcile those conflicting duties:

> Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system

Preamble, cmt. 9. Nevertheless, the Preamble recognizes that the Rules of Professional Responsibility may not fully inform a lawyer's decision-making, expressly recognizing that "moral and ethical considerations [. . .] should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." Preamble, cmt. 16. Rule 2.1 echoes and amplifies the Preamble's recognition that "moral and ethical" considerations may inform a lawyer's thinking, nothing that "[i]n 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."

Along with that lofty vision of the profession comes the charge to abstain from conduct that would undermine the integrity of the profession and the justice system. ABA Model Rule 8.4, dubbed "Maintaining the Integrity of the Profession," is the rule defining "professional misconduct," which has long included:

- Violating the Rules of Professional Conduct (or assisting other to do so);
- Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; or
- Engaging in conduct that is prejudicial to the administration of justice.

Comment 3 to this rule had long recognized that "bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a

violation of this rule." However, on August 8, 2016, the ABA expanded the scope of the rule in the text of the rule itself, making it professional misconduct to engage in harassment and discrimination related to the practice of law. This expansion came when the ABA adopted subsection (g) to Rule 8.4, making it professional misconduct for a lawyer to engage in "conduct that the lawyer *knows or reasonably should know* is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules."

Comment 4 to ABA Model Rule 8.4 elaborates on what amounts to "conduct related to the practice of law" as follows:

> Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

As Rule 8.4(g) expressly notes, it does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16 or preclude legitimate advice or advocacy consistent with these Rules. With respect to withdrawal, Rule 1.16(b) (4) allows a lawyer to decline or withdraw from a representation if . . . "(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

One article cautions against viewing this rule as a sudden reaction to then current events (at that time, the "#metoo" movement) and instead argues that the dialogue about the impact of harassment and discrimination on the administration of justice dates back decades within the ABA. See "The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and harassment in the Practice of Law," Kristine A. Kubes, et al., ABA March 8, 2019, at https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring2019/model_rule_8_4/ (Kubes "Evolution" article); *see also* Revised Resolution 109, Report to the House of Delegates of the ABA from the ABA Standing August 2016 Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice, Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Professional, Commission on Sexual Orientation and Gender Identity, and Commission on Women in the Profession at file:///C:/Users/07958/Desktop/final_revised_resolution_and_report_109.pdf (Attachment A) (hereinafter "Rule 8.4(g) Report"). Specifically, the Kubes Evolution article states

that prior to the formal adoption of Model Rule 8.4(g), twenty states "already had used some or all of the ideas expressed in the Model Rule comments to cultivate similar rules prohibiting discrimination and/or harassment," including California, Colorado, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Washington, and Wisconsin. *Id.*

The Kubes Evolution article likewise points out that some states have expressly declined to adopt Rule 8.4(g), expressing concerns about the chilling effect on independent thought, speech and meaningful debate as well as the potential for enforcement challenges based on unconstitutional vagueness. *Id. See also,* "The Crusade Against Model Rule 8.4(g)," Dennis Rendleman, ABA Ethics In View, October 2018 at https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/ (grouping opposition to Rule 8.4(g) into two general themes: those who object on religious liberty grounds and the "academic/libertarian opposition").

Attachment B illustrates the adoption status of ABA Model Rule 8.4(g) as of June 13, 2019 according to the ABA Center for Professional Responsibility Policy Implementation Committee. It shows which jurisdictions had analogous rules that pre-existed the ABA's adoption of Rule 8.4(g), which were "studying" the revised rule at the time the chart was prepared, which jurisdictions had adopted Rule 8.4(g) following the ABA's adoption of it, which jurisdictions had adopted analogous rules following the ABA's adoption of Rule 8.4(g), and which jurisdictions had declined to adopt the rule. See Attachment B (also found at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf).

