Ethics Handbook

Ethical Considerations For the Lawyer and Client In Idaho

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TABLE OF CONTENTS

"ETHICS IS THE DIFFERENCE BETWEEN WHAT YOU HAVE THE RIGHT TO DO AND WHAT IS RIGHT TO DO."

Justice Potter Stewart

I. CONFLICTS OF INTEREST

A. Applicable rules

Idaho lawyers are governed by the *Idaho Rules of Professional Conduct* promulgated by the Idaho Supreme Court. The rules governing conflicts of interest and other key provisions were substantially amended in 2004 and revised again in 2014. Unless otherwise stated, all references in this Handbook to rules and official comments are to the 2014 version of the Idaho Rules, and are referred to simply as "Rule." The full text of selected rules is set out under Exhibit A.

The Idaho Rules generally track the Model Rules adopted by the American Bar Association in 2002, which, in turn, are reflective of the American Law Institute's *Restatement of the Law (Third), The Law Governing Lawyers* § 122 (2000).

The conflict of interest rules vary by category of client. Generally speaking, the lawyer owes a broader duty to current clients than to former clients. Special rules (adopted in 2004) are applicable to prospective clients.

Note that under Rule 1.10 (discussed in section I.F at page 32) and Rule 1.18(c) (discussed in section I.F(2) at page 32), conflicts of one lawyer are generally imputed to the entire firm (unless the conflict is based on personal interests of the lawyer). Thus, throughout the discussion below, statements about "a lawyer" should be understood to apply to any lawyers within the law firm.

Conflicts of interest may be consented to by the affected clients if certain conditions are met.[1] This is discussed in section I.E beginning on page 23. Some conflicts, however, are not consentable, either because they fall into a prohibited category or because they are inherently unreasonable. These are discussed in section I.E(3) at page 23.

B. Concurrent conflicts (Rule 1.7)

Rule 1.7 governs the duty owed by the lawyer to avoid conflicts among the lawyer's current clients (referred to as "concurrent conflicts"). The rule broadly prohibits the lawyer from putting himself or herself in a position (1) that qualifies as "direct adversity" or (2) that will "materially limit" the lawyer's ability to serve. These are different concepts. Either constitutes a conflict of interest.

Rule 1.7(a) provides (emphasis supplied):

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

[1] In this Handbook, I use the terms "consent" and "waiver" interchangeably.

> (a) Except as provided in paragraph (b) [dealing with consent], 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 the personal interests of the lawyer, including family and domestic relationships.

These are two separate tests. It is a conflict of interest if either test is failed. The two categories of concurrent conflicts ("directly adverse" and "materially limited") are discussed below.

(1) Materially limited (Rule 1.7(a)(2))

We will take up the second test first, because it is more straightforward (albeit more subjective) and because its understanding is necessary to the discussion of the more complex "directly adverse" rule.

Even where there is no direct adversity of interest between two clients, Rule 1.7(a)(2) prohibits any representation of a client (in the absence of consent) that poses a significant risk that the representation will be "materially limited" by the lawyer's responsibility to any other person (not just a client), including family and domestic relationships.

The "materially limited" portion of Rule 1.7(a) is emphasized below:

> RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS
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> (a) Except as provided in paragraph (b) [dealing with consent], a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> (1) the representation of one client will be directly adverse to another client; or
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> (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 the personal interests of the lawyer, including family and domestic relationships.

Comment 8 to this rule provides an example involving formation of a joint venture. (This situation is discussed further in section I.B(5) at page 11 dealing with common representation). The comment makes clear that the analysis ordinarily would proceed under the "materially limited" part of the conflict rule, not the "directly adverse" portion:

> 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. 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. The mere possibility of subsequent harm does not itself require disclosure and consent. 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.

As this comment illustrates, determining whether particular circumstances would materially limit a lawyer from effective representation is essentially a common sense analysis based on practical considerations.

In another example offered by the comments, a lawyer ordinarily should not engage in discussions about employment opportunities with an opposing law firm. Comment 10 to Rule 1.7.

Take this example. Suppose a lawyer represents a client seeking to build a suburban residential development, and another client of the lawyer is personally opposed to the development because she believes it would violate smart growth principles. As we will discuss below, that in itself probably does not create a conflict based on direct adversity. On the other hand, if the client favoring smart growth was the lawyer's biggest client whom he cannot afford to offend, his representation of the developer client may be materially limited.

Another example might involve a lawyer arguing conflicting legal positions in different cases. This is discussed under the rubric of "positional conflicts" in section I.B(3) at page 9. These are ordinarily analyzed under the "materially limited" branch of the conflict rule.

An example involving the "personal interests" of the lawyer might arise if the lawyer was a devoted member of the Sierra Club and was asked to represent a logging client seeking to log old growth timber. Here the conflict is not between the client and another person, but with the lawyer herself.

It seems doubtful that a lawyer who is personally materially limited can obtain an effective conflict waiver to personally represent both clients. But if the lawyer believes that he is not materially limited, he or she would be wise to obtain a waiver (typically in the engagement letter) to protect against the client or others contending that the lawyer had such a conflict. A good example would be in the context of positional conflicts.

(2) Directly adverse (Rule 1.7(a)(1))

Most conflict issues arise under the first category (those occurring due to direct adversity between current clients). The rule is simply stated: "[A] lawyer shall not represent a client if . . . the representation of one client will be directly adverse to another client." Rule 1.7(a)(1). The challenge comes in figuring out what "directly adverse" means.

I begin by jumping to the quick answers. There are three basic fact settings in which a conflict based on direct adversity may arise. I also jump ahead here to include a column on conflict waiver:

	Extent of adversity	Is this a conflict under the "directly adverse" portion of the conflict rule?	Is the conflict waivable?
(i)	The firm represents neither client on the matter to which the clients are adverse.	Never	No conflict, so no waiver required.
(ii)	The firm represents both clients on the very matter to which they are adverse.	Always	Depends on whether the matter is before a tribunal. If not before a tribunal (e.g., a property transaction as opposed to litigation), it is waivable under some circumstances. If before a tribunal: Not waivable.
(iii)	The firm represents one of the clients in a matter adverse to another client, and represents the other client in an unrelated matter.	Yes, assuming the firm's representation of one client is "directly" adverse (and not merely incidentally adverse) to another client.	Yes, under some circumstances.

Situations (i) and (ii) are straightforward . Situation (iii) is trickier and requires a longer discussion. Each is discussed below.

(i) It is not a "directly adverse" conflict to represent two clients adverse to each other where the representation of neither client relates to the clients' adversity.

I will first take up situation "(i)" (from the table above). The language of Rule 1.7(a)(1) tells us that only direct adversity involving representation by the lawyer of at least one of the clients on the matter that makes them adverse gives rise to a "directly adverse" conflict. For instance, two clients might be fierce business competitors or they might simply despise each other. Likewise, they might be battling each other in a different lawsuit unrelated to the lawyer's representation of either of them. In these cases, the lawyer may ethically represent both of the clients in other lawsuits, business transactions, or matters having nothing to do with the clients' antagonism for each other. Doing so does not constitute a conflict under Rule 1.7(a)(1) and requires no consent by the clients (unless the lawyer is materially limited in his representation under Rule 1.7(a)(2)). This follows from the rule's language that there is no direct adversity unless "the representation of one client will be directly adverse to another client." The rule does not say that it is a conflict to have two clients who are "directly adverse" to each other. It says that it is a conflict to represent a client on a matter that is directly adverse to another client. In short, in order to create a conflict of interest under this subsection of Rule 1.7, the lawyer's representation must relate to the thing that makes the clients adverse.

The *Restatement* puts it this way: "General antagonism between clients does not necessarily mean that a lawyer would be engaged in conflicted representations by representing the clients in separate, unrelated matters. A conflict for the lawyer ordinarily exists only when there is conflict in the interests of the clients that are involved in the matters being handled by the lawyer or when unrelated representations

are of such a nature that the lawyer's relationship with one or both clients likely would be adversely affected." *Restatement of the Law (Third): The Law Governing Lawyers* § 121, Comment c(iii), reproduced in Thomas D. Morgan, *Lawyer Law: Comparing the ABA Model Rules of Professional Conduct with the ALI Restatement (Third) of the Law Governing Lawyers*, at 376 (2005) (emphasis supplied).

(ii) It is always a conflict to represent <u>both</u> clients on the very matter that makes them adverse.

Turning to situation "(ii)" from the table above, if the law firm represents <u>both</u> clients on the very matter that makes them adverse, that is as direct as it gets and this is plainly a conflict of interest. Thus, for instance, it would be a conflict of interest for lawyers from the same law firm to represent both the plaintiff and the defendant in the same lawsuit or both the buyer and the seller in a real estate negotiation.[2]

Such dual-representation direct conflicts are waivable in some circumstances. They are not waivable where the representation would be unreasonable or where the matter is in litigation or otherwise before a "tribunal."[3]

For example, it seems obvious that the same individual lawyer cannot represent two opposing clients in an adversarial transaction except in the rare case where the lawyer is genuinely acting as a facilitator and scribe, and not as an advocate for either side. That is described as a "common

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[2] Generally, conflicts are imputed to all lawyers in a firm. *See* Rule 1.10; discussion in section I.F(1) at page 25. Therefore, lawyers from the same firm cannot typically represent clients whose interests are directly adverse in transactional matters unless (1) each client gives written, informed consent, (2) the lawyers reasonably believe that they will be able to provide competent and diligent representation to each client, (3) the representation is not prohibited by law, and (4) the representation does not involve the assertion of a claim by one client against the other client in the same litigation or other proceeding before a tribunal. *See* Rule 1.7(b).

The Comments to Rule 1.7 recognize that conflicts can arise in the transactional setting. *See* Comments 7, 8, 26-28. The Comments also recognize that it may be beneficial, under certain circumstances, for clients to waive such conflicts. *See* Comment 28 ("[A] lawyer may seek to establish or adjust a relationship between two 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. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests."). Comment 28 recognizes that, given all the relevant factors, clients may prefer that one lawyer (or one firm) act for all of them. However, representation is forbidden (and not consentable) if the clients' interests are "fundamentally antagonistic to each other." The Rules do not suggest or require a screen, presumably because the Rule speaks in terms of a single lawyer and applies to firms only through Rule 1.10. But a screen seems necessary to ensure the lawyers will maintain confidentiality and provide competent and diligent representation to each client. *See* Rule 1.6.

Accordingly, the Rules permit representation of adverse parties (or potentially adverse parties) in transactional matters under certain circumstances. Just because representation may technically be permissible does not mean it is advisable. Lawyers and firms should proceed with the utmost caution in these situations.

[3] Rule 1.0(m) defines tribunal: "'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

representation" in which the lawyer (or law firm) is essentially representing both clients in common. Examples would include a "friendly" uncontested divorce or an entity formation. The key is that both clients must understand that their lawyer is not acting as an advocate for them against the other, and the lawyer(s) will not maintain confidences between the two clients.

In contrast to a common representation, one can imagine a situation where two lawyers in the same firm who have longstanding relationships with separate clients might reasonably obtain consent to represent their separate clients in an adverse but "friendly" transaction between the clients. This would probably require some sort of a "screen" to be established. (The screen does not eliminate the conflict, it simply aids in making the conflict waivable.) In this situation, the two lawyers could, to some extent, serve as advocates for the respective clients against the other.

See discussion of client consent in section I.E(3)(iii) at page 24. See also discussion in section I.B(5)11 dealing with the special situation of representation of multiple clients on a common matter.

If the matter is in litigation or before a "tribunal" (as defined in footnote 3), the conflict is never waivable. In other words, consent by both clients cannot cure the conflict.

(iii) Representation of one client on a matter adverse to another client who is represented on a different matter may not constitute a conflict if the lawyer is not required to confront and oppose the other client.

Now, we will tackle the more difficult "(iii)" example from the table above. Suppose that the firm represents one client on a matter that is adverse to another client of the firm, but the firm's representation of the other client is unrelated to that matter. It is clear that Rule 1.7(a)(1) can apply in this context.[4] The commentary on Rule 1.7 addresses this question squarely:

> 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.

Comment 6 to Rule 1.7 (emphasis supplied).

The point is reiterated in another comment offering an example in a transactional context:

> 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.

Comment 7 to Rule 1.7.

[4] In contrast, Rule 1.9 dealing with former clients is limited to representations of both clients involving the "same or substantially related matter." See discussion in section I.C at page 16. In other words, it is perfectly acceptable to represent a current client against a former client where the current direct adversity is unrelated to the former representation of the other client.

In this example, the conflict is "direct" because the representation of one client is aimed directly against the other. In the words of Comment 6, the lawyer may not act as an advocate "against a person the lawyer represents in some other matter." Presumably, this adversity would be present even where the negotiation between the two clients is "friendly." However, consent might be more appropriate in the context of a friendly negotiation.

Another example of a direct conflict is found in Comment 6, which provides that it is a conflict of interest for a lawyer to confront his other client on the witness stand: "[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 the other client, as when the testimony will be damaging to the client who is represented in the lawsuit." Comment 6 to Rule 1.7. In this example, the witness-client might not even have an interest in the lawsuit; she might simply be a witness to an automobile accident. Nevertheless, this comment suggests that it would be a conflict of interest for the lawyer to cross-examine her. Note that the comment simply says this is a conflict. It does not address whether the conflict is waivable. As discussed in section I.E(3)(iii) at page 24, consent is not barred even in litigation, so long as the attorney is not representing both clients in the same litigation. However, the necessity to cross-examine a client raises other difficult questions (is the consent reasonable? and is the lawyer materially limited?).

