

ARTICLES

Teaching Conflicts of Interest

EMILY HUGHES*

ABSTRACT

Analyzing conflicts of interest is a critical part of the daily life of a lawyer, although the urgency and complexity of conflicts are difficult to teach in a meaningful way. After teaching conflicts to law students enrolled in Professional Responsibility courses and discussing conflicts with lawyers in ethics presentations, the author has developed a method for teaching conflicts of interest that is accessible and (hopefully) memorable. This Article presents that method. By using an evolving fact pattern as the analytical lens for studying conflicts, students learn how conflicts emerge, converge, and diverge as facts develop. Beginning with a personal injury accident that causes a married couple to seek legal advice, the narrative progresses through predictable—and unpredictable—turns. As the narrative evolves, so do the conflicts. By learning conflicts through a focused and evolving lens, law students better understand the complexity of conflicts of interest analysis.

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I. SETTING THE SCENE

Picture this: Ellie surprises her husband, Carl, with the gift of a hot air balloon ride for their second anniversary. The balloon operator, Ballo, is a doctor by day and a balloon enthusiast by night. Ballo has enjoyed taking friends into the sky for years, eventually turning the hobby into a part-time business called Cielo. The business offers short hot air balloon rides on weekends and some evenings. Ballo runs the business alone. On a gorgeous April evening, with picnic dinner in hand, up into the air they go. After a romantic champagne toast at 1,000 feet, Ballo starts the balloon's descent. All goes well until the last 40 feet, when a suddenly strong gust of air pushes the balloon dangerously close to a tall tree. Ballo maneuvers away from the tree, but not before the basket knocks against a large, outlying branch. The collision tips the basket to its side and, before the basket rights itself, Carl falls overboard with Ellie, who loses her footing trying to prevent Carl from falling. Luckily, some ground-level bushes brace their fall. Ballo calls 911, lands the balloon, and races to help Carl and Ellie until the ambulance arrives. Although Carl and Ellie escape without severe injuries, Carl's diagnosis includes prolonged back pain. Three months later, surrounded by mounting hospital bills and constant pain, Carl and Ellie consult a lawyer—hereinafter "Lawyer"—about suing Ballo and Cielo for personal injuries and emotional distress damages.

II. CAN LAWYER REPRESENT BOTH PROSPECTIVE CLIENTS?

Examining the law of conflicts through the eyes of prospective clients Carl and Ellie, as well as through Lawyer—the attorney they consult—students confront the first question that lawyers face when two clients call their office seeking concurrent legal representation: can (and should) a lawyer represent both prospective clients, neither client, or only one of them?

Because the situation presents a possible concurrent conflict of interest, the analysis starts with Model Rule 1.7.¹ Lawyer can represent both Carl and Ellie so long as their interests are not directly adverse to one another under Rule 1.7(a)(1),² meaning that the representation of one client would not be adverse to the ability of the lawyer to represent the other client's interests. It does not appear that a significant risk exists that Lawyer's representation of Ellie will be materially limited by Lawyer's representation of Carl or vice versa.³

At this stage in the analysis, students can also identify the need to conduct a firm-wide conflict check. This means that the lawyer who is considering accepting a new client must check with the clients of everyone else in the firm before agreeing to represent the prospective client to ensure that no other lawyer in the firm has a conflict with the prospective client.⁴ Firms may use computer software programs to help streamline this process.⁵ The lawyer enters the name of the prospective client in addition to all other known information, including the names of other parties and witnesses. The computer system checks to see if any of the names are already in the firm's database. If so, those names must be examined in more detail to see why they are in the firm database and if the nature of the firm's relationship with that person creates a conflict. If any other lawyer in the firm would be unable to represent the prospective client because of a conflict that imputes to the firm under Rule 1.10,⁶ the lawyer must decline to represent the prospective client. Even though conflict-checking systems have become more

1. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2018) [hereinafter MODEL RULES].

2. MODEL RULES R. 1.7(a)(1).

3. MODEL RULES R. 1.7(a)(2).

4. See MODEL RULES R. 1.7 cmt. 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."); see also N.Y. City Bar Ass'n, FORMAL OPINION 2003-03: CHECKING FOR CONFLICTS OF INTEREST (Mar. 2, 2003), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2003-03-checking-for-conflicts-of-interest> [<http://perma.cc/ESS3-DYBP>] (explaining the policies and systems a law firm must implement to comply with New York's mandatory conflict-checking rule).

5. See N.Y. City Bar Ass'n, *supra* note 4 (noting that the kind of conflict checking system the firm employs "will depend on factors such as: (a) the size and structure of the firm; (b) the nature of the firm's practice; (c) the number and location of the firm's offices; (d) the relationship among the firm's separate offices; and (e) other characteristics of the law firm and its operations").

