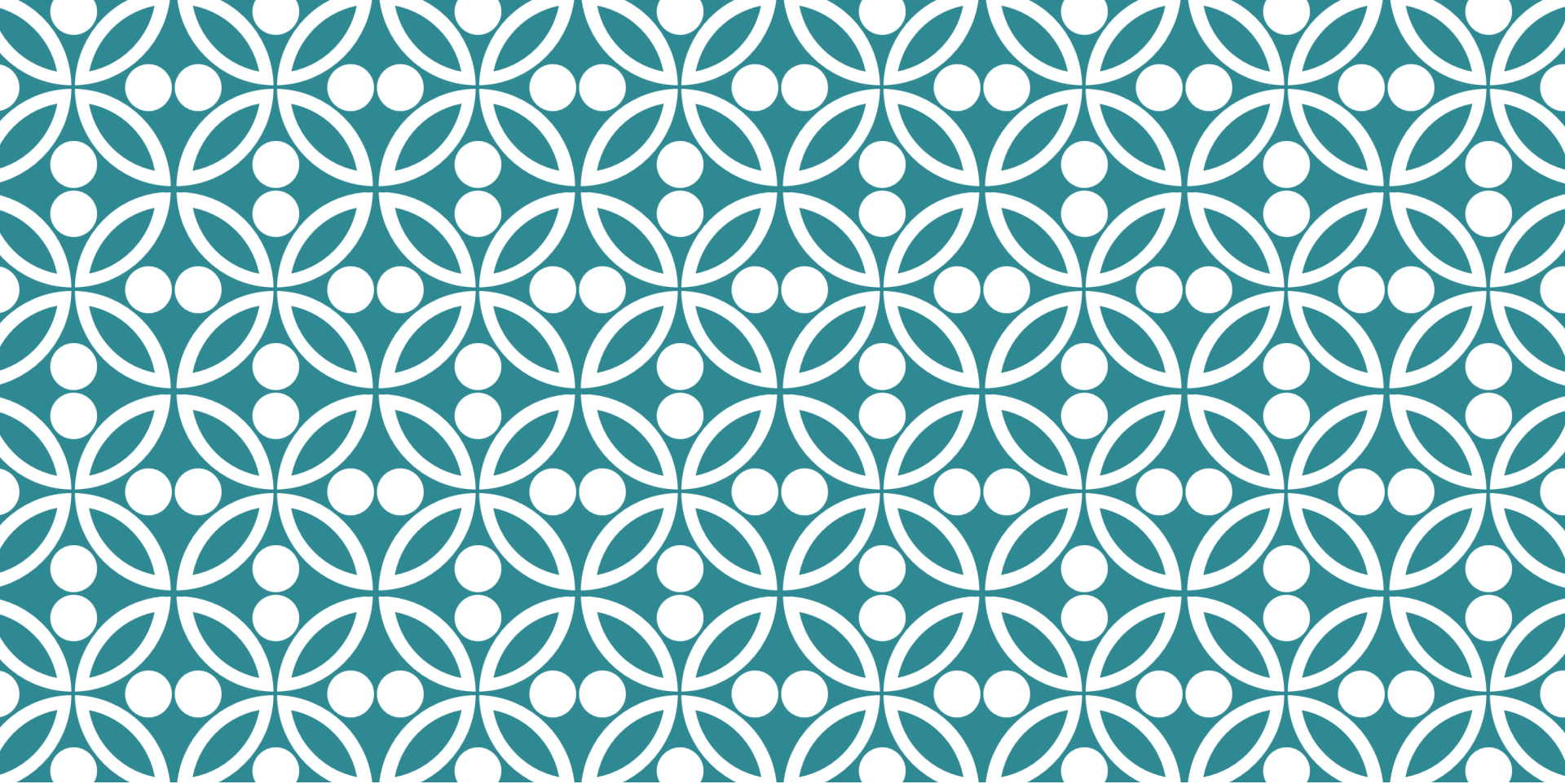




CONFLICTS OF INTEREST

MODEL RULE 1.7

RULE 1.7 - CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

... a lawyer **may** represent a client if:

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

(2) the representation is **not prohibited by law**;

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

and

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

RULE 1.7 - COMMENT

[3] A conflict of interest may exist **before representation is undertaken**, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b).