These Comments make clear that where the lawyer is engaged in direct, one-on-one opposition to another client, there is "direct adversity" – even though the lawyer is not representing the other client on that matter.

On the other hand, one can imagine situations in which the representation is adverse in some sense, but is not directly adverse. Although the rules do not employ this terminology, we might call these "incidentally adverse" situations. These are situations in which the representation of one client has the incidental effect of disadvantaging another client. Comment 6 offers one example based on business competition:

> 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.

Comment 6 to Rule 1.7 (emphasis supplied).

In this example it appears that the lawyer's representation of neither client was related to their economic competition (presumably this is what is meant by "unrelated litigation"). Suppose, however, that the lawyer's representation of one of the clients did relate to the adversity between the clients. For example, suppose the lawyer helped a client buy a property or obtain a land use entitlement, water right, or environmental permit, the existence of which would give that client a competitive leg up vis-à-vis another client.

The rule itself offers no real guidance, other than the use of the adverb "directly" to limit the types of adversity to which the rule applies. The author takes the position that a lawyer's representation is not directly adverse so long as the representation is not directed "against" the other client. In other words, adversity that is merely incidental (meaning that its primary purpose is something other than to disadvantage the other client) does not constitute "direct adversity." (Recall that even if there is no direct

adversity, the lawyer must also be cognizant of whether this representation would be materially limited by his or her representation of the other client.)

For instance, suppose a lawyer represented a real estate developer seeking to build a high rise apartment building in a residential neighborhood. Suppose that lawyer or the lawyer's firm also represents another client on an unrelated estate planning matter. Finally, suppose that the second client lived near the proposed apartment complex and believes that if the high rise is constructed, it may reduce the value of other properties in the area including hers. Is this a conflict under the rules? Must the representation of the developer client be disclosed to the homeowner client? If the homeowner client declines to consent, must the lawyer end his representation of the developer?

To take a more extreme example, suppose the lawyer represented Idaho Power in a rate case before the Public Utilities Commission. Can the lawyer be conflicted out by any other client that uses electricity and refuses to give consent?

The author suggests that the answer to both hypotheticals is "no." Common sense suggests that being "directly adverse to another client" requires something more than incidentally disadvantaging another client—such as the homeowner in the high rise example or the electric power customer in the Idaho Power example. In order to rise to the level of a direct ethical conflict, the lawyer's representation of one client must be directly aimed at the other client in a manner requiring the lawyer to confront and oppose the other client in some adversarial setting (whether that be in a hearing room or in a contract negotiation).

Of course, if the homeowner or the power customer were to intervene in the proceeding or otherwise put the lawyer in the position of having to take them on as opponents, that would be a different matter. There is no bright line here. Whether the line is crossed may depend on the nature of the hearing and whether the lawyer will be called upon to thrust and parry with the other client.

Another question is what should the lawyer do if she is surprised to discover a conflict. For instance, suppose she walks into a hearing before a planning and zoning commission to discover another client of hers has signed up to speak in opposition to her client's project? The rule and comments offer no guidance. Common sense suggests that the lawyer has little choice but to proceed with the hearing and deal with the question of ongoing representation afterward. To the extent that the lawyer genuinely had no reason to anticipate the other client's involvement, it would seem that she would be in a stronger position to continue to represent the developer client, even without the consent of the opposing client. This situation points up the importance of addressing these issues up front in the engagement letter (see discussion in section III.A at page 37).

In conclusion, it is not easy to say what "directly adverse" means. In the words of Comment 6, it requires that the lawyer affirmatively act "as an advocate in one matter against a person the lawyer represents." The rule, however, offers little guidance (except at the extremes) as to when conduct crosses that line. The comments do not squarely address the issue of when representation of one client in the adverse matter constitutes a "directly adverse" conflict (except for comment 24 discussed below in section I.B(3) at page 9, which comes pretty close). On the other hand, the comments are entirely consistent with the "confront and oppose" analysis suggested by the author.

The American Law Institute's *Restatement*, upon which both the model rule and the Idaho rule are based, avoids altogether the abstract, Jesuitical task of determining when adversity is "direct," focusing

instead on the more practical question of whether the lawyer's representation of either client is materially and adversely affected offers an entirely different and more flexible approach to the whole matter:

> A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, former client, or a third person.

2 *Restatement of the Law (Third), The Law Governing Lawyers* § 122 (2000) (emphasis supplied). This is similar to the "materially limited" language of Rule 1.7(a)(2), discussed below. Thus, rather than employing a rule of thumb based on the mere presence of direct adversity, the *Restatement* allows a lawyer evaluating a possible conflict to think in terms of his or her ability to effectively represent both clients under the circumstances. However, the Rules govern, not the *Restatement*. Consequently, Idaho lawyers not only must weigh whether their representation of a client is materially limited, but must ponder whether that representation is directly adverse.

(3) Positional conflicts (adverse precedents)

Is it a conflict of interest for a lawyer to argue a position in one case that may create a precedent harmful to another client who is not a party to that case? The quick answer is generally no, unless the lawyer will be called upon to take the opposite position for the other client in another case. The commentary makes clear, however, that issue arises solely under the second prong of the conflict rule ("materially limited") not under the first prong ("directly adverse").

In the preceding section, the author concluded that direct adversity occurs when the lawyer will be called upon to confront and oppose the other client in an adversarial setting of some sort. Thus, arguing for conflicting precedents in different tribunals on behalf of different clients would not constitute direct adversity. This conclusion is reinforced by Comment 24 to Rule 1.7 which deals with the special issue of adverse precedents. The comment states that ordinarily it is not a conflict of interest for a lawyer to take a position for one client that establishes a precedent that may be harmful to another client before another tribunal at another time. The comment states in full:

> 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 may create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. 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. Factors relevant in determining whether the clients need to be advised of the risk include: whether the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent

> informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

Comment 24 to Rule 1.7.

Note that the comment addresses the subject entirely under the rubric of the second prong of the conflict rule ("materially limited," as discussed in section I.B(1) at page 2) not under the first prong ("directly adverse"). This allows a more holistic approach to the question that weighs and balances all of the surrounding circumstances. As the comment notes, whether the lawyer's actions constitute a conflict of interest depends on a variety of factors, such as the importance of the precedent and the clients' reasonable expectations. It also bears emphasis that even where a conflict exists, it is waivable based on informed consent.

It is worth noting that the comment is written in terms of "different tribunals at different times." (The meaning of the term "tribunal" is treated in section I.E(3)(iii) at page 24.) Thus, it would be a conflict, presumably, to argue conflicting positions before the same tribunal at the same time.[5] But the comment fails to address advocacy in the same tribunal at different times, or different tribunals at the same time. Even in those cases, the author would suggest, the conflict should be evaluated under the more flexible "materially limited" prong rather than the more rigid "directly adverse" prong. In short, if the clients are not in the same litigation, the clients are not directly adverse, but the representation may nonetheless constitute a conflict of interest where the lawyer's representation is "materially limited."

In any event, the author would suggest that even where the lawyer is seeking differing precedents before the same tribunal, there is no *per se* conflict under the directly adverse rule. So long as the lawyer is representing the clients on different matters (e.g., different water rights or different entitlement applications) that do not require the lawyer to confront and oppose the other client, there would be no direct adversity, and the analysis should proceed under the more practical, common-sense-based "materially limited" prong of the conflict rule. Thus, if the lawyer can reasonably say that his or her advocacy of each water right, entitlement, or whatever, is not materially limited by the other, then there is no conflict of interest.

A cautious approach to this issue would call for the engagement letter to point out that the firm is engaged in a variety of public policy matters and other actions that are likely to create precedents, and warn that the client may disagree with or be adversely affected by undertakings of the firm on behalf of other clients. There could be an issue as to the effectiveness of consenting to such a generic and prospective disclosure of conflicts (see discussion in section I.E(6) at page 28). However, a thoughtful explanation that fairly puts the client on notice should be effective. Comment 22 to Rule 1.7. The practical problem with this approach is that demanding such consent at the outset may be off-putting to many clients and may be downright impossible with some—particularly larger corporate clients who often inflexibly dictate the terms of their engagement letters.

[5] It is unclear what "at the same time" means. Suppose a lawyer filed a motion seeking a broad interpretation of a discovery sanction rule, and the motion was denied. While that case is still pending, could the same lawyer representing another client before a different judge in the same district court defend that client in a discovery dispute by seeking a narrow application of the sanctions rule? The correct answer would seem to be, "that depends." The blurriness of these questions and the need for more facts and context argues for analyzing these under the more flexible "materially limited" rule.

(4) Anticipation of future conflicts

Rule 1.7(a) defines a concurrent conflict in terms of conflicts that "will" occur if the representation is undertaken or continued—not speculative or potential conflicts. In identifying conflicts that "will" occur, a lawyer must consider conflicts that are bound to develop even if they have not yet materialized. For instance, Comment 29 says a lawyer cannot accept representation of multiple clients "where contentious litigation or negotiations between them are imminent or contemplated." On the other hand, the rule does not obligate a lawyer to decline a representation simply because there is a possibility that a conflict might emerge or be discovered in the future involving another client of the firm.

The effectiveness of consent to future conflicts is discussed in Comment 22 to Rule 1.7. "The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails." This is discussed further in section I.E(6)(i) at page 28.

(5) Common representation of multiple parties (Rule 1.7, Comments 29-33)

Comments 29 to 33 to Rule 1.7 address the special challenges of representing multiple clients in a common representation. This subject formerly was addressed by Rule 2.2, but that rule was eliminated in 2004.[6]

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[6] Note that the structure of the rules for addressing these questions changed in 2004. The pre-2004 rules contained Rule 2.2 entitled "Intermediary." This rule was designed to address conflict issues involving a lawyer's function as an intermediary (e.g., mediator or arbitrator) in resolving issues arising among the lawyer's clients. This rule was not retained in the current version of the rules, and instead has been subsumed by Rule 1.7 dealing generally with conflicts of interest. The issue of common representation is now addressed solely by Comments 29 through 33 to Rule 1.7 under the heading "Special Considerations in Common Representation." The decision to drop Rule 2.2 from the model rules was explained by the American Bar Association this way:

> The Commission recommends deleting Rule 2.2 and moving any discussion of common representation to the Rule 1.7 Comment. The Commission is convinced that neither the concept of "intermediation" (as distinct from either "representation" or "mediation") nor the relationship between Rules 2.2 and 1.7 has been well understood. Prior to the adoption of the Model Rules, there was more resistance to the idea of lawyers helping multiple clients to resolve their differences through common representation; thus, the original idea behind Rule 2.2 was to permit common representation when the circumstances were such that the potential benefits for the clients outweighed the potential risks. Rule 2.2, however, contains some limitations not present in Rule 1.7; for example, a flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects. As a result, lawyers not wishing to be bound by such limitations may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result.
>
> Rather than amending Rule 2.2, the Commission believes that the ideas expressed therein are better dealt with in the comment to Rule 1.7. There is much in Rule 2.2 and its Comment that applies to all examples of common representation and ought to appear in Rule 1.7. Moreover, there is less resistance to common representation today than there was in 1983; thus, there is no longer any particular need to establish a propriety of common representation through a separate Rule. "

Common representation involves representation of more than one client in a common undertaking of some sort. This can arise in many contexts. For example, a lawyer may be asked to represent several partners or businesspeople in establishing a joint venture. It would arise where a husband and wife ask a lawyer to draw up reciprocal wills. Another example might involve the representation of a group of neighbors opposing a nearby development project. The common theme is that, at the time the representation is undertaken, the clients are working together toward a common goal and wish to avoid the expense of multiple representations.

In all common representations there is inherent potential for conflicts emerging in the future. For instance, even if the clients are in complete harmony of interest at the outset, conflict could emerge later when disagree on settlement strategies. As discussed in section I.B(4) at page 11, the mere possibility of a future conflict does not constitute a "direct adversity" conflict under Rule 1.7(a)(1). However, depending on the circumstances, it may constitute a conflict based on a "material limitation" under Rule 1.7(a)(2).[7]

Even if there is no conflict at the outset (and thus no consent required), the lawyer is well advised to have a frank discussion with the clients about the potential for future conflicts emerging.

Some common representations involve inherent adversity of interest from the outset. For example, suppose two people wish to form a partnership and ask the lawyer to represent both of them in doing so. Obviously, the lawyer may not effectively represent both of them as an advocate against the other as they work out the terms of the partnership. On the other hand, the lawyer may be able to carve out a more limited role which would avoid direct adversity. (But see discussion in footnote 7 regarding conflicts based on material limitation.)

For instance, the lawyer, with the agreement of the clients, might limit his representation to that of a scribe. By scribe, I do not mean a mere note-taker or implementer of the clients' directives. A lawyer has a duty to point out risks and advantages of various options and approaches. However, a lawyer could agree to be what we might call an active scribe, in which, for example, the lawyer offers alternate language accompanies by comments pointing out the risks and benefits of each and, most importantly, how each approach might benefit one client vis-à-vis the other.

It is important, however, that the clients be made to fully understand just how limited the representation is and what their risks result from not having separate counsel. Notably, the lawyer's role will be more in the nature of an "options giver" rather than an "advice giver." (See Comment No. 32 to Rule 1.7.) Moreover, the lawyer must explain that she will not be in a position to maintain individual

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ABA Comments to Model Rule 2.2." ABA Comments to Model Rule 2.2.

[7] Comment 8 to Rule 1.7 addresses this subject: "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. 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. The mere possibility of subsequent harm does not itself require disclosure and consent. 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."

confidences. The clients should be made to understand that if they have individual circumstances that that need to be explored on a confidential basis, this arrangement will not work. (See Comment No. 31 to Rule 1.7.)