6. MODEL RULES R. 1.10.

sophisticated, it is worth noting real-life examples where lawyers miss this seemingly fundamental step.⁷

Two key inquiries are present at this initial stage of the conflicts analysis: (1) ensuring that Lawyer knows enough about what happened—including the parties' interests and expectations—to be able to determine whether the clients' interests are adverse to one another, whether there is a significant risk that representation of one will be severely limited by representation to the other, or both; and (2) counseling both clients about the advantages and risks of joint representation so that both clients can make an informed decision about whether to proceed jointly or separately.⁸ When brainstorming these questions, I encourage students to consider what they would ask their prospective clients in order to determine whether they can represent both clients concurrently.⁹ We discuss what investigation Lawyer (or Lawyer's paralegal) might do before deciding whether to move forward with the joint representation.¹⁰

Students must also decide whether to interview the two clients together or individually the first time they meet the clients and assess what happened. We discuss the advantages and disadvantages of interviewing the clients together or separately while we unpack the "pitfalls" of joint representation.¹¹ One important pitfall is that the attorney-client privilege does not attach between jointly represented clients if they later sever their connection as joint

7. See, e.g., *Andrew Corp. v. Beverly Mfg. Co.*, 415 F. Supp. 2d 919, 921, 929 (N.D. Ill. 2006) (where two law firms merged without discovering a conflict between two clients, and as a result of the oversight, the district court prohibited client Beverly Manufacturing from using three opinion letters that its lawyers had drafted that were adverse to client Andrew Corporation).

8. See MODEL RULES R. 1.7 cmt. 2, 18, and 19.

9. Such inquiries may include questions like the following: "If one of you wants to settle and the other wants to go to trial, how are we going to resolve the disagreement?" or "If one of you wants to settle for a smaller amount of money than the other, what will we do?" See, e.g., MODEL RULES R. 1.7 cmt. 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.").

10. Preliminary investigation might include any number of a myriad of available records, such as police reports, 911 recordings, hospital records, ambulance records, and credit histories, criminal background checks, or both. See, e.g., *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 692 (Minn. 1980) (where, in a case involving malpractice in the formation of the attorney-client relationship, even the legal expert called as part of the defense case-in-chief testified that "when a lawyer is asked his legal opinion on the merits of a medical malpractice claim, community standards required that the attorney check hospital records and consult with an expert before rendering his opinion").

11. See, e.g., MODEL RULES R. 1.7 cmt. 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. . . . 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.").

clients and become adversaries rather than allies.¹² We discuss what this might mean for clients when their presumably confidential communications are later used against them.

Another potential pitfall is that each client's interests may diverge as the case progresses. For example, consider what might happen if one client's financial circumstances change. If a client loses a job and wants to accept the opposing party's lowball settlement offer—because the client can no longer afford to pay the attorney's fees, needs some quick cash, or both—one client's pressure to settle may directly conflict with the other client's interest in declining the offer and taking the case to trial. Such divergent interests could mean both clients need to find a new lawyer after months—or years—of representation. Finding new lawyers means paying a new lawyer to get up to speed on the case as well as the likelihood of extending the length of the case while the new attorneys seek continuances. Even if neither client's financial circumstances change, both clients may have different risk tolerances for going to trial versus settling a case, which could in turn lead to the same result: finding new lawyers, paying more money, and probably taking more time before any resolution.

Each of these concerns is well worth a single class session to brainstorm and examine in detail, but the mental gymnastics of conflicts becomes more complex as the situation unfolds.

III. PITFALLS OF JOINT REPRESENTATION

Four weeks have elapsed since Lawyer agreed to represent Ellie and Carl against Ballo and Cielo. Lawyer has obtained Carl's hospital records and learns that Carl had a blood alcohol level of 0.17 when he fell from the balloon. Neither Ellie nor Carl has ever mentioned excessive amounts of alcohol. Moreover, as part of Lawyer's investigation into understanding and advocating for Carl's pain management, Lawyer receives additional hospital records documenting different doctor visits in the weeks after the accident. In reviewing these records, Lawyer suspects that Carl may be developing an addiction to his pain medication.

The first question is how—and with whom—Lawyer should discuss the information learned through this initial investigation, including Carl's blood alcohol level at the time of the balloon accident, as well as Lawyer's suspicion that Carl may be developing an addiction to his pain medication. Does Lawyer tell both Ellie and Carl together? Does Lawyer call Carl into the office without Ellie? What if Lawyer meets with Carl alone, learns that Carl had gotten drunk before the balloon ride, and that Ellie did not know that Carl was drunk? Or what if Carl

12. See MODEL RULES R. 1.7 cmt. 30 (“A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney client privilege. 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.”).

admits to Lawyer, in confidence, that he has become addicted to his pain medication? Must Lawyer withdraw from representing both clients, and if so, must Lawyer tell both clients why Lawyer is withdrawing? Must Lawyer disclose to both clients why Lawyer is withdrawing, even if one of the clients asks Lawyer not to disclose the confidence?