Even before the August 2016 adoption of ABA Rule 8.4(g), courts have disciplined lawyers for discriminatory and harassing conduct. *See, e.g., In re Moothart*, 860 N.W.2d 598 (2015) (upholding 30-month license suspension based on Disciplinary Board's finding of sexual harassment in the practice of law with five women, sexual relations with a client with two of the women, and an allegation of a concurrent conflict of interest arising as a result of his relationship with one woman); *In re Kratz*, 851 N.W.2d 219 (2014) (upholding 4-month suspension for former district attorney who, among other things, texted a victim calling her "beautiful" and "pretty" and sending the following inappropriate messages: (i) "I wish you weren't one of this office[']s clients. You'd be a cool person to know!" (ii) "Are you the kind of girl that likes secret contact with an older married elected DA ... the riskier the better? Or do you want to stop right know [sic] before any issues?" (iii) "I'm the atty. I have the $350,000 house. I have the 6 figure career. You may be the tall, young, hot nymph, but I am the prize! Start convincing," and (iv) "I would not expect you to be the other woman. I would want you to be so hot and treat me so well that you'd be THE woman. R U that good?"); *In re Griffith*, 838 N.W.2d 792 (2013) (imposing indefinite suspension with no right to petition for reinstatement for 90 days for misconduct finding based on (1) unwelcome comments about the student's appearance; (2) unwelcome physical contact of a sexual nature with the student; and (3) attempt to convince the student to recant complaints she had made to authorities about him.); *In re Campiti*, 937 N.E.2d 340

(2009) (public reprimand for making disparaging references in course of representing a father in a child support proceeding about the fact that the mother was not a U.S. citizen and was receiving legal services at no charge); *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Steffes,* 588 N.W.2d 121, 124 (Iowa 1999) (upholding finding of misconduct by court-appointed attorney in taking semi-nude pictures of client purportedly to document back injuries to justify drug use but allegedly to influence the jury but increasing 6-month suspension imposed by the Grievance Commission to two years); *People v. Lowery,* 894 P.2d 758, 760 (Colo.1995) (en banc) (upholding hearing board's finding of misconduct for vulgar, degrading non-consensual sexually abusive conduct but grievance committee increased the suspension from 30 days to 90 days on appeal and the Supreme Court increased it to one year and one day after further appeal); *In re Discipline of Peters,* 428 N.W.2d 375, 376, 381-82 (Minn.1988) (law school dean "publicly reprimanded" for repeatedly engaging in unwelcome physical contact and verbal communication of a sexual nature against four women employees, two of whom were also law students with concurrences wrestling with ambiguities and proper discipline for the conduct); *In re Gould,* 4 A.D.2d 174, 176, 164 N.Y.S.2d 48 (N.Y.App.Div.1957) (per curiam) (disbarring attorney who lured young women to his premises by advertisements for help wanted, sought to elicit from them answers to highly improper questions by giving assurances that as a lawyer he would keep such answers in strict confidence, attempted to induce them to commit prostitution and other immoral acts, made indecent proposals, and attempted assault with intent to commit rape); *In re Thomsen*, 837 N.E.2d 1011 (2005) (publicly reprimanding lawyer who represented a husband in a divorce action and who stated, among other things: "The wife continues to associate herself around town in the presence of a black male, and such association is causing and is placing the children in harm's way, as husband has been advised by neighbors of the wife and children. Said *1012black male has resided at the home of the wife and children, for lengthy periods of time, while "fixing the computer." The behavior is placing the children in harm's way and should be stopped immediately.").

The Rule 8.4(g) Report explained that the rule change was important because the comment alone to Rule 8.4 did not have the authority of a rule. *See* Preamble comment 21 ("The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."). Additionally, the Rule 8.4(g) Report points out that the comment was more limited in scope than the new rule text because it applied only to conduct by a lawyer that occurs in the courts of representing a client and only if the conduct is also "prejudicial to the administration of justice." According to the Rule 8.4(g) Report, "[c]hanging the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment. It also clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice. It is a specific requirement." Rule 8.4(g), p. 4.

In addition to advocating for the needed amendment, the Rule 8.4(g) Report addressed concerns raised by commenters about vagueness in the definition of harassment and discrimination as well as the phrase "conduct related to the practice of law." The Rule 8.4(g) Report pointed out that the comments to the rule provide guidance, that other rules apply even more broadly to lawyers even when they act in a nonprofessional capacity, that the rule can draw from existing law on discrimination and harassment, and that many states had adopted similar rule provisions prior to the ABA's rule change. Some commenters suggested that the bar should not take action on harassment and discrimination claims unless the claim has first been presented

to a legal tribunal with a finding of liability for harassment or discrimination. The Rule 8.4(g) Report pointed out that such a requirement is "without precedent in the Model Rules" and that the profession is self-governing. Rule 8.4(g) Report, page 11.