In all common representations, it is a good idea to have a careful discussion with each client about what will happen if circumstances change and the lawyer is required to withdraw from the representation. If the lawyer wishes to be able to continue to represent one of the clients, then anticipatory consent should be discussed and obtained at the outset. See discussion in section I.E(6)(i) at page 28.

As noted above, guidance on this subject is found in comments 29 to 33. Common representation is also mentioned in comment 19. A lawyer considering the representation of multiple clients undertaking a common endeavor should carefully consider these comments, which are set out in full below.

> [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 costs, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. 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. 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.
>
> [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.
>
> [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. See Rule 1.4. 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. 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. 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.

[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 a 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. 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. See Rule 1.2(c).

[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.

Comments 22-31 to Rule 1.7.

(6) Representation of corporations and other organizations (Rules 1.13 and 4.3)

When a lawyer deals with a corporation or other organization on matters involving or affecting officers, shareholders, or others with an interest in the organization, there are inherent opportunities for conflict and misunderstanding. The bottom line is that the lawyer must not only avoid conflicts (or obtain effective waivers), but be very clear with everyone involved about who is representing whom.

Rule 1.13 ("Organization as Client") and Rule 4.3 ("Dealing with Unrepresented Parties") both reinforce the lawyer's affirmative obligation to avoid any misunderstanding about the representation. A lawyer representing a corporation or other organization is obligated to explain who he is representing and not representing when dealing with directors, officers, employees, members, shareholders, or other constituents. Rule 1.13(f).

One would think that would be obvious, but it is something that can be overlooked, particularly in closely held companies and where the lawyer has dealt with individuals for a long time. The danger is that everyone comes to think of the corporate lawyer as "their lawyer." Moreover, the lawyer's familiarity and collegiality with the parties may convey to some of them the idea the he will "be fair" to everyone. And that is what gets lawyers in trouble.

Rule 4.3 is very specific about how a lawyer must interact with an unrepresented person (such as an officer or shareholder—or any unrepresented person). Under this rule, the lawyer must avoid any implication that he is acting in a disinterested manner. Likewise, the lawyer must avoid giving any legal

advice whatsoever to the unrepresented party, other than recommending that the party obtain independent counsel.

The Idaho Supreme Court cited both of these rules, albeit in dictum, in *Blickenstaff v. Clegg*, 140 Idaho 572, 578 n.1, 97 P.3d 439, 445 n.1 (2004). In this case, a corporation's attorney was asked to prepare assignment agreements providing for the buy-out of two shareholders in the corporation. One of the shareholders, Blickenstaff, later sued the lawyer when he learned that the agreements did not contain terms that would have better protected him. Although the lawyer was employed and paid by the corporation, the Court found it was an open question (not subject to summary judgment) whether the plaintiff could fairly have understood that the lawyer was not just representing the corporation, but "would represent all of the parties fairly." *Blickenstaff*, 140 Idaho at 757, 97 P.3d at 442.

The Court noted that apart from any fiduciary responsibility that may have been breached, the attorney also had an ethical duty under the Rules 1.13 and 4.3.[8] The same footnote also raised the possibility that the attorney may have violated Rule 1.7, to the extent he represented both the corporation and individuals involved.

Although the Court remanded for further evidence on other issues, it specifically held that, irrespective of whether the attorney actually represented the individual shareholder:

> . . . Joyce [the attorney] breached a fiduciary responsibility towards Blickenstaff, not only to tell Blickenstaff that he was not representing him but also in failing to advise him that he was representing Clegg and that Clegg's and Thomas' interests were very much opposed to those of Blickenstaff and that Blickenstaff should secure independent legal advice to protect his interests against those of Thomas and Clegg.

Blickenstaff, 140 Idaho at 578, 97 P.3d at 445.

It should be noted that the lawyer believed that "he merely performed ministerial acts of drafting the assignment agreements and that Blickenstaff never asked [the lawyer] for his advice as an attorney or to act in M & D's best interest." *Blickenstaff*, 140 Idaho at 574-75, 97 P.3d at 441-42. The message here is that it is not good enough for the lawyer to be clear in her own mind about whom she is representing. In order to protect against both ethical charges and civil liability, the lawyer must carefully document that she has informed each of the other parties as to who she is representing and who she is not representing.

Moreover, under both Rule 1.13(f) and Rule 4.3, she must act affirmatively to correct any potential misunderstanding on the part of unrepresented parties. Thus, the lawyer should not convey the idea that she will be "fair to everyone" (unless she is representing everyone). To the contrary, she must make clear that she may be acting against their interest. Obviously, this cuts against the grain, particularly when the lawyer is dealing with persons that she has worked with for years.

One final thought. Suppose two parties walk into a lawyer's office and ask the lawyer to represent them in forming a partnership or other entity. Perhaps this may be possible under a limited engagement,

[8] An excellent discussion of how ethical rules are often employed in other contexts, such as disqualification motions, legal malpractice cases, and suits for breach of fiduciary duty (such as *Blickenstaff*), and fee forfeitures, is found in Mark J. Fucile, *Why Conflicts Matter*, 48 Advocate 23 (Sept. 2005) attached hereto as Exhibit B.

but this must be analyzed under the rubric of common representation as discussed in section I.B(5) at page 11. The lawyer cannot sidestep the issue of conflicts and potential conflicts that are inherent in such a representation by declaring that she will represent the entity only and not the parties. The reason is simple; at this point there is no entity. Once the entity is formed, the lawyer may be able to become the entity's lawyer. But the lawyer will need to address whether she will also continue to represent the individuals, in which case the representation must be evaluated under the conflict rules for common representations. If she will represent the entity only, her representation must be analyzed under the rubric of the conflict rules for former clients, as discussed in section I.C at page 16.

C. Sequential conflicts (Rule 1.9)

(1) The applicable rule

A lawyer owes a duty not only to each of his or her existing clients, but to the lawyer's former clients. The duties owed to former clients are somewhat more limited, but remain significant constraints in perpetuity. Rule 1.9 governs conflicts arising between a current and a former client. These are sometimes referred to as "sequential conflicts."

The rule states:

> (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.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm 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.

Rule 1.9.

The discussion immediately below addresses Parts (a) and (b) of this rule. Part (c) of this rule, dealing with the protection of confidences, is discussed in section I.B(6) beginning on page 14.

(2) Must be substantially related matter

Rule 1.9 prohibits a lawyer from representing a client (in the absence of consent) whose interests are materially adverse to those of a former client whom the lawyer represented in "the same or a substantially related matter." Thus, for instance, a lawyer who represented the wife in a divorce proceeding may not come back years later and represent the husband in a petition to re-open the custody issues. On the other hand, that same lawyer could appear, years later, in a tort case opposing the wife, because that would not be "substantially related" to the divorce action.

Whether the matters are "the same or substantially related" generally refers to whether the matter involves the same disputed issues of fact. The official commentary offers these examples:

> [A] lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

Comment 3 to Rule 1.9.

In the first example in Comment 3, both the new matter and the former matter relate to environmental issues at the project, even though one involved environmental regulatory permits and the other involved rezoning. If the new matter involved rezoning issues completely unrelated to the environmental considerations addressed in the old matter, then, depending upon the particular facts, one might contend that the matters are not substantially related. However, this would be a close call.

Here is another example. Suppose a lawyer helped a client obtain a permit for a water right in a routine uncontested administrative filing, and then concluded the representation. Could another person subsequently retain the lawyer to oppose the former client's application to transfer that water right to a different use? This, too, will depend on the facts. For example, does the opposition to the transfer have anything to do with how the water right was originally permitted? Assuming there is no such factual nexus, it would seem that the original permit application and the subsequent transfer should not be deemed "substantially related" simply because they involved the same water right.

In all such close cases, obviously, the lawyer will be better off if he or she can obtain consent from the former client. The practical difficulty is that consent tends to be harder to obtain from former clients than it is from current clients. This is another reason that these matters should be addressed at the time of the initial engagement. See discussion in section III.A at page 37.

(3) Clients of former firm

Note that Rule 1.9(b) provides a somewhat more relaxed standard for the duty owed to former clients when a lawyer leaves his or her law firm. See discussion in section I.F(5) at page 33.

(4) Consent of former client

As with current clients, conflicts relating to former clients may be waived if the former client gives informed consent, confirmed in writing. Rule 1.9(a) and (b). See discussion in section I.E beginning on page 23.

(5) Distinguishing between current and former clients

Distinguishing between a current and a former client might sound like an obvious and simple distinction. However, it is not always so easily drawn. The difficulty is that clients have a tendency to think of the lawyer as "their lawyer" even when the legal task has been completed and the lawyer believes that the representation is concluded. Consequently, lawyers are well advised to ensure that the distinction is drawn by sending the client a disengagement letter at the end of the service clearly explaining that the lawyer-client relationship is ended, unless the client chooses to engage the lawyer in some manner or pay a retainer.

Sometimes that is easier said than done. Suppose there is simply a lull in work, for instance while a client re-thinks whether she wants to proceed with a project. The lawyer may be reluctant to throw cold water on the relationship by sending a disengagement letter. On the other hand, failure to do so may prove costly to the lawyer. If the lawyer waits until a new client arrives on the scene with work adverse to the dormant client's interests, it may be difficult to sever the relationship with the dormant client at that point. (See discussion below.)

(6) The "hot potato" rule

Suppose a lawyer encounters a conflict between two current clients in which the lawyer represents only one of the clients on the matter over which they are adverse. The lawyer might be tempted to fire the other client in order to bring the analysis under the more generous former-client rule (Rule 1.9). Under this rule, the lawyer could represent the current client on a matter directly adverse to the former client so long as the lawyer never represented the former client on that or a substantially related matter. Will this work? They quick answer is no, at least not it if will harm the discharged client. Here is one commentator's take:

> A stratagem that might suggest itself to some is for the lawyer to withdraw from the less favored representation before a disqualification motion is filed in order to be able to enjoy the less restrictive former-client conflict rules. The stratagem should be unavailing. Unless the concurrent representations were only momentary, the loyalty principle would continue to bar an adverse representation, even in an unrelated matter.

Charles W. Wolfram, *Modern Legal Ethics*, § 7.4.1 at p. 359 (1986). This is often referred to as the "hot potato" rule. The lawyer may wish to get rid of the hot potato and make the problem go away. But firing the client (the hot potato) does not change the conflict analysis.

Rule 1.16 addresses this in Idaho. It provides that a lawyer may withdraw from a representation (unless otherwise ordered by a tribunal) so long as "withdrawal can be accomplished without material adverse effect on the interests of the client." (The rule also lists six other proper bases for withdrawal.)

Conflicts that are "thrust upon" the lawyer do not fall within the hot potato rule.[9] Under this doctrine—sometimes characterized as an "exception" to the hot potato rule—a lawyer may terminate representation of one client so long as (1) the conflict did not exist at the time either representation commenced, (2) the conflict was not reasonably foreseeable at the outset of the representation, (3) the

[9] The Idaho Rules of Professional Conduct does not explicitly recognize this exception. But there is no reason to think that Idaho would reject this widely accepted exception.

conflict arose through no fault of the lawyer, and (4) the conflict is of a type that is capable of being waived under the concurrent-representation rule, but one of the clients will not consent to the dual representation. *New York Bar Ass'n Formal Opinion 2005-5* (June 2005) ("Opinion 2005-5") at 2-3.

Determining that a lawyer may withdraw from one client does not end the inquiry. The lawyer must choose which client should be dropped. Opinion 2005-5 provides a list of factors that the lawyer should consider. These factors include the prejudice that withdrawal or continued representation would cause the clients, the origin of the conflict (*i.e.*, which client's action caused the conflict to arise), whether one client has manipulated the conflict to try and force a lawyer off the matter, the costs and inconvenience to the client being required to obtain new counsel, whether the choice would diminish the lawyer's vigor of representation toward the remaining client, and the lawyer's overall relationship to each client. Opinion 2005-5 at 5. Importantly, "economic benefit to the lawyer" or "desirability of the client" is *not* among these factors. Opinion 2005-5 emphasizes that the lawyer must determine which client to withdraw from in good faith:

> Where the attorney's decision regarding withdrawal appears opportunistic, for example the retained client generates significantly more fees that the dropped client and there are no other factors that weigh in favor of retaining that client, any insistence that the conflict was thrust upon the lawyer, or protestations of prejudice to the major client, may be viewed skeptically.

Opinion 2005-5 at 7.

Note the limited effect of the "thrust upon" exception: it permits a lawyer to withdraw from one client instead of disqualifying the lawyer outright. Withdrawal from one client may prevent a concurrent conflict under Rule 1.7. But the lawyer still must honor her duties to the withdrawn-from (and now former) client under Rule 1.9. This may require, among other things, implementing an ethical screen and obtaining written consent to the conflict. These requirements of Rule 1.9 are discussed in sections I.C (1)-(4).

D. Prospective conflicts (Rule 1.18)

(1) A prospective client may bar a lawyer from continuing to represent a current client

In addition to current and former clients, there is a third category known as the prospective client. This new category was added by the rule change effective in 2004.

A prospective client is someone who "discussed with a lawyer the possibility of forming a client-lawyer relationship." Rule 1.18(a). Obviously, if the prospective client becomes an actual client, the relationship is governed by Rule 1.7. But if for any reason the lawyer is not retained by the prospective client, then Rule 1.18 controls.

The rule provides in full:

> RULE 1.18: DUTIES TO PROSPECTIVE CLIENT
>
> (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal

information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing.