Such questions highlight the importance of discussing with clients from the outset the pitfalls of joint representation, as well as the dilemma of what happens if Lawyer does not discuss a contingency plan before significant concurrent conflict issues arise.¹³ Even if Lawyer has a plan in place for how representation will proceed if a conflict arises between the two clients, depending on what kind of conflict arises, the plan may fall apart.

For example, suppose that Carl and Ellie agreed in their engagement contract with Lawyer that Lawyer would continue to represent Ellie if a conflict of interest arose during the concurrent representation of Carl and Ellie. That contingency may have seemed unnecessary at the time both clients consented to it, but this perception can change when a specific conflict arises. What if Lawyer is proceeding adversely against Carl on Ellie's behalf—and disclosing Carl's confidences to Ellie—and Carl informs Lawyer that Carl is not willing to waive Lawyer's conflict. Even though Comment [4] to Rule 1.7 explains that 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,"¹⁴ clients such as Carl may decline to give informed consent when the actual situation arises, or they may assert that any prior such agreement was given without a complete understanding of what they were waiving.

Alternatively, even if Carl agrees to find a new lawyer and consents to Lawyer continuing to represent Ellie, a major conflict still exists if Carl asks Lawyer to keep confidential the damaging information that Lawyer has learned about Carl during the representation. An example of how such a situation could arise is the following development.

A. DIVERGENT CURRENT CLIENT INTERESTS

Suppose that Carl tells Lawyer, in an individual meeting with Lawyer, that Carl realizes he has developed an addiction to his pain medication. Carl promises to seek treatment but does not want Ellie to know about his drug addiction and does not give Lawyer permission to tell Ellie about his addiction to pain medication.

13. Attorneys can work with the clients to devise a contingency plan outlining the procedure that should be followed if a conflict or other task or occurrence transpires. *See, e.g.*, MODEL RULES R. 1.7 cmt. 32 (the lawyer should, at the outset of 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).

14. MODEL RULES R. 1.7 cmt. 4.

Assuming that Carl instructs Lawyer not to tell Ellie about his drug addiction, whether Lawyer may continue to represent Ellie or Carl (but not both) 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.”¹⁵ Because Lawyer must “continue to protect the confidences of the client from whose representation the lawyer has withdrawn,”¹⁶ it is difficult to imagine how Lawyer could continue to represent Ellie—while withdrawing from representing Carl—if Carl insists that Lawyer not disclose confidential information about his addiction. Lawyer could not competently—in the Rule 1.1 sense of “competence”¹⁷—continue to represent Ellie if Carl insists that Lawyer keep information about his addiction a secret. If Carl insists that Lawyer not share information, Lawyer would have a direct Rule 1.7(a) conflict that is non-consentable: neither Ellie nor Carl can consent to continued joint representation if they do not have complete information with which to make that decision, and Lawyer is conflicted in advising Ellie whether to waive her ability to know the confidential information that Carl has disclosed to Lawyer.¹⁸

Assume that Lawyer explains this dilemma to Carl, pointing out that if Carl insists that Lawyer withhold confidential information from Ellie, Lawyer must withdraw from representing both Ellie and Carl.¹⁹ Lawyer also points out that even if they were each to obtain new, separate attorneys, as the discovery progresses and opposing sides request each other’s medical records, they will most likely need to disclose the information eventually.²⁰ As a result, Carl agrees that Lawyer can share the information about Carl’s alcohol use and pain medication addiction during their next meeting.

1. WHEN THINGS FALL APART

In their next meeting with Lawyer, Carl begins by telling Ellie that he was drunk before he boarded the balloon and that he has developed an addiction to his pain medication. In response, Ellie drops a bombshell of her own: Ellie is not

15. MODEL RULES R. 1.7 cmt. 4.

16. MODEL RULES R. 1.7 cmt. 5.

17. MODEL RULES R. 1.1 (“Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

18. See MODEL RULES R. 1.7 cmt. 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. 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.”).

19. *Id.*

20. See MODEL RULES R. 1.7 cmt. 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.”).

surprised to hear about Carl's drug addiction because she believes that Carl is also an alcoholic, and she suspected that Carl was drunk when he boarded the hot air balloon. Ellie thinks Carl is partially at fault for their falling out of the hot air balloon. Ellie believes that Carl's drunkenness prevented him from being able to hang onto the basket and retain his footing when it tipped to the side. Ellie explains that she reached out to try to keep him in the basket, but he dragged her out of the basket with him. Ellie says she plans to divorce Carl and intends to sue him, along with Ballo and Cielo, for the pain he has caused her.