Notwithstanding the practical challenges that Rule 8.4(g) might face in application, the rule should be viewed in the context of the lofty expectations of the lawyer as a professional as set out in the preamble to the ABA Model Rules and their predecessor, the ABA Model Code of Professional Responsibility, and as discussed above.

IV. Ethics issues at the forefront of the pandemic (teleworking, confidentiality, and UPL issues)

The very practical problems associated with a law practice that arise during the COVID-19 pandemic arise from:

- Working remotely consistent with confidentiality and licensing requirements;
- Keeping up with rapidly evolving orders that change access to government services and agencies, including courts;
- Attempting to advise clients on new and complex laws and regulations in time sensitive circumstances, including whether and how business can operate and avenues for financial relief;
- Advising a broad spectrum of clients facing unprecedented challenges and changes in how they do business, generating many legal questions about the implications of those challenges and changes;
- Widespread financial disruption and distress that causes clients to bump into each in ways they may not have prior to the disruption and distress, placing even more focus on controlling expenses (including legal expenses), placing existing clients in potential bankruptcy processes, and making it more likely that lawyers may be tempted to practice outside their usual areas of practice; and
- Practicing in seeming physical isolation in increasingly stressful circumstances -- whether because of increased or decreased volumes of work or health or family challenges that demand more than usual amounts of attention -- by a legal service provider population that is already more likely to suffer from and yet fail to recognize mental health and substance abuse issues in circumstances in which colleagues may be less likely to see signs requiring intervention.

There are two relatively recent ABA Formal Opinions that identify many of the ethical issues at the forefront while practicing law during a pandemic. They include:

- ABA Formal Opinion 482: "Ethical Obligations Related to Disasters" (September 19, 2018), and

- ABA Formal Opinion 477R: "Securing Communication of Protected Client Information Formal Opinion" (May 22, 2017).

These opinions predate the specific crisis arising from the worldwide spread of COVID-19. Opinion 482 specifically speaks in terms of a "disaster," though perhaps "natural disaster" was more in view than the current pandemic. "Telecommuting" or "working remotely" was more squarely in view for Opinion 477R along with the increasing challenges of mobile technology. Even though the ABA may not have predicted this specific type of "disaster" or mass and immediate need for remote working arrangements, both opinions discuss some common themes in terms of duties under the ethics rules and have specific applicability to the current COVID-19 practice environment. The duties and rules[33] that are front and center on the issues include the duty to:

- Communicate (Rule 1.4),
- Be competent (Rule 1.1) and diligent (Rule 1.3),
- Keep client information confidential (Rule 1.6) and safeguard property (Rule 1.15),
- Supervise (Rules 5.1, 5.3),
- Manage conflicts (Rules 1.7, 1.8, 1.9), and
- Avoid the unauthorized practice of law (Rule 5.5).

Communicating (Rule 1.4)

The Rule 1.4 duty to communicate includes attention to who and how: "To be able to reach clients following a disaster, lawyers should maintain, or be able to create on short notice, electronic or paper lists of current clients and their contact information. This information should be stored in a manner that is easily accessible." In this regard, Opinion 482 – citing Rule 1.1's competence requirement – notes that lawyers must consider the possibility that communications may be disrupted and consider the risks and benefits of technology solutions to the communications issues. *See also,* Comment [8] to Rule 1.1 (". . . [A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."). The duty to communicate means that the lawyer needs to know how to communicate with clients in the remote working environment and to communicate to client how they may reach the lawyer. It also means that the lawyer needs to communicate about whether the "disaster" prevents continuation of the representation or whether withdrawal consistent with Rule 1.16 may occur.[34] In short, the lawyer must communicate with clients about any limitations

[33] References to the rules are generally to the ABA Model Rules of Professional Conduct unless otherwise specified. These rules are generally adopted with some variations at the state level. The applicable jurisdictions should be consulted to resolve specific questions.