Rule 1.18.

The rule provides that if during a discussion with a prospective client the lawyer learns certain information of use to another client adverse to the potential client, the lawyer may thereby be disqualified from continuing to represent the lawyer's existing client. This may happen despite the fact that the lawyer did not solicit the information, despite the fact that the lawyer obtained the information before having entered into representation of the prospective client, despite the fact that the lawyer does not use or reveal the confidential information, and despite the fact that the lawyer promptly declines the representation of the prospective client. Thus it is possible that a lawyer could lose his or her largest client simply by taking a phone call from a prospective client. The rule goes on to say that every lawyer in the firm is similarly disqualified.

(2) Rule is triggered by learning harmful information

It bears emphasis that mere adversity between the prospective client and the current client is not enough to disqualify the lawyer from continuing to represent the current client. The rule is triggered only when the lawyer learns information that "could be significantly harmful" to the prospective client if used by another client of the firm in connection with the same matter.

Here is how it might play out. Suppose a prospective client makes an appointment with a lawyer. At the first meeting (which might even be a phone call),[10] the prospective client lays out his problem, revealing confidential information in doing so, and asks if the lawyer can help her. This is how it might unfold:

Prospective client: "You've been recommended to me as the best real estate lawyer in town. I'm interested in buying a property. Can you help me?"

Lawyer: "That depends. I'll need to discuss terms and run a conflict of interest check first. Then I might be able to help you. What is it you're interested in

[10] Rule 1.18 applies only if it reasonably appears to the prospective client that the lawyer is willing to discuss taking on the matter. "Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of paragraph (a)." Comment 2 to Rule 1.18.

doing?"

Prospective client: "I want to build a new cineplex on that old used car lot out by the mall. I need you to help me secure an option on the property within the next month."

Lawyer: "Stop right there. Based on what you've just told me, I believe I have a conflict of interest."

The lawyer already represents a client who is trying to develop that same site for another purpose. The knowledge that a competitor is moving quickly to tie up the property would help the lawyer's current client to the disadvantage of the prospective client.

Under this scenario, the rule apparently requires that the lawyer not only to decline the representation of the prospective client but to stop representing his or her current client in connection with this matter (absent informed consent from both parties).

Note, however, that the prospective client rule (like the former client rule and unlike the current client rule) applies only where the lawyer is representing both clients on the same or substantially related matter. Thus, in the example above, there would be no conflict if the lawyer were representing the other client on a matter unrelated to acquiring the used car lot.

(3) Advance consent by prospective client

What can the lawyer do to prevent this unpleasant result? A lawyer might simply decline to discuss anything with the client until the conflict check is completed and the parties have agreed to terms of engagement. This might work in a traditional litigation context where the parties are readily identifiable. But it may not work in the context of a real estate transaction, land use matter, water rights matter, road access conflict, or other situation in which the prospective client may not be able to identify with specificity all of the adverse parties. (In the example above the prospective client has no idea that your client is also interested in this parcel.) In other words, it is often necessary for the client to explain the matter to some extent before the lawyer can complete the conflict check. But as soon as the client begins talking, the lawyer is running the risk of learning information that may disqualify him or her from representing a current client.

Note that this dilemma is not resolved by the lawyer declining to represent the prospective client, and then simply keeping the information obtained to herself—that is, not sharing it with the current client or using it in the representation of the client. That would be sufficient to comply with Rule 1.18(b) (which prohibits the lawyer from using or revealing the information obtained). But Rule 1.18(c) goes on to bar the lawyer from representing his or her current client if the information "could be significantly harmful" to the prospective client.

The solution contemplated by Rule 1.18(d) is for the lawyer to obtain informed consent from the prospective client:

> (d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing.

Rule 1.18(d). A comment to the rule explains how this might work:

> A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. . . .

Comment 5 to Rule 1.18 (emphasis supplied).

Note that the consent may be obtained on-the-fly, over the telephone, and later confirmed in writing. (See definition of "confirmed in writing" in Rule 1.0(b).) Operating in this fashion would require the lawyer to conduct the initial interview more like this:

Prospective client:	"You've been recommended to me as the best real estate lawyer in town. I'm interested in buying a property. Can you help me?"
Lawyer:	"That depends. I'll need to discuss terms and run a conflict of interest check first. In the meantime, I need you to promise not to tell me anything confidential. At this point, we are not in an attorney-client relationship, and whatever you tell me may be shared with others. Are we agreed on that?"
Prospective client:	"Sure."
Lawyer:	"O.K., what is it you're interested in doing?"
Prospective client:	"I want to build a new cineplex on that old used car lot out by the mall. I need you to help me secure an option on the property within the next month."
Lawyer:	"Stop right there. Based on what you've just told me, I believe I have a conflict of interest. Consequently, I will not be able to represent you. I will send you a letter confirming this. I suggest you contact another lawyer right away."

This approach would appear to satisfy the requirements of Rule 1.18. Moreover, the lawyer may now share the information about the potential competition from the prospective client with the existing client. This assumes that the consent was informed and reasonably obtained under the circumstances, that the lawyer did not unfairly solicit the information, and that the lawyer acted quickly to inform the prospective client once it became apparent that there was a conflict.

Interestingly, on its face, Rule 1.18 seems to contemplate only anticipatory consent with respect to continued representation of the current client, not use of the confidential information:

> Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing.

Rule 1.18(d). Fortunately, a comment to the rule makes it clear that the consent may also encompass disclosure of the information received:

> . . . If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Comment 5 to Rule 1.18.[11]

Of course, the lawyer could agree not to share the information from the prospective client with her current clients. Whether this is feasible or not depends upon the nature of the lawyer's practice and her relationship with her clients. If the lawyer has a large number of business clients competing in the same area, she may be able to let them understand that she will represent them on legal matters, but will not give them business or strategic advice. For other clients, who rely on their lawyers for business and strategic advice as well as legal advice, this simply will not work. In any event, the lawyer needs to obtain a waiver appropriate to her practice, which may or may not include use and disclosure of the information obtained.

E. Client consent (concurrent, sequential, and prospective client)

A lawyer is allowed to represent a client despite a concurrent, sequential, or prospective conflict, if the lawyer obtains the informed consent of both parties. Rules 1.7(b)(4), 1.9(a), and 1.18(d). The 2004 amendments to the rules require that consent be "informed" and "confirmed in writing." Rule 1.0(b) and 1.0(e).

(1) Consent by the prospective client

The subject of obtaining consent from the prospective client was treated under section I.D(3) at page 21. Although the discussion focused on obtaining advance consent, consent could, in theory, be obtained after-the-fact as well.

(2) Consent by the former client

Rule 1.9(a) allows a lawyer to overcome a conflict of interest involving a former client by obtaining the former client's consent. Interestingly, the rule does not expressly require the lawyer also to obtain the consent of the existing client. Unlike the more complex rule for concurrent clients, discussed below, no special rules or limitations apply to the consent obtained from the former client. Like other consents, it must be "informed" and "in writing." See the discussion of these topics below in the context of concurrent conflicts.

(3) Special requirements for consent by current clients

A concurrent conflict under rule 1.7(a) may be cured by an effective consent from both clients, as provided in Rule 1.7(b). While consent by former clients and prospective clients is simply required to be informed and in writing, additional rules apply to consent by current clients. Rule 1.7(b) provides:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), 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;

[11] The comment speaks in terms of "use" of the information. See footnote 20 at page 36.

(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(b). Each of these requirements is discussed below.

(i) Consent must be objectively reasonable

The first test is whether the consent is objectively reasonable. "[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." Rule 1.7(b)(1). Thus, the lawyer should not ask for a person's consent if a disinterested lawyer would conclude that the client should not agree to the representation.

Comment 15 to Rule 1.7 provides:

> Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

This requirement that the consent be reasonable makes sense, but it seems redundant with the test set out for the definition of a "materially limited" conflict in Rule 1.7(a)(2). Wouldn't it make more sense simply to say that "materially limited" conflicts are not waivable? Then again, there may be occasions when such a conflict may be cured by a Chinese Wall. See discussion in section I.E(8) at page 31. In any event, this provision serves as a check to ensure that no concurrent conflict (whether based on "direct adversity" or a "material limitation") can be cured if the lawyer remains unable to effectively represent the client.

Interestingly, this requirement does not appear in the context of a sequential conflict under Rule 1.9. Thus, apparently, the consent of the former client will not be second-guessed as to whether or not it was reasonable.

(ii) Consent must not be prohibited by law

Under Rule 17.(b)(2), the consent will not be valid if the representation is prohibited by some other provision of law. For example, representation of multiple defendants in a death penalty case is unlawful in many jurisdictions, even with the clients' consent.

(iii) Consent is not allowed when in litigation or before a tribunal and the lawyer (or law firm) is representing both clients on that issue

Under Rule 1.7(b)(3), a lawyer is prohibited from seeking consent to represent both the plaintiff and the defendant in the same lawsuit or other proceeding before a tribunal. The rule states in relevant part:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

. . .

(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;

Rule 1.7(b) (emphasis supplied).

A careful reading of the rule shows that this limitation is limited to circumstances in which the lawyer is representing both clients in the same lawsuit or matter. Thus, the absolute prohibition against consent does not apply, for example, to a lawyer representing the plaintiff in the lawsuit while doing unrelated legal work for the defendant. Even if consent is not prohibited, however, this scenario poses significant problems that would need to be addressed under Rule 1.7(b)(1) (is the consent reasonable?) and Rule 1.7(a)(2) (is the lawyer materially limited?).

The term "tribunal" is broadly defined in Rule 1.0(m) to include "an administrative agency or other body acting in an adjudicative capacity."[12] This would include any "contested case" (as that term is used in the Idaho Administrative Procedures Act) before a state agency. It is less clear whether it applies to informal quasi-judicial proceedings, such as an application for a special use permit before a planning and zoning commission in which a town hall style hearing is to be held. The safer course, however, is to assume that the prohibition applies to all quasi-judicial proceedings. On the other hand, being limited to adjudicative matters, it apparently does not apply to lobbying and advocacy before bodies sitting in a purely legislative capacity (*e.g.*, annexation and initial zoning).

Note that the prohibition in Rule 1.7(b)(3) applies only to the "same litigation or other proceeding." A special case is presented by general water rights adjudications. Strictly speaking, the entire adjudication is one "proceeding" (even though it is composed of thousands of distinct "sub-cases" for each water right holder). One might also contend that every water right is adverse to every other water right in a hydraulically connected water body. If that interpretation were applied to rule 1.7(b)(3), it would be impossible for a water lawyer to obtain consent to represent more than one client. Such a result is untenable and would serve no useful purpose. Plainly, the rule was not written with this situation in mind. One answer is that the various representations, although adverse, are not directly adverse so long as the lawyer is not required to "confront and oppose" another client. (Thus, even if consent is not obtainable, no consent is required.) Another approach is to interpret the term "same litigation" as limited to a sub-case or a "basin-wide issue." With respect to positional conflict in a general water rights adjudication, see discussion in section I.B(3) at page 9.

[12] "'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." Rule 1.0(m)

(4) Requirements for an effective consent

(i) Must be informed

To be effective, all consents must be "informed." This is true for concurrent, sequential, and prospective client conflicts. Rules 1.7(b)(4), 1.9(a), and 1.18(d). A definition of the term "informed consent" was added in 2004 and is defined in Rule 1.0(e) as requiring "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Naturally, the client's consent must be completely voluntary—the client should never be pressured or induced to act.

The official commentary provides this sound advice:

> Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Comment 6 to Rule 1.0.

(ii) Confirmed in writing

In the case of consent to a concurrent conflict (Rule 1.7(b)(4)), a sequential conflict (Rule 1.9(a) and (b)(2)), or a prospective client conflict (Rule 1.18(d)), the informed consent also must be "confirmed in writing."[13] This is a defined term under the 2004 amendment. Rule 1.0(b) and (n). The writing may be a letter from the lawyer confirming an oral informed consent.

[13] In contrast, a lawyer may disclose confidential information if she obtains either informed consent or implied authorization, neither of which must be in writing. Rule 1.6(a). Note also that the consent required under Rules 1.8(a) and (g) must be signed by the client, not merely confirmed in writing.

It is not required that the client sign the letter. Comment 20 to Rule 1.7. Emails satisfy the requirement. Rule 1.0(n).[14] However, given the uncertainties of proving that an email was successfully transmitted, it is a good practice to retain some evidence that the email was received, such as an acknowledging reply.

The written confirmation may come later, confirming the prior oral consent:

> If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Comment 1 to Rule 1.0.

This is elaborated on in the commentary to Rule 1.7:

> Paragraph (b) [of Rule 1.7] 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[15] and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). 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. See Rule 1.0(b). 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. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Comment 20 to Rule 1.7.

Rule 1.13(g) specifies that where the lawyer is representing both a corporate entity and individual officers or others, "the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

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[14] There is no need to be concerned with the discussion in Rule 1.0(n) regarding what qualifies as a "signed" writing. (Ordinary emails probably do not qualify.). The definition of "confirmed in writing" does not include the requirement that the writing be signed by the sender. Rule 1.0(b).

[15] It is odd that the commentators chose the word "records" to describe writing a letter. Obviously, they do not intend for the lawyer's letter to her client to be publicly recorded. Presumably, all this means is that the letter should make a record of the consent given by the client.

(5) Revocation of consent

A client may always revoke his or her consent to a representation in the sense of firing the lawyer and terminating the representation. The more interesting question is whether the disgruntled client may revoke his or her consent to the lawyer's continued representation of the other client.

The commentary to Rule 1.7 says that the answer is "maybe":

> 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. 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.