With this revelation, Lawyer must withdraw from representing both Ellie and Carl. Even if Ellie and Carl are willing to consent to the conflict that has emerged in their joint representation under 1.7(b)(4), Lawyer would be hard-pressed to “reasonably believe that [Lawyer] will be able to provide competent and diligent representation to each affected client.”²¹ Each client has a legal interest in separate representation, and Ellie has a strong interest in ensuring her own damages are not reduced by any contributory negligence or other share in the fault that is due to Carl's negligence. Moreover, even if Ellie ultimately decides not to sue Carl, she needs her own attorney to counsel her about whether to proceed with that separate claim.

Both clients' interests in settling the case or proceeding to trial will strongly diverge from this point forward. Given Ellie's belief that she shared no fault in the accident, she has more of an interest in proceeding to trial or holding out for a larger settlement, while Carl's main interest may be to minimize his exposure and avoid trial so that he does not have to testify about his drug dependency.

At this point in the representation, Lawyer should tell Ellie and Carl to seek independent legal counsel. At a minimum, Ellie and Carl should seek independent legal counsel to get individual advice about whether to continue joint representation or whether doing so would allow their lawyer to engage in malpractice.²² If, after independently consulting with separate lawyers, both Ellie and Carl choose to continue with joint representation (which would likely be possible only if Ellie changes her mind about suing and divorcing Carl), Lawyer must obtain informed consent from both Ellie and Carl, acknowledging and waiving the conflicts that have emerged under 1.7(b)(4).²³ In this situation, “informed consent” means “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”²⁴

21. MODEL RULES R. 1.7(b)(1).

22. See MODEL RULES R. 1.8(g)(1) (“A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.”).

23. See MODEL RULES R. 1.7(b)(4) (explaining that despite a conflict, a lawyer may represent a client if: “(4) each affected client gives informed consent, confirmed in writing”); see also MODEL RULES R. 1.7 cmt. 18.

24. MODEL RULES R. 1.0(e).

Even if both parties are willing to waive their conflicts, some conflicts are not consentable. For example, assume Ellie decides to sue Carl in addition to suing Ballo and Cielo. Even if Ellie and Carl want Lawyer to represent them both and are willing to waive any conflict between the two of them, it is not possible for Ellie and Carl to waive the conflict.²⁵ This is because Ellie's claim against Carl would "involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation."²⁶ Moreover, even if Ellie chooses not to sue Carl, it is difficult to imagine how Lawyer could "reasonably believe that [Lawyer] will be able to provide competent and diligent representation to each affected client," especially in light of the strong possibility of an impending divorce.²⁷

Given the inevitability that Lawyer must withdraw from the joint representation, can Lawyer continue to represent Carl or Ellie individually, while the other party hires a new lawyer, or must Lawyer withdraw from both clients? Even if Carl were to agree to allow Lawyer to represent Ellie against him, can Lawyer proceed in such representation, directly against Lawyer's former client?

2. FORMER CLIENT WAIVER

Assume that Carl takes the high road, admitting that the accident was partially his fault so he should be the person who gets a new lawyer. Carl agrees that it is not fair for Ellie to find a new lawyer, let alone pay a new lawyer to get up to speed on the case, especially when Ellie has developed a good working relationship with their current lawyer. Also assume that after consulting with outside counsel, Carl is willing to sign a waiver to that effect, giving Lawyer and Ellie his full consent to continue forward without him—even suing him, if need be.

Can Lawyer represent Ellie in such a situation?

The most significant factor in this analysis is that Carl is a former client agreeing to waive the conflict. No such waiver—regardless of how informed, voluntary, and complete that waiver may be²⁸—is possible if Carl is still Lawyer's current client. Because Lawyer's representation of Ellie and Carl would "involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation," Carl cannot consent to such a conflict when he is a current client.²⁹

25. See MODEL RULES R. 1.7(b)(3).

26. *Id.*

27. MODEL RULES R. 1.7(b)(1), R. 1.7 cmt. 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.")

28. For the waiver to be valid, the attorney must still have advised the clients to seek independent counsel's advice on the matter. See, e.g., *Ryan v. Eighth Judicial Dist. Court*, 168 P.3d 703 (Nev. 2007) (holding that attorneys are required to advise criminal defendants of their right to consult with independent counsel to advise them on the potential conflict of interest and the consequences of such).