[34] For example, will continuing representation cause the lawyer to violate the Rules? Rule 1.16(a)(1). Does the lawyer's physical or mental condition materially impair the lawyer's ability to represent the client? Rule 1.16(b)(2). Is court permission required to withdraw? Rule 1.16(c)?

on the practice and how the COVID-19 restrictions may impact what can be achieved and the changes to the goals or timeline of the representation.

Competence (Rule 1.1) and Diligence (Rule 1.3)

ABA Opinion 482 reminds lawyers that the duty of competence under Rule 1.1 continues to apply if the lawyer continues the representation. However, it also notes that lawyers may be able to provide additional services under "emergency circumstances" that would otherwise be outside the lawyer's ordinary practice. Specifically Comment 3 to Rule 1.1 notes: "In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. Ill-considered action under emergency conditions can jeopardize the client's interest." Lawyers should always keep in mind that the Rules tend to view clients are more vulnerable than lawyers, and a client in the wake of a disaster may be more so. Accordingly and in keeping with the Rule 1.4 duty to communicate, a lawyer proceeding into matters outside the lawyer's usual practice should "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." That is, the lawyer should let the client know that the scope of representation is outside he lawyer's usual practice, what resources are or are not available to the lawyer to compensate, and what the practical pros and cons might be of waiting to take action until the client can identify a lawyer with more applicable experience.

In the COVID-19 circumstances, an example can be found with respect to the rapidly evolving financial assistance laws and programs. The laws and regulations are new and rapidly evolving while the availability of funds seem to be short-lived. These circumstances may qualify as exigent enough to justify delving into new space on short fuses. However, Opinion 482 counsels lawyers to explain to the clients the risks of what is known and unknown and to do what is reasonably possible to be both competent and diligent in those circumstances.

Whether continuing a representation or withdrawing, the lawyer needs to ensure access to information regarding applicable deadlines and the impact of the "disaster" – here the pandemic – on those deadlines. Because the pandemic is affecting the availability of courts and government services, there are forum-by-forum orders addressing what is open and closed and for what purposes, which varies by the week. Likewise, there are jurisdiction-specific orders addressing filing deadlines and statutes of limitations, and lawyers will need to assess whether there are any enforceability issues with such orders. Not only must the lawyer determine how to monitor deadlines affecting client rights and obligations, the lawyer will need to determine the methods for appearance or communication with the varying courts and forums. If the pandemic affects the lawyer or lawyer's client but not the court or forum – for example, if one or both becomes ill or subject to more restrictive quarantine measures – the lawyer again needs a plan for communicating and adjusting deadlines and arrangements for "appearances" and interactions.

Confidentiality (Rule 1.6) and Safeguarding Property (Rule 1.15)

Safeguarding client confidentiality is at the top of the list of professional duties in play in this "working remotely" environment. Lawyers working remotely must consider whether their conversations and files are safeguarded from view and earshot of those outside the lawyer-client relationship. There is no "family and friends" exception to confidentiality, so a lawyer will need a private place for conversations or must limit the lawyer's side of the conversation to one that could occur in a public space. Files and computer monitors should likewise be secured and out of general view.

Of course, the technology used to communicate, access client files, and create work product also must reasonably protect client information and otherwise comport with client agreements as to data security. Apart from client agreements, Opinion 477R and some rules amendments that resulted from the ABA Commission on Ethics 20/20 address what a lawyer should be doing to protect against the various cyber threats and data breach risks**.** Specifically, Opinion 477 points to the "reasonable efforts" standard set out in the ABA Cybersecurity Handbook,[35] which "rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that require a 'process' to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments." Opinion 477 also points to the factors identified for consideration in meeting a reasonableness standard in Comment 18 to Rule 1.6(c):

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

In addition to the confidentiality obligation, as Opinion 482 notes, the lawyer has a duty to safeguard the client's property under Rule 1.15. Although the pandemic may not present the same level of risk to client property as a natural disaster might, the remote working circumstances may place client files in home environments. Since the client file is central to both, a lawyer must consider in advance how the client's file will be preserved and accessible in the pandemic scenario. Opinion 482 gives the example of storing data to the "cloud" as a means of preserving the file and its accessibility. However, use of the cloud for data storage and retrieval likewise means attention to the technological safeguards around access. Client funds are within the Rule 1.15 duty to keep client property safe. Just as the lawyer needs to determine how the lawyer (or lawyer's successor) can identify and reach out to clients, the lawyer needs to ensure durable accounting records and accessible client funds that take into account the potential for a lawyer's unexpected illness or unavailability.

