

# CONFLICTS OF INTEREST

## MODEL RULE 1.7 Part 2

# INFORMED CONSENT



# **INFORMED CONSENT**

**[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.**

# INFORMED CONSENT

[18] ...The information required depends on the nature of the conflict and the nature of the risks involved.

When representation of multiple clients in a single matter is undertaken, 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.

# INFORMED CONSENT

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent.

***For example,*** when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer **cannot** properly ask the latter to consent.

# INFORMED CONSENT

*Centra, Inc. v. Estrin*, 538 F.3d 402 (6th Cir. 2008)(client's "vague and general" knowledge of firm's prior work "not an adequate foundation for informed consent");

*Anderson v. Nassau County Dep't of Corr.*, 376 F. Supp. 2d 294 (E.D.N.Y. 2005) (granting employer-defendants' motion to disqualify plaintiff's counsel, whose firm concurrently represented different employee in similar Title VII action in which plaintiff was fellow defendant; irrelevant that firm already disqualified in that action)

# **CONSENT CONFIRMED IN WRITING**

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing.

Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.

## **CONSENT CONFIRMED IN WRITING**

[20] ...If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.



## **CONSENT CONFIRMED IN WRITING**

[20] ...The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.

## **CONSENT CONFIRMED IN WRITING**

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# REVOKING CONSENT



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[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time.

# REVOKING CONSENT

[21] ...Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

# CONSENT TO FUTURE CONFLICT

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b).

The effectiveness of such waivers is generally **determined** by the extent to which the **client reasonably understands** the material **risks** that the waiver entails.

# CONSENT TO FUTURE CONFLICT

[22] ...The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.

**(MORE IS BETTER)**



# CONSENT TO FUTURE CONFLICT

[22] ...Thus, if the client agrees to consent to a particular type of conflict with which the **client is already familiar**, then the consent ordinarily will be effective with regard to that type of conflict.

# CONSENT TO FUTURE CONFLICT

[22] ...If the consent is **general** and **open-ended**, then the consent ordinarily will be **ineffective**, because it is not reasonably likely that the client will have understood the material risks involved.

# CONSENT TO FUTURE CONFLICT

[22] ...On the other hand, if the client is an **experienced user** of the legal services involved and is **reasonably informed** regarding the risk that a conflict may arise, such [**GENERAL**] consent is more likely to be effective, **particularly** if, e.g., the client is **independently represented** by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

# CONSENT TO FUTURE CONFLICT

[22] ...In any case, advance consent **cannot be effective** if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

(remember: prohibited by law; adverse parties in same proceeding; lawyer knows he cannot give competent & diligent representation to both)

# CONSENT TO FUTURE CONFLICT

The effectiveness of a client's prospective waiver of a conflict depends upon whether the conflict is **consentable** in the first place, and how clearly the waiver **identifies the anticipated conflict**.

# CONFLICTS IN LITIGATION



# CONFLICTS IN LITIGATION

A conflict may exist by reason of:

- substantial discrepancy in the parties' testimony;
- incompatibility in positions in relation to an opposing party; or
- the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.

# CONFLICTS IN LITIGATION

Such conflicts can arise in criminal cases as well as civil.

**CRIMINAL CODEFENDANTS**: The potential for conflict of interest in representing multiple defendants in a **criminal case** is **so grave** that ordinarily a lawyer should **decline** to represent more than one codefendant.



# CONFLICTS IN LITIGATION

Such conflicts can arise in criminal cases as well as civil.

**CIVIL CODEFENDANTS**: On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

# CONFLICTS IN LITIGATION

Much of the law involving conflicts of interests in criminal cases interprets the Sixth Amendment **right to effective assistance of counsel.**

Key decisions from the Supreme Court include ***Mickens v. Taylor*, 535 U.S. 162 (2002)** (when trial court fails to address potential conflict of interest about which it reasonably should have known, defendant must establish that conflict adversely affected his lawyer's performance)...

# CONFLICTS IN LITIGATION

*Wheat v. United States*, 486 U.S. 153 (1988)  
(district court has discretion to disqualify defense counsel even if defendant waives conflict);

*Glasser v. United States*, 315 U.S. 60 (1942)  
(federal courts may not force defendant to accept appointment of counsel who is representing another defendant in same proceeding).

# CONFLICTS IN LITIGATION

[24] Ordinarily a lawyer may take inconsistent legal positions in **different tribunals at different times** on behalf of different clients.

The mere fact that advocating a legal position on behalf of one client **might** create **precedent adverse** to the interests of a client represented by the lawyer in an **unrelated** matter **does not create a conflict of interest.**

# CONFLICTS IN LITIGATION

[24] ...A conflict of interest **exists**, however, if there is a significant risk that a lawyer's action on behalf of one client will **materially limit** the lawyer's effectiveness in representing another client in a different case.