Comment 21 to Rule 1.7. It would appear, however, that if the client merely changes her mind, she probably cannot prevent the lawyer from continuing to represent the other client. The author would suggest that in order for the revocation to be effective, there must be some objective unfairness to the lawyer's continued representation of the other client. Thus, the more carefully the lawyer has spelled out the circumstances and expectations in the engagement letter, the less likely the client will be able to undo the agreement.

(6) Anticipatory consent by current client

(i) Client may consent to future conflicts

In taking on a new representation, the lawyer and client should think carefully about not only then-existing conflicts but also potential future conflicts. In virtually all instances, some potential future conflict is conceivable. In many cases, these potential conflicts are modest, manageable, and consentable. In such cases, the lawyer may reasonably ask the client to consent to them in advance.

The official commentary specifically addresses this practice, concluding that it is appropriate under the proper circumstances:

> 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. 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. 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. 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. 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 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. 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).

Comment 22 to Rule 1.7.

Here is an example of excerpts of a letter of engagement in which the client waives anticipatory conflicts:

> Dear Ms. Smith:
>
> We are pleased to represent you in connection with the acquisition of the commercial property on Broadway and Boise Avenues. . . .
>
> As I explained yesterday in my office, my firm represents a number of other developers. None of the work we are now doing for other clients deals with the subject property. If, in the future, a current or prospective client desired to acquire the same property or otherwise act in a manner adverse to you in connection with our work for you, we would not handle that matter for them. However, we may chose represent them in other matters, despite the fact that they may be in competition with you on this property or other activities. Of course, any information you provide us, or which we otherwise acquire in our representation of you, will not be shared or used to your disadvantage.
>
> . . .
>
> I am writing to confirm that you have agreed to these terms and understandings. If you have any questions or concerns, be sure to raise them with me.

Here is another example:

> Dear Mayor Gonzales:
>
> We are pleased to represent Sycamore City and its Public Works Department in a contract dispute involving the City's airport expansion project. . . .
>
> As I explained yesterday in my office, my firm represents a number of other developers, homeowner groups and others with matters that come before the City from time to time. For instance, lawyers from this firm, including myself, frequently appear before the planning and zoning commission and sometimes appeal those matters to the city and to court.
>
> We expect to continue to handle such matters, so long as they have no bearing on the airport expansion project.
>
> Of course, any information you provide us, or which we otherwise acquire in our representation of you, will not be shared or used to the City's disadvantage.
>
> . . .

> I am writing to confirm that you have agreed to these terms and understandings. If you have any questions or concerns, be sure to raise them with me.

The key is to lay out the potential problems in sufficient detail to fairly inform the client of the potential risk, so that the client may fairly evaluate whether she is comfortable with the representation under these terms.

(ii) Some conflicts are not waivable

Some conflicts of interest are not waivable, even with client consent. These are discussed in section I.E(3) at page 23.

(iii) Representation of one client after withdrawal from the representation of another client

Suppose one member of a coalition represented by a lawyer is the lawyer's largest client, who has been with the firm for twenty years. Should a conflict emerge later that is unresolvable, the lawyer must withdraw from the representation of one or more of the clients. Can she, however, continue her representation of the client with the longstanding relationship?

The rules do not specifically address this situation. Presumably, however, a full and fair disclosure coupled with a written anticipatory consent agreement entered into with all the clients at the outset of the representation would be enforceable. Thus, the lawyer may explain to the client at the outset of the representation that, in the event an unresolvable conflict emerges, she will no longer be able to represent that client, but expects to continue her representation of another client. Of course, such consent must also satisfy the requirement that the consent be "reasonable" under Rule 1.7(b)(1). Comment 22 to Rule 1.7. (This comment applies to current and former clients. Comment 9 to Rule 1.9.)

(7) Limited engagements (Rule 1.2(c))

The term "limited engagement" has more than one meaning. It may mean that the engagement is limited to a particular matter. In that sense, most engagements probably should be described to the client as limited engagement, to make clear that the lawyer is not intending to serve as general counsel for anything and everything that may arise. Indeed, this is something that belongs in every engagement letter.

On the other hand, the term may refer to a limitation on extent of the work expected from the lawyer. Rule 1.2(c) uses the term in the later sense. It recognizes that under the proper circumstances, and with the consent of the client, a lawyer may limit the extent of the lawyer's representation of a particular client:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 1.2(c).

The examples given in the comments suggest that the thrust of the rule is intended to provide a mechanism for the lawyer to limit his or her work responsibility to a client. For instance, Comment 7 describes an engagement in which the lawyer's representation is limited to a single telephone consultation, and says that this would be a proper factor to consider in determining how much skill and preparation the lawyer is obligated to provide.

However, the limited engagement could also have implications in the context of conflicts of interest. For instance, a lawyer may agree with a client that his or her role will be limited to a particular piece of litigation and will not, for instance, include representation of that client on legislative matters involving the client's business.

The question then arises whether a client's agreement to a limited engagement eliminates a conflict that would otherwise be present. It is unclear under the rules whether the limited engagement eliminates conflict based on direct adversity.[16] A limited engagement probably will not eliminate conflicts based on "material limitations."

On the other hand, limited engagements may offer an effective way of addressing conflicts that may arise and making it reasonable and possible to secure the consent of the clients.

(8) Consent to conflicts based on a material limitation

Rule 1.7(b)(4) allows conflicts to be waived under proper circumstances by a lawyer's clients. By its own terms, this exception applies equally to "directly adverse" conflicts and to "materially limited" conflicts.[17] It seems difficult to conceive, however, of a circumstance where a lawyer who is materially limited and therefore unable to effectively represent both clients, reasonably could ask for their consent to the representation. As noted in section I.E(3)(i) at page 24, in order for the consent to be effective, the lawyer must reasonably believe that she can effectively serve each client. Perhaps such consent would be appropriate in the context of a Chinese Wall. For instance, with an effective Chinese Wall in place, it is conceivable that one lawyer in the firm might represent Investor A and while another represented Investor B in the creation of a joint enterprise. Plainly, a single lawyer would be materially limited in representing both of them, because the conflicting duties of loyalty to each client. (See Comment 8 to Rule 1.7, reproduced in section I.B(1) at page 2). But a Chinese Wall might cure this to the extent that consent would be reasonable.

Note that material limitations based on the personal interests of the lawyer are not imputed to other members of the law firm (see discussion in section I.F(2) at page 32). Consequently, there would be no conflict of interest (and no consent or Chinese Wall required) where the material limitation was based on such considerations. But not all material limitations are based on the personal interests of the lawyer. It is where the material limitation is based on a duty owed to another client or person that consent based on a Chinese Wall may come into play.

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[16] The Restatement suggests that a limited engagement may eliminate the conflict altogether: "Some conflicts can be eliminated by an agreement limiting the scope of the lawyer's representation if the limitation can be given effect without rendering the remaining representation objectively inadequate." *Restatement of the Law (Third): The Law Governing Lawyers* § 121, Comment c(iii), reproduced in Thomas D. Morgan, *Lawyer Law: Comparing the ABA Model Rules of Professional Conduct with the ALI Restatement (Third) of the Law Governing Lawyers*, at 376 (2005).

[17] The rule says that conflicts under 1.7(a) may be waived. That section includes both "directly adverse" and "materially limited" conflicts.

F. Imputed conflicts (Rule 1.10(a))

(1) General rule of imputation for concurrent and sequential conflicts

Under Rule 1.10(a), one lawyer's conflict respecting current and former clients is "imputed" to each of the lawyer's partners and associates. This general rule (Rule 1.10(a)) applies to concurrent conflicts (Rule 1.7) and to sequential conflicts (Rule 1.9). Thus, if it would be a conflict for a single lawyer to represent two clients, the conflict is not eliminated because different lawyers within the firm are handling the matters. The rule is based on "the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." Comment 1 to Rule 1.10.

Rule 1.18(c) contains its own imputation rule for prospective clients. See discussion in section I.F(2)below.

Rules 1.10(d) and 1.11 deal with disqualification of lawyers associated in a firm with former or current government lawyers.

(2) Exception for personal matters

Although most conflicts are imputed to the entire firm, the rules carve out an important exception. There is no imputation if the conflict "is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Rule 1.10(a). Thus, for example, if one lawyer were unable to represent a client because her personal views would materially limit the effectiveness of her representation, she may, without conflict, step aside and allow another lawyer in the firm to represent that client.

(3) Imputation in the context of the prospective client

Rule 1.18 (duties to the prospective client) contains its own specific rule governing the imputation of one lawyer's responsibilities to other lawyers in the firm:

> If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d) [consent by client].

Rule 1.18(c).

A comment to Rule 1.18 suggests that the rule works in the same fashion as Rule 1.10, which contains an exception to the imputation rule for personal matters.

> Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but under paragraph (d), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing of both the prospective and affected clients. While some jurisdictions also permit internal screening within a firm to avoid conflicts, commonly called a "Chinese Wall," Idaho does not recognize such screening.

Comment 7 to Rule 1.18 (emphasis supplied). It may be that the omission of the personal matters exception from Rule 1.18 was a drafting oversight. Nevertheless it remains a mystery why the drafters did not simply add a cross-reference to Rule 1.18 to the imputation rule itself (Rule 1.10(a)).

(4) Chinese Walls (aka "screens")

The creation of a "Chinese Wall" preventing the two lawyers from communicating any information about the matters does not eliminate the existence of a conflict.[18] "While some jurisdictions also permit internal screening within a firm to avoid conflicts, commonly called a 'Chinese Wall,' Idaho does not recognize such screening." Comment 7 to Rule 1.18 (dealing with screens in the context of duties to a prospective client).[19]

While screens do not in themselves eliminate conflicts, they may be employed effectively in conjunction with waivers of conflicts. In other words, they may make the client more comfortable giving consent and may make the consent objectively reasonable. For example, the client may consent to a conflict based on the assurance that the lawyer representing her will have no dealings or communications with other lawyers or staff at the firm who are representing other clients with interests adverse to her. As discussed in section I.E beginning on page 23, such waivers are only valid if they are based on informed consent reasonably requested and in writing.

(5) Rules applicable when a lawyer switches firms

When a lawyer leaves one firm to join another, his conflict duty to former clients left behind at the old firm is governed by Rule 1.9(b). This rule is somewhat more generous to the lawyer than Rule 1.9(a) which governs the duty owed to former clients by lawyers remaining at the old firm. Recall that Rule 1.9(a) (combined with the vicarious imputation rule) prohibits lawyers remaining at the old firm from representing someone adverse to a former client on the same or substantially related matter, regardless of whether the individual lawyer had gained confidential information about the matter. Rule 1.9(b) is more generous to the departing lawyer in that it prohibits him or her from representing another person with an adverse interest in the same or substantially related matter only if the lawyer gained confidential information about the matter when at the old firm. See comments 4, 5, and 6 to Rule 1.9 for a more detailed discussion.

In any event, the departing lawyer has an ongoing duty to protect information of the former client. Rule 1.9(c).

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[18] Some have suggested that the term Chinese Wall is not politically correct and should be avoided in favor of "screen." The author would suggest that the term "Chinese Wall" is intended simply to capture the idea that the protective measures employed will create an impenetrable barrier against the disclosure of confidences. It refers to a physical object, one of the wonders of the world. It does not refer to an ethnic or national group and, in any event, is neither disparaging of a people nor reinforcing of stereotypes. The term "screen" is employed throughout the Idaho Rules of Professional Conduct, except that the term "Chinese Wall" appears in Comment 7 to Rule 1.18.

[19] Under the Idaho Rules of Professional Conduct, screens can eliminate conflicts—so as not to require consent—only in the context of lawyers moving from firm to firm (Rule 1.11(b)(1) and 11(c)), and former judges and neutrals (Rule 1.12(c)(1)). Screens are also proper for protecting against the disclosure of confidences by staff (Comment 4 to Rule 1.10).

A separate question arises as to the ongoing duty owed by the lawyers of the former firm to avoid conflicts with clients or former clients represented by the former lawyer. This is governed by Rule 1.10(b). The essential idea, stated informally, is that the departing lawyer takes the conflict baggage with him, unless other members of the former firm gained confidential information about the matter when the lawyer was at the firm. Thus, for example, if a departing lawyer takes a client with her to a new firm and she was the only lawyer who worked on the matter, then that client is no longer treated as a "former client" of the old firm (under Rule 1.9(a)) and lawyers at the old firm may undertake new representations that are adverse to the departing lawyer's client even on the same or substantially related matter. The rule apparently is the same if the departing lawyer had already concluded her representation of the client while still at the old firm. In other words, the client would remain the former client of the departing lawyer, but the old firm would be free to take on adverse representations adverse to the former client (even on the same or substantially related matter) so long as no one else in the former firm had gained confidential information related to the matter. At least this is how I read the rule. Frankly, however, the rule is somewhat difficult to parse; Comment 5 to the rule basically restates the rule without providing any useful examples or explanation.

A note of caution should be added. Comment 6 to Rule 1.9 observes that determining whether confidential information was gained is a highly fact-specific determination and "the burden of proof should rest upon the firm whose disqualification is sought." Perhaps the same burden of proof would apply to disqualification sought under Rule 1.10(b).

Special rules apply to lawyers going to or from government practice. Rule 1.11. For instance, a lawyer leaving private practice to work for the government has an obligation (in addition to his or her obligations under Rule 1.9) that runs to the governmental client on matters in which he or she was "personally and substantially" involved at the former law firm. Rule 1.11(d).