[35] See Jill D. Rhodes & Vincent I. Polley, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 7 (2013) ("ABA Cybersecurity Handbook").

In the event that client property with intrinsic value (e.g., original wills, trusts, deeds, and negotiable instruments) is lost or destroyed, the lawyer must notify the client, whether a current or past client. Opinion 482 states that a "lawyer need not notify either current or former clients about lost documents that have no intrinsic value, that serve no useful purpose to the client or former client, or for which there are electronic copies." Citing Rule 8.4(c)'s reference to dishonesty as professional misconduct, Opinion 482 goes on to note that a "lawyer must respond honestly, however, if asked about those documents by either current or former clients." Opinion 482 recognizes that most documents will "fall in the middle." With respect to this category, the lawyer may attempt to reconstruct the file but must notify a client of the loss of documents that cannot be reconstructed and which are necessary for the current representation or would serve some useful purpose to the client. As the opinion notes, this "obligation stems from the lawyer's obligations to communicate with clients and represent them competently and diligently," citing Rules 1.1, 1.3, and 1.4. Moreover, the lawyer should determine whether the lawyer's agreement with the client contains any pertinent requirements.

Supervision (Rules 5.1, 5.3)

Remote working arrangements may also challenge a lawyer's ability to properly supervise as required under Rules 5.1 (responsibilities of a partner or supervisory lawyer) and 5.3 (responsibilities regarding nonlawyer assistance). The duty to supervise boils down to making reasonable efforts to ensure that the supervised lawyers and nonlawyers are conforming to the Rules of Professional Conduct. With respect to the pandemic circumstances, that would include – among other things – ensuring that work is competently and diligently completed, that clients are kept in communication, and that confidentiality and client property are safeguarded. The practical challenge of "remote" supervision means that a lawyer will need to be more proactive than would be the case if the lawyer were practicing from the same office space. For example, the lawyer may need more scheduled conferences than would be the case in the "office" environment. Rather than awaiting a cry for help, the lawyer may need to more specifically inquire about the status of work, the home office arrangements, and the health and well-being.

The topic of lawyer mental health and well-being has garnered much attention in the past several years as a result of statistics that show those engaged in the practice of law to have higher incidences of mental health and substance abuse issues. The Report of the Working Group to Advance Well-Being in the Legal Profession, Commission on Lawyer Assistance Programs, Standing Committee on Professionalism, and National Organization Of Bar Counsel Report To The House Of Delegates (see https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_2018_hod_midyear_105.pdf) ("Resolution 105 Report")) summarized the responses of 12,825 licensed and employed lawyers, which indicated that

- more than one-fifth of the respondents scored at a level consistent with problematic drinking;
- over a fourth of the respondents reported some level of depression, with nearly half indicating that they had experience depression at some point in their careers;
- about a fifth of respondents reported suffering from anxiety, with more than six out of ten having done so at some period of their careers;

- more than one out of ten respondents reported suicidal thoughts at some point while practicing law; and
- 0.7 percent of respondents indicated at least one prior suicide attempt, which if extrapolated over the 1.3 million lawyers in the U.S., would suggest that 9,100 lawyers have attempted suicide.