RULE 1.7 - COMMENT

[3] ...To determine whether a conflict of interest exists, a lawyer **should adopt reasonable procedures**, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved.

RULE 1.7 - COMMENT

[4] If a conflict arises **after** representation has been undertaken, the lawyer **ordinarily must withdraw** from the representation, **unless** the lawyer has obtained the informed consent of the client under the conditions of paragraph (b).

RULE 1.7 - COMMENT

Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client.

DISQUALIFICATION

Opposing party files a motion asking the court to remove the attorney who has the conflict of interest.

RULE 1.7 - STANDING TO SEEK DISQUALIFICATION

The general rule is that **only a former or current client** has standing to bring a motion to disqualify counsel on the basis of a conflict of interest.

In re Yarn Processing Patent Validity Litig.,
530 F.2d 83 (5th Cir. 1976) (often cited in
standing cases)

RULE 1.7 - STANDING TO SEEK DISQUALIFICATION

Bernocchi v. Forcucci, 614 S.E.2d 775 (Ga. 2005) (non-client movant must show “violation of the rules which is sufficiently severe to call in question the fair and efficient administration of justice”).

RULE 1.7 - DISQUALIFICATION NOT INEVITABLE

A violation of Rule 1.7(a) does not always result in disqualification, particularly if the firm has implemented a screen and the complaining party cannot show it was harmed.

See, e.g., Hempstead Video, Inc. v. Vill. of Valley Stream, 409 F.3d 127 (2d Cir. 2005); *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 380 F.3d 1331 (11th Cir. 2004).

RULE 1.7 – COMMENT 5

[5] Unforeseeable developments, such as **changes in corporate and other organizational affiliations** or the addition or **realignment of parties** in litigation, might create conflicts in the midst of a representation, **as 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.**

RULE 1.7 – COMMENT 5

Depending on the circumstances, the lawyer **may have the option to withdraw** from one of the representations in order to avoid the conflict.

The lawyer must **seek court approval** where necessary and take steps to minimize harm to the clients.

SIMULTANEOUSLY REPRESENTING CLIENTS INVOLVED IN DIFFERENT SUITS OVER RELATED MATTERS

Simultaneous representation of clients involved in different lawsuits can give rise to a conflict if the suits involve related matters.

Rembrandt Techs., LP v. Comcast Corp., No. 2:05CV443, 2007 WL 470631 (E.D. Tex. Feb. 8, 2007) (disqualifying law firm from simultaneously prosecuting patent infringement case for one client and representing potential infringer on other matters);

Andrew Corp. v. Beverly Mfg. Co., 415 F. Supp. 2d 919 (N.D. Ill. 2006) (without consent, law firm may not render noninfringement opinion for one client if patent belongs to another client)

RULE 1.7 - IDENTIFYING CONFLICTS OF INTEREST: DIRECTLY ADVERSE

[6] ...Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.

RULE 1.7 - IDENTIFYING CONFLICTS OF INTEREST: DIRECTLY ADVERSE

[6] ...The client as to whom the representation is directly adverse is likely to **feel betrayed**, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.

FEELINGS OF BETRAYAL



RULE 1.7 - IDENTIFYING CONFLICTS OF INTEREST: DIRECTLY ADVERSE

[6] ...Similarly, a directly adverse conflict may arise when a lawyer is required to **cross-examine a client who appears as a witness in a lawsuit** involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.

RULE 1.7 - IDENTIFYING CONFLICTS OF INTEREST: DIRECTLY ADVERSE

[6] ...On the other hand, simultaneous representation in **unrelated** matters of clients whose interests are only economically adverse, **such as representation of competing economic enterprises in unrelated litigation**, does *not* ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

RULE 1.7 - IDENTIFYING CONFLICTS OF INTEREST: DIRECTLY ADVERSE

[7] Directly adverse conflicts can also arise in **transactional matters**.