29. MODEL RULES R. 1.7(b) (requiring consent as one of *four* factors).

The noteworthy difference is that a conflict that is not waivable when clients are concurrent becomes waivable when a current client becomes a former client.³⁰ Although Model Rule 1.9 stipulates that a “lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client,”³¹ Rule 1.9(a) adds an escape clause to the otherwise unsurmountable conflict: “unless the former client gives informed consent, confirmed in writing.”³²

Under Rule 1.9(a), conflicts with former clients are consentable. Read in conjunction with Rule 1.7(a), even if a former client waives a conflict, Lawyer must still assess whether “there is a significant risk” that Lawyer’s representation of the current client “will be materially limited by . . . Lawyer’s responsibilities to . . . [the] former client.”³³ This means that once Carl becomes Lawyer’s former client, Carl can waive the conflict with Ellie and Lawyer may continue to represent Ellie, so long as Lawyer “reasonably believes” it is possible to “provide competent and diligent representation” to Ellie in the wake of Lawyer’s continuing duty of loyalty to former client Carl.³⁴ The “may” hinges on the difficulty of anticipating possible contingencies and thoroughly advising clients about those contingencies before they arise.³⁵ It also hinges on whether Lawyer sought an advance waiver and if so, whether the advance waiver is enforceable.³⁶ Plus, even if those

30. See MODEL RULES R. 1.9(a) (“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”).

31. MODEL RULES R. 1.9(a).

32. MODEL RULES R. 1.9(a).

33. MODEL RULES R. 1.7(a)(2).

34. MODEL RULES R. 1.7(b)(1); see also MODEL RULES R. 1.7 cmt. 1 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”); MODEL RULES R. 1.7 cmt. 14 (“[S]ome conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”).

35. See, e.g., MODEL RULES R. 1.7 cmt. 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 interest of that client. . . . 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.”).

36. See MODEL RULES R. 1.7 cmt. 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 [1.7](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. 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 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.”).

two hurdles were surmountable, the duty of loyalty that Lawyer owes to Carl may be insurmountable,³⁷ in which case Lawyer could not represent Carl or Ellie.

3. FORMER CLIENT REFUSES TO WAIVE CONFLICT

While Carl could indeed take the high road and waive the conflict, Carl may conclude it is against his interests to do so. Without Carl's waiver, Lawyer would not be able to continue to represent Ellie against Carl and must withdraw from both clients. But what if Carl agreed to this contingency plan at the start of the case?³⁸ What if Lawyer is Ellie's long-time family lawyer, who has been representing Ellie's parents for the past twenty years on a number of personal and professional matters? What if Lawyer specifically anticipated that a conflict could arise between Carl and Ellie, and Carl agreed to Lawyer's representation from the outset—knowing that if a conflict arose, Lawyer would continue to represent Ellie?

Although "a lawyer may properly request a client to waive conflicts that might arise in the future,"³⁹ it is difficult to predict every material risk and potential problem that may arise. Compounding that issue is the difficulty of explaining those risks to a client comprehensively enough to make the advance waiver enforceable. The "effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails."⁴⁰ This means that even if Ellie and Carl agreed at the beginning of their joint representation that Carl would need to find a new lawyer if a conflict arose, that agreement may not necessarily be valid, leaving both Carl and Ellie to search for new lawyers.

The agreement may not be binding because it did not sufficiently explain the material risks involved, but there is also another reason the agreement may not be binding. That is because no matter what the parties agreed to at the outset of their joint representation, Rule 1.7 prohibits Lawyer from continuing to represent Ellie if "there is a significant risk that the representation of [Ellie] will be materially limited by the lawyer's responsibilities to [former client Carl]."⁴¹ In addition,

37. See MODEL RULES R. 1.7 cmt. 9 ("In addition to conflicts with other current clients, a lawyer's duty of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9. . . .").

38. See, e.g., MODEL RULES R. 1.7 cmt. 31 (discussing the importance of forewarning clients about the lawyer's duty to share confidential information if a conflict arises).

39. MODEL RULES R. 1.7 cmt. 22.

40. MODEL RULES R. 1.7 cmt. 22.

41. MODEL RULES R. 1.7(a)(2). Rule 1.7(a) mandates that Lawyer "shall not represent" Ellie while there is a concurrent conflict of interest between current client Ellie and former client Carl, including in the circumstance described in the accompanying text. At the same time, Rule 1.7 has a partial release valve in Rule 1.7(b), which states that "[n]otwithstanding the existence of a concurrent conflict in paragraph (a), a lawyer may still represent a client if . . ." four required circumstances exist. MODEL RULES R. 1.7(b). One of those circumstances is the former client's informed consent, but since Carl has not given his informed consent—confirmed in writing—the 1.7 concurrent conflict is insurmountable. Even if the informed consent requirement were fulfilled, the 1.7(b) release valve also requires that Lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to [Ellie]." MODEL RULES R, 1.7(b)(1). How Lawyer could provide

even if Lawyer has no confidential information from Carl, and even if Lawyer “reasonably believes” it is possible to “provide competent and diligent representation” to Ellie despite Carl’s status as a former client,⁴² the duty of loyalty that Lawyer owes to Carl may prohibit Lawyer from continuing to represent Ellie over Carl’s objection.

In short, without Carl’s informed consent, confirmed in writing and obtained after consultation with an independent lawyer, it is extremely difficult—if not impossible—for Lawyer to continue representing Ellie over Carl’s objection. Such an outcome is a significant pitfall of joint representation and bears detailed forewarning at the outset. When things fall apart, they really fall apart: Lawyer has lost the business of two clients who are forced to find, and start over with, two new lawyers.