The Resolution 105 Report also reported that lawyers are reluctant to seek help. "They are concerned that available measures are not sufficiently private and confidential and worried that others will learn of their circumstances." The recommendations transmitted through the Resolution 105 Report focus on five central themes:

> (1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession,
>
> (2) eliminating the stigma associated with help-seeking behaviors,
>
> (3) emphasizing that well-being is an indispensable part of a lawyer's duty of competence,
>
> (4) educating lawyers, judges, and law students on lawyer well-being issues, and
>
> (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

The COVID-19 pandemic may be a huge leap in terms of how law is practiced, but the circumstances are unlikely to be stress relieving. Some lawyers may face exponential volumes of new client crises while others see work dry up while attention is diverted to the COVID-19 related issues. Some lawyers may have increased family obligations because of the lack of available childcare or the suspension of school. Lawyer parents may have home schooling added to their already busy "to do" list. Whatever support systems were in place may have evaporated while even family members keep their "distance." If that increased stress translates into mental health or substance abuse issues, it may be easier to keep those issues "off the radar" when in-person interactions are more limited than ever.

Nevertheless, when lawyer mental health and well-being issues impair an attorney's ability to competently and ethically represent clients, professional rules may mandate withdrawal, intervention, or reporting. As pointed out in a September 19, 2018 article on Americanbar.org, "[t]he affected practitioner is often the last to realize or acknowledge the existence of a problem. Self-reporting of cognitive impairment of active lawyers is rare." *See* https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/interventionandimpairmentassistance/. Because of the likelihood that an impaired lawyer will fail to self-identify or otherwise seek help, the ethics opinions typically focus the responsibility of other lawyers practicing with the impaired lawyer. For example, Virginia Legal Ethics Opinion 1886 (*see* http://filehost.thompsonhine.com/uploads/Virginia_Legal_Ethics_Opinion_1886_cfbd.pdf),

dated December 15, 2016, addresses the "the ethical duties of partners and supervisory lawyers in a law firm to take remedial measures when they reasonably believe another lawyer in the firm may be suffering from a significant impairment that poses a risk to clients or the general public." Virginia LEO 1886 then identifies the Virginia version of the following ABA Rules:

- Rule 5.1: requiring partners or other lawyers in the firm with managerial authority to make reasonable efforts to ensure that all lawyers in the firm conform to the Rules of Professional Conduct.

- Rule 8.3: requiring lawyers to report rule violations that raise a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects to the appropriate professional authority.

- Rule 1.16(a)(2): requiring a lawyer to withdraw if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

Virginia LEO 1886 stresses that partners and supervisory attorneys need to take precautionary measures "before a lawyer's impairment has resulted in serious misconduct or a material risk to clients or the public."

In addition to Virginia LEO 1886, there are a number of ABA and state ethics opinions touching on the topic of lawyer mental health and well-being as it may intersect duties under the professional rules:

- ABA Formal Opinion 03-429 - Obligations with Respect to Mentally Impaired Lawyer in the Firm,

- ABA Formal Opinion 03-431 - Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment,

- Kentucky 2014 Legal Ethics Opinion 14.01 – Duty to Report Attorney Memory Lapses, and

- North Carolina 2013 Formal Ethics Opinion 8 - Responding to the Mental Impairment of Firm Lawyer.

The emphasis on intervention is aimed both at minimizing harm to the clients but also at increasing the likelihood of intervention and help to address the attorney's mental health issues if possible.

Managing Conflicts (Rules 1.7, 1.8, 1.9)

There is nothing about COVID-19 that gives the conflict of interest rules a holiday. While conflicts checking is not unique to the pandemic, the circumstances may well give rise to a higher number of instances in which clients' interests are clashing. Instead of having a vendor/customer issue or two, a client may suddenly have commercials disputes with dozens of

vendors/customers increasing the likelihood that some of those will present conflict issues. Pressure to respond and act fast will challenge the usual processes to identify and clear those conflict issues.

In addition, "positional" conflict issues are always harder to spot and may be more likely in the "pandemic" scenario when large numbers of clients may be impacted by similar issues. Force majeure is an apt example. Many clients will seek to characterize the pandemic as a force majeure event while others may oppose that characterization. If lawyers are taking public-facing positions on these issues, they may unhappy clients even if they don't find true ethical conflict issues.

True positional or issue conflicts under the professional rules are those in which the law firm represents two different clients in two unrelated matters but in which arguments may be advanced on opposite sides of the same issue in those separate cases. For example, a lawyer for one client may argue to invalidate an agency's new rule on the theory that the agency failed to give deference to an administrative law judge's factual findings. On the other hand, another lawyer from the same firm may argue to invalidate an agency's new rule on the theory that agency should not have given deference to an administrative law judge's factual findings.