**For example:** when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.

# CONFLICTS IN LITIGATION

**Positional** or **issue conflicts** arise when a lawyer's successful advocacy of a client's legal position in one case could be detrimental to the interests of a different client in another case.

*See Williams v. State*, 805 A.2d 880 (Del. 2002) (lawyer who argued in one pending capital appeal that trial court was required to give great weight to jury's recommendation against death penalty permitted under Rule 1.7(b) to withdraw from second capital appeal in which he would be arguing that trial court gave too much weight to jury's recommendation favoring death penalty)

# CONFLICTS IN LITIGATION

[25] **CLASS ACTIONS:** 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.

# CONFLICTS IN LITIGATION

[25] **CLASS ACTIONS:** 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.



# NONLITIGATION CONFLICTS



# NONLITIGATION CONFLICTS

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation.

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

# **NONLITIGATION CONFLICTS**

**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.

# NONLITIGATION CONFLICTS

[27] **For example**, conflict questions may arise in estate planning and estate administration.

A lawyer may be called upon to prepare wills for several **family** members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present.

# NONLITIGATION CONFLICTS

[27] ...In estate administration the identity of the client may be unclear under the law of a particular jurisdiction.

Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should **make clear the lawyer's relationship** to the parties involved.

# NONLITIGATION CONFLICTS

[28] Whether a conflict is consentable depends on the circumstances.

**For example**, a lawyer may **not** represent multiple parties to a negotiation whose interests are **fundamentally antagonistic** to each other, but common representation is **permissible** where the clients are generally **aligned** in interest even though there is some difference in interest among them.

# NONLITIGATION CONFLICTS

[28] ...Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; **for example**, in helping to **organize a business** in which two or more clients are entrepreneurs, working out the **financial reorganization** of an enterprise in which two or more clients have an interest or **arranging a property distribution** in settlement of an estate.

# NONLITIGATION CONFLICTS

[28] ...The lawyer seeks to resolve potentially adverse interests by developing the parties' **mutual interests**. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation.

Given these and other relevant factors, the **clients may prefer that the lawyer act for all of them.**



## SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that **if the common representation fails** because the potentially adverse interests cannot be reconciled, the result can be additional **cost, embarrassment and recrimination.**

## SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION

[29] ...Ordinarily, the lawyer will be forced to **withdraw** from representing all of the clients if the common representation fails.

In some situations, the **risk** of failure is so great that multiple representation is plainly **impossible**.

## SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION

[29] ...*For example*, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated.

## SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION

[29] ...Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is **improper** when it is **unlikely** that **impartiality** can be maintained.

# SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION

[29] ...Generally, if the relationship between the parties has **already assumed antagonism**, the possibility that the clients' interests can be adequately served by common representation is not very good.

Other relevant factors are whether the lawyer subsequently **will represent both parties on a continuing basis** and whether the situation involves **creating or terminating a relationship** between the parties.

## **SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION**

**[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege.**

## SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION

[30]...With regard to the attorney-client privilege, the **prevailing rule** is that, as between commonly represented clients, **the privilege does not attach.**

Hence, it must be assumed that if litigation eventuates between the clients, the **privilege will not protect any such communications,** and the clients should be so advised.

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Hence, it must be assumed that if litigation eventuates between the clients, the **privilege will not protect any such communications,** and the clients should be so advised.



## **SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION**

**[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.**

## **SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION**

[31] ...This is so because the lawyer has an **equal duty of loyalty to each client**, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit.

## **SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION**

[31] ...The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

## SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION

[31] ...In limited circumstances, it **may be appropriate** for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer **will keep** certain information confidential.

## SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION

[31] ...*For example*, the lawyer may reasonably conclude that failure to disclose one client's **trade secrets** to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

## SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION

[32] When seeking to establish or adjust a relationship between clients, the lawyer should **make clear** that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the **clients may be required to assume greater responsibility for decisions than when each client is separately represented.**

## **SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION**

[32] ... Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation.

## **SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION**

[33] Subject to the above limitations, **each client** in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client.

The client also has the right to discharge the lawyer as stated in Rule 1.16.



## ABA FORMAL OP. 16-474

Rule 1.5(e) allows lawyers who are not in the same firm to divide a fee under certain circumstances.