But even with Carl’s informed consent, does the duty of loyalty that Lawyer owes to Carl prevent Lawyer from representing Ellie against Carl?

B. CLIENTS SEEK NEW COUNSEL

Ellie and Carl fire Lawyer and each seek individual representation with a new lawyer. Ellie hires Lawyer X at Firm XYZ, while Carl is still deciding whom to hire. In the meantime, Ballo (the balloon operator) learns that Ellie and Carl have fired Lawyer. Ballo’s best friend works at the law firm where Lawyer works, so Ballo asks her friend, BFF, if BFF can represent her now that Ellie and Carl are gone. Can BFF, who works at Lawyer’s firm, defend Ballo in this matter?

Because Ellie and Carl are Lawyer’s former clients, examining the duties to former clients under Rule 1.9 is critical to understanding what can—or cannot—happen next. When Ellie and Carl become former clients, can another attorney at Lawyer’s firm represent Ballo? Even though Lawyer no longer represents Ellie and Carl, if Lawyer could not represent Ballo, that same conflict will impute to every attorney at Lawyer’s firm.⁴³ This much of the analysis is straightforward: Lawyer cannot represent Ballo against former clients Ellie and Carl, so through imputation, no other attorney at Lawyer’s firm can represent Ballo against the firm’s former clients Ellie and Carl.

“competent and diligent representation to [Ellie]” when Lawyer is “materially limited by [Lawyer’s] responsibilities to [Carl]” is difficult to imagine, but so long as Ellie and Carl both provide informed consent, confirmed in writing, and provided that the representation isn’t prohibited by law, 1.7(b) would allow the representation to continue.

42. MODEL RULES R. 1.7(b)(1).

43. See MODEL RULES R. 1.10(a) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9. . . .”).

At the same time, while Ellie and Carl could theoretically waive the conflict,⁴⁴ it is difficult to envision a situation in which former clients in a similar situation would actually agree to a waiver.⁴⁵ Moreover, even if Ellie and Carl somehow did decide to waive the conflict under Rule 1.9, Lawyer is prohibited from using or revealing information relating to the prior representation to disadvantage Ellie and Carl, except if any such confidential information is no longer confidential because it has become generally known.⁴⁶ In addition to all of these prohibitions, Lawyer must continue to safeguard Ellie and Carl's confidences under Rule 1.6.⁴⁷ Lawyer also has a continuing duty of loyalty to former clients Ellie and Carl under Rules 1.7⁴⁸ and 1.9,⁴⁹ and all of these conflicts would impute to every lawyer at Lawyer's firm, including BFF.⁵⁰

The more interesting question is what happens if Lawyer resigns from the firm. In this case, even though the matter is the exact same lawsuit that Lawyer filed *against* the person now seeking representation,⁵¹ the remaining lawyers at Lawyer's former firm could represent the balloon operator, so long as none of the remaining lawyers at the firm has confidential information that is material to the matter.⁵² Whether a law firm would choose to do so is a different question, but in

44. See MODEL RULES R. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.")

45. Practically speaking, if one attorney obtains confidential information about a client, that client would not want that lawyer to represent opposing party in the same or a substantially related matter. The attorney could have information including trial strategy, or potentially damning information that could lower the amount of damages awarded.

46. MODEL RULES R. 1.9(c) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.")

47. See MODEL RULES R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."); MODEL RULES R. 1.6(c) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."); MODEL RULES R. 1.6 cmt. 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship.")

48. MODEL RULES R. 1.7.

49. MODEL RULES R. 1.9 cmt. 4 (noting, in the context of lawyers moving between firms, that "the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised")

50. See MODEL RULES R. 1.10(a).

51. See MODEL RULES R. 1.10(b) ("When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm . . .").

52. See MODEL RULES R. 1.10(b)(2) (specifying that no lawyer remaining in the firm may have "information protected by Rules 1.6 and 1.9(c) that is material to the matter"). Rule 1.6 is the main rule regarding Confidentiality of Information. See MODEL RULES R. 1.6. Rule 1.9(c) specifies a lawyer's continuing duty to

order to decide whether a firm would like to undertake such representation, the firm must first decide whether representation is allowed. In this case, representation is allowed assuming that Lawyer has left the firm and none of the remaining lawyers at the firm learned confidential information material to the matter.⁵³

Because real-world lawyers are relatively mobile,⁵⁴ assume that Lawyer does leave the firm in order to examine the evolving situation in the context of lawyer mobility.