G. Other specific conflict situations (Rule 1.8)

Rule 1.8 directs a lawyer's conduct when faced with ten specific conflict situations. These situations have very narrow application, but should be reviewed. For instance, Rule 1.8(g) could be applicable when representing multiple clients making an aggregate settlement.

A separate section of this Handbook (section VIII) deals with limitations on acquiring an interest in the client's business transaction, governed by Rules 1.8(a) and 1.8(j).

H. Conflicts over consultants

Lawyers increasingly find themselves working with experts and other technical consultants. In a particular field, there may be only a few such experts who are available to litigants in Idaho. Consequently, a lawyer may find herself working with a retained expert on one matter, and working against that same expert in another matter.

There is no rule of professional conduct directly applicable here. Thus, this situation is not strictly forbidden. Indeed, as a practical matter, it often cannot be avoided.

On the other hand, the general prohibition in Rule 1.7(b) against a lawyer representing a client where her representation may be limited by her responsibilities to another person may come into play here. Thus, the lawyer must ask herself if she can really work with the expert one day and vigorously cross-examine her the next. If the answer is yes, then the representation is appropriate. If not, then the lawyer

should consider whether it is in the best interest of the client to switch experts, or to withdraw from the representation. In any event, the situation should be fully disclosed and explained to the client, who must make the final determination.

A lawyer may attempt to avoid this problem by entering into agreements with experts that prohibit them from taking on another client adverse to the lawyer's client. However, in a limited field, the expert may decline to sign such an agreement.

II. CONFIDENTIALITY

The rules governing a lawyer's obligation to maintain a client's confidences are set out in different sections, depending on whether the person is a current, former or prospective client. These are discussed in turn.

A. Information of current clients (Rule 1.6)

Rule 1.6, applicable to current clients, sets out a blanket prohibition against revealing information obtained in connection with the representation of a client. The rule is simple and absolute. Such information cannot be revealed, absent informed consent (unless a special exception applies, as discussed below).

Note that the consent need not be in writing. The consent may even be "impliedly authorized" where revealing the information is necessary "in order to carry out the representation."

The scope of what information must be protected is quite broad. The prohibition applies to all "information relating to representation," not just to information that one might consider "confidential" and not just to information that came from the client. Thus, anything learned about a client's situation as a result of the representation falls under the ambit of the rule.

For example, suppose that during the scope of representing Mr. Smith on a real estate acquisition, the lawyer learns from Mr. Smith's son that Mr. Smith has great sentimental attachment to the property and will pay anything to acquire it. The lawyer must hold that information in confidence (i.e., not share it with the seller), even though the information did not come from the client.

Arguably, the rule would not apply if the information learned from the son was that his father had a drinking problem (assuming this had nothing to do with the real estate transaction). However, there is considerable latitude in determining what is "information relating to representation of a client," and the lawyer should play it safe by deeming virtually everything she learns as subject to the rule.

The rule sets out six exceptions. A lawyer is allowed to reveal confidential information where necessary to prevent a crime, to avoid injury or substantial bodily harm, to prevent, mitigate or rectify substantial financial injury, or to comply with a court order. A lawyer may reveal confidential information when necessary in an action to collect her fee or defense of an action against the lawyer. Finally, a lawyer may reveal confidential information as necessary to secure advice about compliance with this rule; thus, a lawyer may inquire of bar counsel as to whether particular information should or should not be released.

The lawyer's duty extends to the prevention of accidental disclosure of confidential information. Comment 17 to Rule 1.6. This obligation has particular applicability in the age of electronic communications. "This duty, however, does not require that the lawyer use special security measures if the

method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions." Comment 18 to Rule 1.6.

B. Information of former clients (Rule 1.9(c))

Under Rule 1.9(c), a lawyer's general duty to maintain the confidentiality of information gained from an attorney-client relationship continues indefinitely, even after the representation is concluded. The same exceptions (to prevent the commission of a crime, etc.) also continue to apply.

There are these differences, however:

First, a lawyer may use information from a client relationship if it has become generally known.

Second, Rule 1.9(c) contains no mechanism for a former client to consent to the release or use of information obtained during the representation. Presumably, any consent obtained from a current client under Rule 1.6, however, would continue to be effective when that client becomes a former client.[20]

C. Information of prospective clients (Rule 1.18(b))

Under Rule 1.18(b), the duty owed to protect information gained from a prospective client is identical to that owed to a former client. In other words, the rule converts the prospective client to former client status, even when the prospective client never became a client.

See Section 0 beginning on page 19 for a more complete discussion of the prospective client.

D. Relationship to attorney-client privilege and work product doctrine

A comment to Rule 1.6 addresses the relationship between the ethical obligation (discussed here) and the separate bodies of law governing attorney-client privilege and the protection of attorney work product:

> The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

[20] There is a third distinction. It is so obscure, however, that it is relegated to this footnote. Rule 1.9(c) draws a Jesuitical distinction between "using" information and "revealing" information. Its purpose is unclear. Apparently, a lawyer may use public information gained from a prior representation (for instance, in shaping a strategy on behalf of a new client), but she may not do so in a manner that reveals that information. This distinction, carried over from the pre-2004 rule, is not explained (or even recognized) in either the new or the old comments. Also, apparently, a lawyer may use information from a former client, so long as it is not to the former client's disadvantage, but may never reveal the information, even if there is no disadvantage to the former client. Comment 8 to the rule, however, contradicts this conclusion, and employs both "use" and "reveal" in the same operative language.

Comment 2 to Rule 1.6.

III. TERMS OF ENGAGEMENT

A. The engagement letter

The lawyer is required to promptly communicate the scope and terms of the engagement to the client. The applicable rule provides in full:

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Rule 1.5(b), as amended in 2004 (emphasis supplied).

The lawyer should use the engagement letter to clarify any issues about who the client is. For instance, the lawyer might represent an individual, the family farm or other company, or both. In the event that the fees are being paid by another person (such as an insurance company or family member), address that. In the event the firm is representing a broker or agent, clarify who the client is. If a family or other group is involved, clarify both who the clients are and how communications will be handled. Pin down the clients' responsibility for communication if there is an arrangement for the lawyer to communicate with one person on behalf of the group.

While the rule does not require a written engagement letter (it says "preferably in writing"), the lawyer is well advised to provide one.[21] Failing to do so is likely to result in a tribunal construing any uncertainty regarding the terms of engagement against the lawyer. The trend is toward more routine use of detailed engagement letters that set out not only fees, but other significant matters such as billing practices, rules for expenses, late fees, retainer arrangements, file retention, termination rights, confidentiality, and the like. And, of course, the engagement letter should also fully address any current or potential conflicts of interest.

The rule requiring communication of terms of the engagement has long been in place. However, the exceptions were tightened down in the 2004 amendments. The only exception is that a lawyer need not discuss fees with an existing client when taking on a new matter if there has been no change in the fee structure.

An important addition to the rule in 2004 is the requirement that any changes in fees also be communicated to the client. The rule does not say when they must be communicated, so presumably it must be within a reasonable time. Given this requirement, the lawyer is well advised to include a provision in the engagement letter advising the client at the outset that the lawyer's hour rate is subject to, for instance, annual adjustment. Then, when the rate is adjusted, it should be disclosed on the bill or in an independent communication.

[21] Although there is no general requirement for a writing on the terms of engagement, a writing is required in the case of fee splitting. Rule 1.5(e)(2). See discussion below.

Rule 1.5(b) is a disclosure obligation, not a statute of frauds. Consequently, there is no requirement under the rule that the client sign the engagement agreement. Thus, it is sufficient for the lawyer to send a letter to the client outlining the terms of the engagement. The lawyer may elect to include an acknowledgement form on the bottom of the letter for the client to sign. The downside to this practice is that the lawyer may neglect to obtain (or retain) the client's signature, thus creating an issue as to whether an agreement was reached.

Billing should be detailed and comprehensible. Rule 1.5(f). It is a good practice for the billing statement to set out a summary of the work performed, the time spent, the timekeeper performing the work, and the hourly (or other) rate of the timekeeper. A client is less likely to complain about a bill that he or she can understand.

B. Fees must be reasonable

The setting of fees is a private matter between attorney and client. However, Rule 1.5(a) requires that a lawyer's fees and expenses be reasonable.

Most lawyers charge a flat hourly rate. Other arrangements, such a fixed fee for a particular matter, are permissible, so long as the fee is reasonable.

The rule includes a list of eight factors to consider in determining the reasonableness of a fee. It is appropriate for a lawyer's fee to reflect his or her skill, experience, expertise, and reputation. The fee may be adjusted upwards based on time constraints and other factors imposed by the client. The fee in a particular matter may also take into account that the work to be performed will preclude the lawyer from obtaining other work (through conflicts or otherwise).

The fee may be based on the result obtained. This is explored further in the discussion under "Contingent Fees" below.

C. Splitting of fees

A lawyer may not accept a "referral fee" when referring work to another attorney. Rule 1.5(e)(1). However, a lawyer may associate counsel from another firm "where neither alone could serve the client as well." Comment 7 to Rule 1.5. In such a case (where lawyers from different firms are working on the same matter), a single fee may be divided between the lawyers. However, the division of the fee must be in proportion to the services performed, unless the lawyers assume "joint responsibility for the representation." Rule 1.5(e)(1). "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." Comment 7 to Rule 1.5. Rule 1.5(e)(2) requires that any division of fees among lawyers in different firms be approved by the client and confirmed in writing, and that the total fee be reasonable.

D. Contingent fees

Historically, contingent fees were viewed as inherently unethical. In modern times, however, contingent fees have come to be viewed as appropriate funding mechanisms for civil cases not involving domestic relations. The matter is now governed by Rule 1.5(c). Note that contingent fees are expressly improper in domestic relation matters and criminal defense. Rule 1.5(d).

Ordinarily, contingent fees are charged only where the litigation will produce a judgment in the form of money damages from which to pay the fee. The classic example is a tort case. However, the rule

is not so limited. Thus, for instance, it would appear that a lawyer could charge a fee that differed depending upon whether a permit is granted or denied. Likewise a lawyer might enter into an engagement that provided a higher payment if attorney fees were recovered. For a variety of practical reasons, however, these types of arrangement are not common. For example, if an attorney entered into a contingent fee agreement to defend a party against damage claims, where a fee is charged only if the defendant prevails, it is not always so clear whether the party prevailed or not.

IV. *EX PARTE* COMMUNICATIONS WITH DECISION MAKERS

See discussion *in Idaho Land Use Handbook.* That handbook addresses both ethical rules and Idaho case law bearing on *ex parte* communications.

V. OPEN MEETINGS ACT AND EXECUTIVE SESSIONS

The Open Meetings Act was enacted in 1974 with this bold statement of purpose:

> The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is a public business and shall not be conducted in secret.

Idaho Code § 74-201.[22]

The Act prohibits any decision-making body from meeting to make a decision or meeting to deliberate toward a decision unless the meeting is properly noticed and open to the public. Idaho Code §§ 74-202, 74-203, 74-204.[23]

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[22] Note: The Open Meetings Law was recodified in 2015 to Idaho Code § 74-201 to 74-208. 2015 Idaho Sess. Laws, ch. 140. It was formerly codified to Idaho Code §§ 67-2340 to 67-2347. A subsequent amendment in 2015, 2015 Idaho Sess. Laws, ch. 271, delayed the effectiveness of certain of the amendments dealing labor negotiations until 2020. Quotations of the statute set out in this Handbook will be based on 2015 Idaho Sess. Laws, ch. 140. The reader should consult 2015 Idaho Sess. Laws, ch. 271 prior to 2020 if the matter involves labor negotiations.

[23] The operative provision reads: "Except as provided below, all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot." Idaho Code § 74-203(1).

The term, "meeting" is defined as follows: "'Meeting' means the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter." Idaho Code § 74-202(6). The definition goes on to define two types of meetings (regular and special).

The terms "decision" and "deliberate" are also defined terms, and are defined broadly. Idaho Code §§74-202(1) and 67-2341(2). Arguably, occasions when decision makers exchange information outside of meetings of the governing body (such as at the country club or in a mediation) do not meet the definition of "meeting" under the act—even if such exchange of information meets the definition of deliberation. *See, Safe Air for Everyone v. Idaho State Dep't of Agriculture*, 145 Idaho 164, 177 P.3d 378 (2008).

Consequently, if an applicant or opponent of a land use or other matter wishes to communicate directly with decision makers, it is essential not only to follow the rules governing *ex parte* communications, but also to avoid any group meetings that might implicate the Open Meetings Law.

Not every conversation in which quorum is present constitutes a "meeting" subject to the Act. The term "meeting" is defined as "the convening of a governing body of a public agency to make a decision or to deliberate toward a decision on any matter. Idaho Code § 67-2341(6). "Decision" and "deliberation" are also defined terms.

Violations of the Open Meetings Law must be challenged by filing an action in the district court within 30 days of the alleged violation. Idaho Code § 67-2347(4); *Petersen v. Franklin Cnty.*, 130 Idaho 176, 181, 938 P.2d 1214, 1219 (1997).

In *Noble v. Kootenai Cnty.*, 148 Idaho 937, 231 P.3d 1034 (2010), the Court found that a site visit violated the open meeting laws because the public was not allowed to be close enough to hear what was being said.

Section 74-206 sets out a set of exceptions to the open meeting requirement authorizing governmental entities to go into "executive session" for purposes of discussing matters outside the presence of the public. The exception most applicable in the land use context is section 74-206(1)(f) dealing with pending or imminent litigation. It authorizes executive sessions "[t]o communicate with legal counsel for the public agency to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated. The mere presence of legal counsel at an executive session does not satisfy this requirement." Idaho Code § 74-206(1)(f).