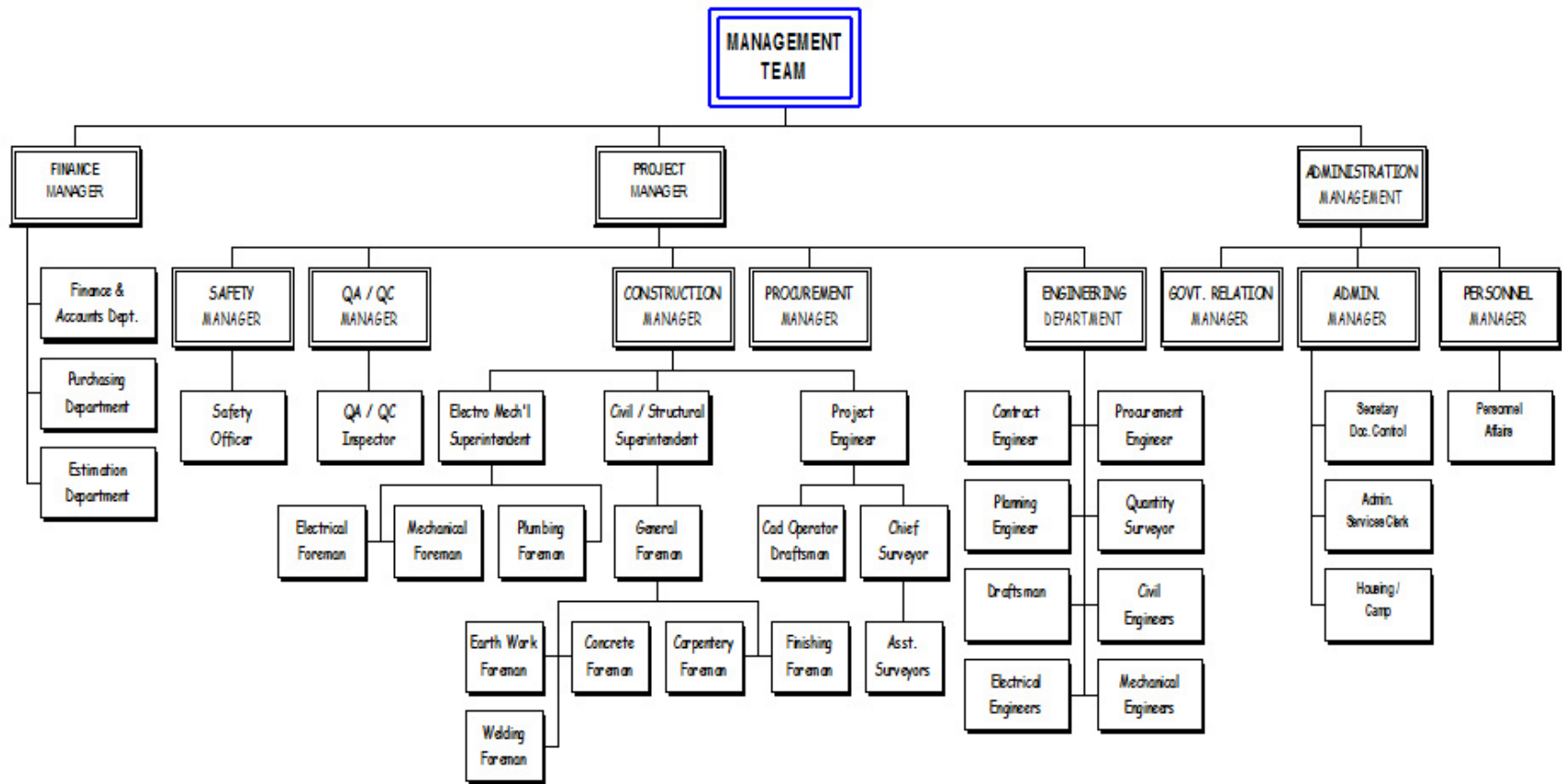
A lawyer who refers a matter to another lawyer outside of the first lawyer's firm and divides a fee from the matter with the lawyer to whom the matter has been referred, **has undertaken representation of the client.**

## ABA FORMAL OP. 16-474

Fee arrangements under Model Rule 1.5(e) are subject to Rule 1.7.

Unless a client gives informed consent confirmed in writing, a lawyer **may not accept a fee** when the lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter.

# ORGANIZATIONAL CLIENTS



# ORGANIZATIONAL CLIENTS

[34] A lawyer who represents a corporation or other organization does **not**, by virtue of that representation, necessarily represent **any constituent** or affiliated organization, such as a **parent or subsidiary**.

# ORGANIZATIONAL CLIENTS

[34]...Thus, the lawyer for an organization is **not barred** from accepting representation **adverse to an affiliate in an unrelated matter**, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

# ORGANIZATIONAL CLIENTS

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict.

The lawyer may be called on to advise the corporation in matters involving actions of the directors.

# ORGANIZATIONAL CLIENTS

[35] Consideration should be given to

- the frequency with which such situations may arise,
- the potential intensity of the conflict,
- the effect of the lawyer's resignation from the board and
- the possibility of the corporation's obtaining legal advice from another lawyer in such situations.

# ORGANIZATIONAL CLIENTS

[35]...If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise.



# ORGANIZATIONAL CLIENTS

[35]...The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might **not be protected by the attorney-client privilege** and that conflict of interest considerations **might require the lawyer's recusal** as a director or **might require the lawyer and the lawyer's firm to decline representation** of the corporation in a matter.