For example, if a lawyer is asked to represent the **seller of a business in negotiations** with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

RULE 1.7 - DIRECT ADVERSITY IN NONLITIGATION CONTEXT (CMT 7)

Comment [7] points out that direct adversity “**can also arise in transactional matters.**” See, e.g., *Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Wagner*, 599 N.W.2d 721 (Iowa 1999) (may not represent both buyer and seller in residential real estate transaction).

Even so, outside the litigation context the lawyer is **far more likely** to encounter **material-limitation** conflicts under Rule 1.7(a)(2), discussed below, than direct-adversity conflicts under Rule 1.7(a)(1).

IDENTIFYING CONFLICTS OF INTEREST: MATERIAL LIMITATION

[8] Even where there is **no direct adverseness**, a conflict of interest exists if there is a 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.

IDENTIFYING CONFLICTS OF INTEREST: MATERIAL LIMITATION

[8]...For example, a lawyer asked to represent **several individuals** seeking to **form a joint venture** is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others.

The conflict in effect forecloses alternatives that would otherwise be available to the client.

IDENTIFYING CONFLICTS OF INTEREST: MATERIAL LIMITATION

**[8]...The mere possibility
of subsequent harm **does
not** itself require
disclosure and consent.**

IDENTIFYING CONFLICTS OF INTEREST: MATERIAL LIMITATION

[8]...The critical questions are

- the likelihood that a difference in interests will eventuate and
- if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

IDENTIFYING CONFLICTS OF INTEREST: MATERIAL LIMITATION

In re Shay, 756 A.2d 465 (D.C. 2000) (conflict materially limited lawyer's representation of couple in estate planning when lawyer knew at time wills drafted that husband, unbeknownst to wife, was actually married to another person)

In re Toups, 773 So. 2d 709 (La. 2000) (assistant district attorney representing husband in divorce case should have withdrawn after client's wife filed criminal complaint against husband)

PERSONAL INTEREST CONFLICTS

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.

PERSONAL INTEREST CONFLICTS

For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

PERSONAL INTEREST CONFLICTS

Similarly, when a lawyer has discussions concerning **possible employment** with an opponent of the lawyer's client, or with **a law firm representing the opponent**, such discussions could materially limit the lawyer's representation of the client.

PERSONAL INTEREST CONFLICTS

In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.

PERSONAL INTEREST CONFLICTS

[11] When lawyers representing different clients in the same matter or in substantially related matters are **closely related by blood or marriage**, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment.

PERSONAL INTEREST CONFLICTS

...As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation.

Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent.

PERSONAL INTEREST CONFLICTS

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

PERSONAL INTEREST CONFLICTS

Even in the absence of the specific prohibition (Rule 1.8j), however, courts have had no trouble applying Rule 1.7 or its Model Code predecessor to lawyer-client sexual relationships.

See, e.g., Horaist v. Doctor's Hosp. of Opelousas, 255 F.3d 261 (5th Cir. 2001); *In re Ryland*, 985 So. 2d 71 (La. 2008); *Attorney Grievance Comm'n v. Hall*, 969 A.2d 953 (Md. Ct. Spec. App. 2009); *cf. In re Anonymous*, 699 S.E.2d 693 (S.C. 2010) (sex with client's wife is "per se violation of Rule 1.7")

PERSONAL INTEREST CONFLICTS

ABA Formal Ethics Op. 04-432 (2004)
(advancing bail on behalf of accused client
may pose conflict if amount of bail is
“material” to lawyer)

ABA Formal Ethics Op. 02-427 (2002)
(discussing propriety of lawyer taking
security interest in client’s property to
guarantee payment of fees).

INTEREST OF PERSON PAYING FOR A LAWYER'S SERVICE

[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.

PROHIBITED REPRESENTATIONS

[16] Paragraph (b)(2) describes conflicts that are **nonconsentable** because the representation is **prohibited by applicable law**.

For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a **capital case**, even with the consent of the clients, and under federal criminal statutes **certain representations by a former government lawyer are prohibited**, despite the informed consent of the former client.

PROHIBITED REPRESENTATIONS

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position **when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.**

Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. . .