A common question is whether the executive session may be used for purposes of engaging in negotiation with the opposing party where a local government is in litigation. The Open Meetings Act does not directly address whether it is permissible to use such an executive session to conduct a mediation or negotiation. Specifically, the issue is this: Is it permissible to have an executive session with selected members of the public (the opposing party) present, but the rest of the public excluded? Stated differently, must the executive session be limited to situations in which attorney-client privilege may be maintained?

It appears that executive sessions are not so limited and may be used for purposes of negotiation. This conclusion is based on the fact that a separate provision specifically prohibits the use of executive sessions for labor negotiations. Idaho Code § 74-206A (effective only until 2020 per 2015 Idaho Sess. Laws, ch. 271). By implication, other negotiations in executive session are permissible. The conclusion is also based on the operative language of the executive session statute. The term "executive session" is not defined in the definition section of the act, but it is described in the operative section of the statute as a "session at which members of the public are excluded." Idaho Code § 74-206(1). Thus, it does not appear to prohibit having other persons present who might negate the attorney-client privilege.

It bears great emphasis, however, that, in any event, the government decision-makers cannot reach a final decision in the executive session. Idaho Code § 74-206(4). Rather, once a tentative solution has been reached, the elected officials must go into a public meeting, fully disclose the nature of the discussions and the proposed settlement, allow the public to comment on it, and then reconsider the whole thing with an open mind.

A completely different approach would be to conduct the negotiation or mediation in a public working session. This approach would allow members of the public to watch and listen, but not to speak

during the course of the negotiation/mediation discussion. This is, of course, more transparent. But it can also make the discussions more difficult, because they are conducted it in a fishbowl.

Yet another approach is to appoint just one member of the governing board to participate in the negotiation or mediation. Since that is not a quorum, it does not trigger the open meeting act. The downside to this, obviously, is that that person may not have buy-in from the other officials, who must ultimately approve any settlement.

Bear in mind that, even if the executive session is compliant with the Open Meetings Act, there remains the issue of *ex parte* communications. If an interested party is allowed to participate in the executive session in a quasi-judicial, that may not violate the Open Meetings Act, but it is an *ex parte* communication. As discussed elsewhere, that is not necessarily improper, but the communications need to be fully disclosed in a manner that enables other parties an effective opportunity to rebut what has been said.

VI. COMMUNICATIONS BETWEEN LAWYER AND UNREPRESENTED PARTIES

Rule 4.3 addresses communications between a lawyer and an unrepresented party. This rule is discussed in the section of the Handbook dealing with representation of corporations and other organizations (Section I.B(6) beginning on page 14).

VII. COMMUNICATIONS BETWEEN LAWYER AND REPRESENTED PARTIES

A. The basic rule: no contact with a represented party

Rule 4.2 prohibits lawyers from engaging in direct communications with the opposing party. The rule provides:

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

Rule 4.2.

Thus, in the simplest context, a lawyer may not make direct contact with a represented opposing party to solicit an admission, urge settlement, or engage in any other communication concerning the matter. The rule, obviously, is designed to ensure that lawyers do not put other parties in an unfair or unequal position.

Most lawyers interpret this prohibition as barring the practice of "copying" opposing parties on communications between counsel. In dealing with institutional or governmental parties involving a number of active participants, counsel may waive the rule (expressly or by course of conduct) in order to facilitate effective group communication.

B. Using the rule as a shield

A lawyer is obligated under I.R.P.C. 1.4 to keep her client "reasonably informed about the status of a matter" and shall "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Unfortunately, not all lawyers live up to this obligation. Worse yet, there are instances in which counsel may steer the client toward litigation or confrontation by

painting an incomplete or inaccurate picture of the seriousness of the perceived threat, the availability of effective relief, the risks of litigation, and the opportunities for creative problem-solving and settlement.

When one is facing opposing counsel who is suspected of falling in this category, the instinct will be to bypass the obstructive lawyer and seek direct communication with client. Rule 4.2 prohibits this, even when circumstances like this would seem to justify it. The most the lawyer can do (other than seeking relief from a judge or bar association) is to seek from opposing counsel an opportunity for a larger meeting including the clients. In such a context, direct communication may occur.

Of course, Rule 4.2 governs the lawyer's behavior, not the client's. Thus, the client is free to speak with whom she wishes. However, a lawyer should not subvert the rule by encouraging her client to make direct contact with opposing parties. However, if the client determines to do so of her own accord without prodding, that is no violation of the rule.

C. Contacts with government officials

Arguably, a lawyer has more latitude when the opposing party is the government. Although there is little law on the subject, an argument can be made that all citizens have a constitutional right to "petition the government," meaning to contact their public officials. That right arguably includes the right to contact one's public officials through counsel.

Rule 4.2 contains an exception stating that the prohibition on direct contact does not apply where the lawyer "is authorized by law to do so." The comment on the rule strongly suggests that this would include contacts with government officials:

> Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

Comment 5 to Rule 4.2 (emphasis supplied).

A 1997 Formal Opinion issued by the ABA discusses the appropriate balance between protection of the opposing party and recognition of a party's right to petition the government. The bottom line of the opinion is that lawyers may contact members of governing bodies, but should, wherever possible, notify their counsel in advance to give them an opportunity to be present. *Communication with Government Agency Represented by Counsel,* ABA Formal Opinion 97-408 (Aug. 2, 1997); s*ee also* 31 Suffolk Univ. Law Review 349.

D. The rule has been interpreted to prohibit direct communications by government officials with represented parties

On its face, Rule 4.2 applies only to lawyers. Thus, it would seem not to apply where a non-lawyer government official sends a communication directly to a party known to be represented by counsel.

Idaho Bar Counsel, however, has opined that such action is a circumvention of the rule.[24] Thus, for instance, it would be inappropriate for a state regulatory enforcement agency to send a notice of violation, demand letter, or other communication directly to a party known to be represented by counsel. Unfortunately, this position has not been uniformly adhered to by regulatory officials in Idaho who have been known to send such communications directly to parties for "shock effect."

VIII. ACQUIRING AN INTEREST IN THE CLIENT'S BUSINESS VENTURE

A. Introduction

From time to time, lawyers are offered a share of a client's business venture in lieu of payment for a fee. Although nothing in the rules of ethics prohibits this practice (so long as fairness standards are met), some within the legal community have contended that such transactions are inherently suspect.[25]

The practice is not necessarily unethical, so long as appropriate caution is exercised.

B. The issue is governed primarily by Rule 1.8

Rule 1.8 is entitled "Conflict of Interest: Prohibited Transactions." The two key provisions read as follows:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's

[24] Oral communication between Christopher H. Meyer and Bradley G. Andrews (June 11, 2003).

[25] "There has been some lingering doubt, however, regarding whether this practice is ethical." Editorial, *Legal Fees: Take Stock of Your Options*, New Jersey Lawyer: The Weekly Paper (July 24, 2000).

For instance, *see* Home Group's video entitled *An Attorney's Approach to Avoid Malpractice* by Stein-McMurray. The video included a staged interaction between a lawyer and a potential client in which the client offered to compensate the attorney with an interest in the business venture in which he sought legal advice. The conclusion of the video was that the attorney must decline such an offer because it constitutes a "questionable practice" under the Model Rules and is "an inherent conflict" because the attorney's judgment will be clouded by her financial involvement.

role in the transaction, including whether the lawyer is representing the client in the transaction.

. . .

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

Rules 1.8(a) and (i).[26] Other applicable rules are:

Rule 1.5, requiring that fees be reasonable,

Rule 1.7(b) requiring the lawyer to avoid representation where the lawyer's ability to perform will be limited by responsibilities to others or himself, and

Rule 2.1, requiring the exercise of independent professional judgment in advising a client.

C. Rule 1.8(a) authorizes business transactions with clients, so long as specific and rigorous fairness rules are followed

Rule 1.8(a), which governs business transactions between lawyer and client, is directly applicable to this arrangement. The rule generally discourages business transactions with the client, but permits them where the terms are fair and reasonable, fully disclosed, and transmitted in writing in a manner understandable to the client, and where the client has access to independent counsel and gives her consent in writing.

There is really no room for debate here over the basic principle: The practice is permissible, so long as the fairly rigorous standards are met. The concern (and the potential for litigation) is over whether the lawyer has satisfied each of the criteria.

In 2000, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association issued Formal Opinion 00-418 (July 7, 2000) on this subject. The opinion confirms the conclusions reached above regarding Rule 1.8(a). The ABA opinion has not been adopted or endorsed in Idaho. Nonetheless, it should carry some weight, particularly since there is no contrary authority.

D. Rule 1.8(i) does not apply in a non-litigation context

Rule 1.8(i)[27] prohibits a lawyer from acquiring an interest in a "cause of action" or the "subject matter" of a client's litigation, unless an exception applies.[28] This odd rule is a holdover from the rules

[26] The predecessor to Rule 1.8(a) in Idaho is Idaho Disciplinary Rule 5-104. The predecessor to Rule 1.8(i) in Idaho is Idaho Disciplinary Rule 5-103(A). See *In Re May*, 96 Idaho 858, 538 P.2d 787 (1975), one of the few Idaho cases to discuss these rules.

[27] Former Rule 1.8(j) was renumbered Rule 1.8(i) in the 2004 amendments. It was otherwise unchanged.

against maintenance, champerty and barratry.[29] Fortunately, it is not necessary to dwell on the rule's arcane history and purpose,[30] due to its limited applicability.

By its own terms, Rule 1.8(i) applies only in a litigation context. Thus, a lawyer may accept an interest in the client's venture where his or her role is to assist in creating or advancing the venture through legal counseling (as opposed to litigation).

This is confirmed by Timothy J. Dacey, III, *Fee Agreements* (in *Ethical Lawyering in Massachusetts*), Massachusetts Continuing Legal Education, Inc. (2000). "Rule 1.8(j) [now Rule 1.8(i)] applies only to litigation. Thus, a lawyer may obtain an interest in the subject matter of a business transaction that she is conducting for a client, such as a stock issue or real estate development, provided that the lawyer complies fully with Rule 1.8(a) concerning business transactions with clients." Dacey, § 5.7.

But what if the business later becomes involved in litigation requiring the lawyer's services? Or what if, from the outset, litigation was anticipated and was one of the lawyer's responsibilities? In the authors view, Rule 1.8(i) should not be implicated, even under these circumstances.[31] As one scholar has noted, "Normally, those prohibitions are narrowly confined by a doctrine of 'primary purpose,' which permits lawyers and others to purchase causes of action if the primary purpose is investment or even speculation, so long as the purpose of suing is 'incidental.'" Wolfram at 491 n.56. In other words, so long as the lawyer's purpose in acquiring the interest in the business venture is not to "stir up litigation," it

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[28] In practice, the two exceptions virtually swallow the rule. First, a lawyer may accept a lawful contingent fee. Second, a lawyer may acquire a lien to secure her fee or expenses. Consequently, Rule 1.8(i) applies very narrowly in the following contexts: (1) where a contingent fee is impermissible, such as a domestic or criminal case, (2) it is not a proper lien, or (3) the lawyer is engaged in the outright purchase of a cause of action. The one reported Idaho case involving a direct violation of the rule, *In Re May*, 96 Idaho 858, 538 P.2d 787 (1975), dealt with a lawyer who accepted an interest in a client's property which was subject to a divorce proceeding (thus ineligible for a contingent fee).

[29] Maintenance is the impermissible financial assistance of a lawsuit. Champerty is a specialized form of maintenance in which the person providing the assistance obtains an interest in the recovery. Barratry is simply "adjudicatory cheerleading" in which persons are urged to quarrels and lawsuits. C.W. Wolfram, *Modern Legal Ethics* § 8.13 at 489-90 (West 1986). "Not so long ago, a considerable area of the law of legal ethics was given over to the mysteries of the Macbethian witches of the common law who stirred the cauldron of despised litigation – maintenance, champerty, and barratry." Wolfram at 489. "Despite the general demise of the champerty-type prohibitions, decisions and rules still variously prohibit a lawyer's purchase of causes of action on which a lawyer intends to file suit or a client's interest in property that is the subject of litigation." Wolfram at 491.

[30] The rule was not a part of the draft model rules, but was inserted by floor amendment at the 1983 ABA meeting. Wolfram at 491. It is virtually identical to the older ABA Code provision: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client . . . ." DR 5-103(A). The code's predecessor, in turn, is Canon 10 of the ABA Canons of Professional Ethics adopted in 1908: "The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

[31] On the other hand, the fact that the business venture might someday lead to litigation (which, in turn might call for the lawyer's services), is an issue that should be taken into account under Rule 1.8(a) and the more generic Rule 1.7(b).

should not come within the purview of Rule 1.8(i), even if the venture is then or later the subject of litigation.

The sharply limited scope of Rule 1.8(i) is confirmed by the ABA's Formal Opinion mentioned above. The opinion focuses primarily on the applicability of Rule 1.8(a). It finds only one narrow circumstance in which Rule 1.8(i) might be applicable:

> In our view, when the corporation has as its only substantial asset a claim or property right (such as a license), title to which is contested in a pending or impending lawsuit in which the lawyer represents the corporation, Rule 1.8(j) [now rule 1.8(i)] might be applicable to the acquisition of the corporation's stock in connection with the provision of legal services. If the acquisition of the stock constitutes a reasonable contingent fee, however, Rule 1.8(j) [now rule 1.8(i)] would not prohibit acquisition of the stock.

ABA Formal Opinion 00-418 at 9 (July 7, 2000). The official commentary to the rule is consistent with this interpretation:

> Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Comment 16 to Rule 1.8.