IV. LAWYER MOBILITY AND FORMER CLIENTS

Lawyer resigns from the firm. Because none of the remaining attorneys at the firm learned confidential information that is material to the matter, balloon operator (Ballo) hires BFF—an attorney at Lawyer’s former firm—to defend Ballo in the lawsuit against Lawyer’s former clients. In the meantime, Ellie is getting to know her new attorney (“Lawyer X”) at Firm XYZ. Months go by and the discovery process marches forward. Back at Ellie’s first firm, where BFF is defending the balloon operator, a young associate who has been working closely with BFF to represent the balloon operator, receives an offer to join Firm XYZ. Can Ellie’s new firm hire the young associate who has been representing the balloon operator?

A. YOUNG ASSOCIATE HAS CONFIDENTIAL INFORMATION MATERIAL TO THE MATTER

Best practices warrant waiting to hire the young associate until the case has resolved: hiring the young associate who was helping to represent the balloon operator in the defense against Ellie—especially in the middle of litigation—may undermine Ellie’s perception of her new firm’s duty of loyalty to her. That said, civil cases can take years to resolve,⁵⁵ and the firm may lose the opportunity to hire the young associate in the interim.

Although it is preferable to wait, is it even possible for Ellie’s new firm to hire the young associate without creating a conflict with the pending litigation? The answer is yes, so long as the newly hired young associate is screened.⁵⁶ Rule 1.10 sets forth the complete rule governing the situation, which requires that (1) the

former clients not to “use information relating to the representation to the disadvantage of a former client” and not to “reveal information relating to the representation except as [the] Rules would permit. . . .” MODEL RULES R. 1.9(c)(1), (2). Further, paralegals, secretaries, and other legal assistants are also typically imputed, so the court will consider whether they know any confidential information.

53. See MODEL RULES R. 1.10(b)(2).

54. See, e.g., Robert W. Hillman, *Law Firms and Their Partners Revisited: Reflections on Three Decades of Lawyer Mobility*, 96 TEX. L. REV. 787, 787 (2018) (observing that “lawyer mobility has become a pervasive and unquestioned feature of the contemporary legal profession.”).

55. See, e.g., Patrick E. Higginbotham, *Mahon Lecture*, 12 TEX. WESLEYAN L. REV. 501, 503 (2006) (noting, in the context of declining rates of completed trials, that the average time to trial in a civil case is more than twenty-one months).

56. See MODEL RULES R. 1.10(a)(2)(i)–(iii).

newly hired lawyer is timely screened from any participation in the matter,⁵⁷ (2) the firm provides written notice to the balloon operator⁵⁸ to enable the balloon operator to make sure that the firm has complied with all aspects of the screening rule,⁵⁹ and (3) the screened lawyer and a partner at the screened lawyer's new firm provide certifications of continued compliance to the balloon operator at his request at regular intervals throughout the litigation. Then the representation is allowed.⁶⁰

All of this assumes that the newly hired lawyer had worked on the balloon operator's case and had acquired confidential information material to the pending lawsuit.⁶¹ What if the newly hired lawyer had *not* worked on the balloon operator's case and had *not* acquired confidential information about the balloon operator that was material to the matter?

B. YOUNG ASSOCIATE DOES NOT HAVE CONFIDENTIAL INFORMATION MATERIAL TO THE MATTER

If the young associate does not have confidential information that is material to the matter of the lawsuit between Ellie, Carl, and Ballo, the young associate does not need to be screened. Even though the conflict was imputed to the young associate while the young associate was at the firm that was representing the balloon operator,⁶² once the young associate leaves that firm, the cloak of imputation vis-à-vis the balloon operator does not follow the young associate to the new firm (provided that young associate did not work on the case and had not acquired confidential information material to the matter).⁶³

Not only does the newly hired lawyer not need to be screened, but the newly hired young associate can work on Ellie's case against the balloon operator. Although the "firm with which the lawyer formerly was associated had previously represented [the balloon operator]," and even though the balloon operator's interests are "materially adverse to" Ellie, if the newly hired young associate did not acquire confidential information that is material to the matter, the newly hired young associate does not have a duty to the former client at the lawyer's former firm.⁶⁴ In short, in these circumstances, once the young associate leaves the firm (without having acquired confidential information that is material to the matter), the balloon operator is not considered a former client of the young associate. Because the balloon operator is not a former client, the newly hired young

57. MODEL RULES R. 1.10(a)(2)(i).

58. Note that Carl is also a former client of the firm, but Ballo's attorney at the firm did not work on Carl's case or Ellie's case, or have confidential information about them.

59. MODEL RULES R. 1.10(a)(2)(ii).

60. See MODEL RULES R. 1.10(a)(2)(iii).

61. See MODEL RULES R. 1.9(b)(2).

62. See MODEL RULES R. 1.10(a).

63. See MODEL RULES R. 1.9(a)-(b).

64. See MODEL RULES R. 1.9(b)(2) (specifying that the confidential information is protected by "Rules 1.6 and 1.9(c)" and is "material to the matter").

associate is free to join Ellie's team and work on her case against the balloon operator as well as her case against Carl.