The conflicts rules do not expressly address positional or issue conflicts as such. Rather, the issue generally falls under Rule 1.7(a)(2) definition of a conflict as the circumstance in which there is "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." On the one hand, the law firm owes a duty to advance the argument for deference on behalf of one client. In doing so, however, the law firm's effectiveness in advancing the contrary argument for another client could be materially limited. The same could be true in reverse. Imagine having your firm's brief cited against your client to contradict or undermine the advocacy. Had the client known of this risk and potential limitation, the client may have selected other counsel.

As ABA Formal Ethics Op. 93-377 (1993) described this ethical issue as follows:

> …[A]rguing a position on behalf of one client that is adverse to a position that the lawyer, or her firm, is arguing on behalf of another current client raises a number of concerns. For example, if both cases are being argued in the same court, will the impact of the lawyer's advocacy be diluted in the eyes of the judge(s)? Will the first decision rendered be persuasive (or even binding) precedent with respect to the other case, thus impairing the lawyer's effectiveness–and, if so, can the lawyer (or firm) avoid favoring one client over the other in the "race" to be first? And will one or the other of the clients become concerned that the law firm it has employed may have divided loyalties?
>
> . . . .
>
> The Committee is therefore of the opinion that if the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create a legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both

clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters.

Even in cases that are not being litigated in the same jurisdiction, this opinion notes that a lawyer should consider the relative importance of the positional conflict issue and the likelihood that it may affect the outcome of one or both of the cases, the extent to which a decision in one case might influence the decision in the other and the extent to which the lawyer might "pull his punches" in one case so as to minimize any adverse effects on the client in the other case. See generally, Peter Geraghty, "Ethics of positional conflicts," Eye on Ethics (American Bar Association, May 2017) at https://www.americanbar.org/publications/youraba/2017/may-2017/the-ethical-issues-surrounding-positional-conflicts.html; Rotunda and Dzienkowski, Positional Conflicts § 1.7–6(o), The Lawyers' Deskbook on Professional Responsibility (2016-17).

Even when issues do not rise to the level of a true ethical conflict of interest, lawyers will be challenged to manage client relationships and must be mindful of any "limitations" that should be communicated on what they will be willing to advocate.

Unauthorized Practice of Law (Rule 5.5)

Opinion 482 advises lawyers who are working remotely not to ignore unauthorized practice of law rules and instead look for authority that allows for a temporary practice akin to the Rule 5.5(c) (allowing "legal services on a temporary basis" in the applicable jurisdiction. Some jurisdictions have adopted as the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (see attached along with a chart showing which jurisdictions have adopted the rule as of September 8, 2017). The D.C. Court of Appeals Committee on Unauthorized Practice of Law specifically issued Opinion 24-20 on March 23, 2020, clarifying that "persons who are not District of Columbia bar members may practice law from personal residences or other locations within the boundaries of the District of Columbia under Rule 49(c)(13) ("Incidental and Temporary Practice")."

The COVID-19 pandemic held many registered to take bar exams in limbo as exams were cancelled, delayed, and otherwise restricted as to numbers. The ABA Board of Governors approved a resolution urging states to adopt emergency rules authorizing limited practice with lawyer supervision for recent law school graduates if the pandemic caused cancellations. https://www.abajournal.com/files/2020_law_grad_limited_practice_resolution.pdf The District of Columbia was one of five jurisdictions as of September 2020 to allow law school graduates to be admitted to practice without taking the bar exam as long as they practice under supervision of a D.C. attorney for three years. See September 24, 2020 Order (No M269-20) of the District of Columbia Court of Appeals (https://images.law.com/contrib/content/uploads/documents/292/74200/DC-ORD_269-20.pdf) and "District of Columbia Adopts Diploma Privilege in Bar Exam's 11th Hour," by Karen Sloan, September 24, 2020, Law.com at https://www.law.com/2020/09/24/district-of-columbia-adopts-diploma-privilege-in-bar-exams-11th-hour/ (joining Utah, Washington, Oregon, and Louisiana).