Speaking of Carl, he has found his way to a new firm and new conflict issues.

V. PERSONAL INTEREST CONFLICTS

Carl has found a firm he would like to represent him: Firm QRS. Carl makes an appointment with Lawyer Q, and the firm diligently performs a thorough conflict check before Lawyer Q meets with Carl. During that conflict check, Lawyer Q learns that one of the named partners at the firm, Lawyer R, sits on the Board of Directors at the private hospital where Ballo (the moonlighting-balloon-enthusiast doctor) works. Does this relationship present an unsurmountable conflict of interest preventing Firm QRS from representing Carl?

The first question that Lawyer Q must address is whether Lawyer R's conflict is a personal interest conflict.⁶⁵ If it is a personal interest conflict, Q must next decide whether that conflict presents a "significant risk of materially limiting representation by the remaining lawyers in the firm."⁶⁶ The imputation rules do not provide much guidance as to what constitutes a personal interest conflict,⁶⁷ but they do specify that if the prohibition is based on a personal interest conflict, "such persons [...] ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect."⁶⁸ The comments to Rule 1.10 give the example of a personal interest conflict arising from "strong political beliefs,"⁶⁹ explaining if those "personal beliefs" of the lawyer will not "materially limit the representation by others in the firm, the firm should not be disqualified."⁷⁰

A more complete explanation of what constitutes a personal interest conflict is found in Comments [10], [11], and [12] to Rule 1.7.⁷¹ In addition to sexual relationships with clients (which are prohibited altogether "unless the sexual relationship predates the formation of the lawyer-client relationship"⁷²), Comment [10] discusses "business related" interests of the lawyer, such as undisclosed financial

65. See MODEL RULES R. 1.10(a)(1).

66. See MODEL RULES R. 1.10(a)(1).

67. See *Attorney Grievance Comm'n v. Culver*, 849 A.2d 423 (Md. 2004) (finding personal interest conflicts where the lawyer's sexual relationship with the client and the lawyer's advice to the client to take out loans to pay his fees constituted a personal interest conflict); see also *In re Hibner*, 897 N.Y.S.2d 489 (N.Y. App. Div. 2010) (finding a personal interest conflict because the attorney had his clients convey title to their home to him in order to prevent a foreclosure and thereafter sought to evict them while continuing to represent them in a Family Court matter).

68. MODEL RULES R. 1.10 cmt. 4.

69. MODEL RULES R. 1.10 cmt. 3.

70. MODEL RULES R. 1.10 cmt. 3.

71. MODEL RULES R. 1.7 cmt. 10, 11, and 12.

72. MODEL RULES R. 1.7 cmt. 12.

interests.⁷³ Another personal interest conflict arises when lawyers representing different parties are “closely related by blood or marriage,” in which case “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.”⁷⁴

While helpful, none of these examples discusses the situation at hand: a named partner of the firm sitting on the board of directors of the hospital where the opposing party works. If Lawyer Q determines that Lawyer R has a personal conflict of interest and that R’s personal interest “does not present a significant risk of materially limiting” Lawyer Q’s representation of Carl, then Lawyer Q could represent Carl, provided that R is also screened from the matter.⁷⁵

If Lawyer Q determines that the matter is not a personal interest conflict but is rather a non-personal interest conflict, then R’s conflict would impute to all lawyers in the firm under Rule 1.10, and Q would not be able to represent Carl.⁷⁶ In this case, assume that Lawyer Q determines that the conflict, albeit a personal interest conflict to R, nonetheless presents a significant risk of materially limiting Q’s representation of Carl. After all, if Q discredits Ballo as a dangerous doctor who hurts people in her moonlighting balloon escapades, the reputational risk for the hospital where Ballo works—and the board on which R presides—could be material to the financial and professional interests of both Ballo and R. In light of this significant risk of materially limiting Q’s representation, Q declines to represent Carl. Carl finds a new firm that has no connection—personal or otherwise—to Ballo or Ellie and happily hires his new attorney.

CONCLUSION

The lens of Ellie and Carl’s balloon mishap serves as a focused prism through which to analyze the evolving nature of conflicts of interest. While real conflicts do not always arise in a methodical progression, analyzing each decision point along a slow-moving continuum enables students to develop an awareness of how conflicts rules interact with and contrast to one another. By developing a deeper awareness of what questions to ask along the way, as well as what difficulties could develop, students can develop a more nuanced appreciation of the critical importance of understanding how to navigate through conflicts of interest when they arise in their daily practice.

73. MODEL RULES R. 1.7 cmt. 10 (noting that “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”).

74. MODEL RULES R. 1.7 cmt. 11.

75. MODEL RULES R. 1.7(a)(2); MODEL RULES R. 1.10(a)(2).

76. See MODEL RULES R. 1.10(a).