E. Although these transactions are permissible, caution is advised

Although there is no direct authority in Idaho, all available authorities, and the plain language of the applicable rules, point to the conclusion that there is no ethical bar to acceptance of a business interest from a client in lieu of a fee.

It is appropriate to note that such transactions, though not inherently wrong, are inherently dangerous. For instance, if a lawyer becomes a significant owner of a client's company, the lawyer may lose her independence, and experience the same temptation as the client to cut legal corners. Likewise, a lawyer's demand for a percentage interest in a transaction raises questions about excessive fees under Rule

1.5(a). There are a host of other potential problems, which are discussed in an emerging literature on the subject.

In the end, these problems appear to be manageable. However, they require considerable and ongoing ethical vigilance on the part of the lawyer, should he or she choose to accept such business interests.

Exhibit A: SELECTED RULES OF PROFESSIONAL CONDUCT

Note: The rules reproduced below became effective in 2014. The reader should be alert to any changes since that date.

RULE 1.0 TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
(e) "Informed consent" denotes the 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.
(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.
(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.
(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 1.2: SCOPE OF REPRESENTATION

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.
(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.
(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
(d) A lawyer shall not enter into an arrangement for, charge, or collect:
(1) any fee in a domestic relation matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
(2) a contingent fee for representing a defendant in a criminal case.
(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
(3) the total fee is reasonable.
(f) Upon reasonable request by the client, a lawyer shall provide, without charge, an accounting for fees and costs claimed or previously collected. Such an accounting shall include at least the following information:
(1) Itemization of all hourly charges, costs, interest assessments, and past due balances.
(2) For hourly rate charges, a description of the services performed and a notation of the person who performed those services. The description shall be of sufficient detail to generally apprise the client of the nature of the work performed.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to 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).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  (1) to prevent the client from committing a crime, including disclosure of the intention to commit a crime;
  (2) to prevent reasonably certain death or substantial bodily harm;
  (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime in furtherance of which the client has used the lawyer's services;
  (4) to secure legal advice about the lawyer's compliance with these Rules;
  (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of a client;
  (6) to comply with other law or a court order; or
  (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(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.

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 the personal interests of the lawyer, including family and domestic relationships.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), 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 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
  (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
  (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument, giving the lawyer or a person with whom the lawyer has a familial, domestic or close relationship any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes

of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

RULE 1.9: DUTIES TO FORMER CLIENTS

(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.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

(3) unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm 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.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(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, unless:
(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(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, unless:
(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

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

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if
(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and
(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take

action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

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

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
   (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
   (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
      (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
      (ii) written notice is promptly given to the prospective client.

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:
   (1) the communication is prohibited by law or court order;
   (2) the juror has made known to the lawyer a desire not to communicate; or
   (3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
    (1) the lawyer has been certified as a specialist by an organization that has been approved by the Idaho State Bar; and
    (2) the name of the certifying organization is clearly identified in the communication.

Exhibit B: WHY CONFLICTS MATTER

Westlaw.

48-SEP ADVOC 23

48-SEP Advocate (Idaho) 23

(Cite as: 48-SEP Advocate (Idaho) 23)

Advocate
September, 2005

Feature Article

*23 WHY CONFLICTS MATTER

Mark J. Fucile [FNa1]
Stoel Rives LLP

The Idaho Rules of Professional Conduct (IRPC) are prefaced with several thoughts on their role in our practices. The Preamble describes the IRPCs as both a moral compass and a disciplinary code. On the former, the Preamble notes: "The Rules ... provide a framework for the ethical practice of law." [FN1] On the latter, the Preamble observes: "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process." [FN2] Without diminishing their role as either an aspirational model or as a disciplinary code, the professional rules-- particularly those relating to conflicts--have increasingly come to form the substantive law of disqualification, legal malpractice, lawyer breach of fiduciary duty and fee forfeiture. In short, conflicts today matter in a very practical way.

DISQUALIFICATION

Although court decisions provide the procedural law of disqualification in terms of standing and waiver, the IRPCs effectively provide the substantive law. Parkland Corp. v. Maxximum Co., 920 F. Supp. 1088 (D. Idaho 1996), illustrates this trend. Parkland was a patent infringement case in which the plaintiff contended that the defendants were infringing on the design of a product the defendants were manufacturing. When the plaintiff first asserted the claim, the defendants contacted a lawyer, Horton, to advise them. Horton later sold his practice to another lawyer, Pedersen, and Pedersen took on both Horton's open and closed files--effectively turning Horton's current and former clients into Pedersen's current and former clients. Later, the plaintiff hired Pederson to prosecute his patent claim against the defendants. The defendants moved to disqualify Pedersen, arguing that he had a former client conflict. The District Court agreed.

In doing so, the District Court relied on the IRPCs: "It is clear that '[i]n deciding whether to disqualify counsel, the Court looks to the local rules regulating the conduct of the members of its bar.'" Id. at 1090 (citation omitted). The District Court then used the former client conflict rule--IRPC 1.9--in holding that Pedersen, by virtue of his acquisition of Horton's practice, had a former client conflict because the matters were the same and he had access to Horton's file and the defendants' confidential information in that file. [FN3] The District Court disqualified

Pedersen based on that conflict.

LEGAL MALPRACTICE

In Wick v. Eisman, 122 Idaho 698, 700, 838 P.2d 301 (1992), the Idaho Supreme Court stated unequivocally "[a]n attorney who represents multiple clients with conflicting interests may subject that attorney to liability for legal malpractice." In making this point in Wick, the Supreme Court echoed an earlier discussion to this same effect in Johnson v. Jones, 103 Idaho 702, 705-06, 652 P.2d 650 (1982).

Paragraph 20 of the Preamble notes that the IRPCs "are not designed to be a basis for civil liability." At the same time, the Preamble acknowledges in that same paragraph that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Among the standards of conduct that the conflict rules in particular establish is the duty of loyalty: "The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in fair dealing with his client, and obligating the attorney to discharge that trust with complete fairness, honor, honesty, loyalty, and fidelity." Blough v. Wellman, 132 Idaho 424, 426, 974 P.2d 70 (1999) (citing Beal v. Mars Larsen Ranch Corp., Inc., 99 Idaho 662, 667, 586 P.2d 1378 (1978)). Based on the duty of loyalty reflected in the conflict rules, the Supreme Court in Blough held: "For a breach or violation of those professional duties, the client may hold the attorney liable or accountable." Id.

Both Wick and Johnson illustrate this latter point. In each, an element of the malpractice allegations was that the lawyers involved had undisclosed and unwaived conflicts. In effect, Wick and Johnson find that the duty of loyalty discussed in Beal and Blough form an element of a lawyer's standard of care in representing clients. Although a claimant would still need to establish causation and damages, the existence of a conflict can have a major strategic effect on a malpractice claim. It has the potential to take what is otherwise a straightforward negligence case and to provide the claimant with an inflammatory argument to explain why the services supposedly were not rendered properly: the lawyer had a conflict.

BREACH OF FIDUCIARY DUTY

Because the conflict rules are cast in terms of a lawyer's duty of loyalty to clients, a violation of the conflict rules translates quite directly into a breach of fiduciary duty. See, e.g., Blickenstaff v. Clegg, 140 Idaho 572, 97 P.3d 439 (2004); Damron v. Herzog, 67 F.3d 211 (9th Cir. 1995) (applying Idaho law). The Idaho Supreme Court in Blough succinctly summarized this link:

"[The conflict rules] mandat[e] that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest. Loyalty to a client prohibits undertaking representation directly adverse to that client without the client's consent." 132 Idaho at 426.

As noted earlier, a conflict can also be cast as an element of a legal malpractice claim. [FN4] The significance of a breach of fiduciary duty claim is that a lawyer's services can be performed flawlessly in a technical sense, but if they result in damage to a client flowing from a conflict, the client has a remedy against the lawyer ***24** under a theory of breach of fiduciary duty. And, the damage element may not be that illusive in the hands of a skilled opponent: the damage claimed in many instances is a transaction or other matter that didn't turn out to the client's liking.

Like a legal malpractice claim layered with a conflict, a breach of fiduciary claim centered on a lawyer's conflict is also dangerous ground for a defense lawyer or law firm. Although juries may have difficulty grasping the

complexities of a complicated business transaction or case, they have no difficulty grasping the simple but powerful concept of loyalty--and the breach of loyalty by a professional in whose hands a client has placed his or her trust.

FEE FORFEITURE

Under the law of agency, one of the remedies available for a breach of fiduciary duty by an agent is the full or partial forfeiture of the agent's fee. See generally, Rockefeller v. Grabow, 136 Idaho 637, 39 P.3d 577 (2001). As the Idaho Supreme Court put it in Rockefeller, which involved a real estate agent:

"It is the established law of this jurisdiction that an agent's right to compensation will be affected by a violation of his fiduciary duties ... Allowing an agent to retain his entire commission as a matter of law when he has breached his fiduciary duties would eviscerate agency law. Secure in his compensation from the principal as long as the assigned task is completed, an agent's only chance of loss from violating his duties would be if he harmed the principal. The higher requirement of acting in the interest of the principal, without a means of enforcement, would simply cease to exist." 136 Idaho at 642 (citations omitted).

Applied to lawyers, this means that a lawyer whose conflict breaches a fiduciary duty to a client may be in jeopardy of losing all or part of the fee the lawyer has charged for the matter involved. See Rockefeller, 136 Idaho at 643 (discussing fee forfeiture as an equitable remedy); see, e.g., In re Larson, No. 03-04001, 2004 WL 307182 at *7 (Bankr. D. Idaho Jan. 30, 2004) (unpublished) (requiring a lawyer to disgorge a fee in light of a conflict); see also Cont. Cas. Co. v. Brady, 127 Idaho 830, 907 P.2d 807 (1995) (no coverage under the malpractice insurance involved for a breach of fiduciary claim seeking fee forfeiture as the principal remedy). This remedy can be used by a client as both a sword to seek the return of fees already paid and as a shield against paying a lawyer's bill.

SUMMING UP

There are important professional reasons as reflected in the Preamble to the IRPCs to follow the rules on conflicts. Increasingly, there are also very important practical reasons to follow those rules. Conflicts are no longer the exclusive province of bar discipline. The conflict rules have become the substantive law on a spectrum ranging from disqualification to fee forfeiture. Or, put simply, conflicts matter today in a very practical way.

[FNa1]. **Mark J. Fucile** is a partner in the Litigation Group at Stoel Rives LLP, where he handles legal ethics, regulatory and attorney-client privilege matters for lawyers, law firms and legal departments throughout the Northwest. He is a member of the Idaho State Bar Professionalism & Ethics Section, is past chair of the Washington State Bar Rules of Professional Conduct Committee and a former member of the Oregon State Bar Legal Ethics Committee and is co-editor of the WSBA's Legal Ethics Deskbook and the OSB's Ethical Oregon Lawyer.

[FN1]. Preamble ¶ 16.

[FN2]. Preamble ¶ 19.

[FN3]. The current version of IRPC 1.9 on former client conflicts is similar to the version in effect at the time Parkland was decided.

[FN4]. Both legal malpractice and breach of fiduciary duty claims must generally be predicated on the existence of an attorney-client relationship. See generally Harrigfeld v. J.D. Hancock, 364 F.3d 1024 (9th Cir. 2004) (applying Idaho law), 140 Idaho 134, 90 P.3d 884 (2004) (answering certified question); see, e.g., Blickenstaff v. Clegg,

supra, 140 Idaho 572 (illustrating this issue in the context of a breach of fiduciary duty claim against a lawyer). For a discussion of the importance of defining the client in a given representation, see Mark J. Fucile, "Defensive Lawyering: Why Engagement Letters Are a Lawyer's Best Friend," Idaho State Bar Advocate at 12 (Sept. 2004).

END OF DOCUMENT

Exhibit C: ABOUT THE AUTHOR

CHRISTOPHER H. MEYER

Chris Meyer is a partner at Givens Pursley LLP. For over three decades, Chris has been a leader in the fields of water law, planning and zoning law, constitutional law, and road and public access law. He has extensive litigation experience at the administrative, district court and appellate levels (including 21 Idaho Supreme Court cases). *Best Lawyers in America* has named him "Lawyer of the Year" seven times in the fields of land use, water, and natural resources. Super Lawyers placed Chris in the "Top 100 Lawyers" list for the Mountain West. Chris has played a significant role in shaping legislation and is described in the *Idaho Yearbook Directory* as "centrally located in the world of Idaho public affairs" and "a key figure in Idaho water law." He serves on the Board of Advisors to the National Judicial College's "Dividing the Waters" water law program for judges. For two decades, he served as President of the Idaho Environmental Forum. His clients include cities, counties, highway districts, municipal water providers, Fortune Ten companies, energy companies, food producers, mining companies, and land developers. Before joining Givens Pursley in 1991, Chris practiced natural resources law with the National Wildlife Federation in Washington, D.C. and later taught water law and negotiation at the University of Colorado Law School's environmental law clinic. Chris earned his law degree, cum laude, from the University of Michigan in 1981. He earned is A.B. degree from the same school with high honors in economics, Phi Beta Kappa, James B. Angell Scholar, and Osterweil Prize in Economics.

LEGAL EMPLOYMENT

GIVENS PURSLEY LLP, Boise, Idaho.
Partner. August 1991 to present.

UNIVERSITY OF COLORADO LAW SCHOOL, Boulder, Colorado.
Associate Professor Adjoint. August 1984 to July 1991. Held this teaching position while serving as counsel to NWF Natural Resources Clinic. Taught seminars in advanced water law, environmental law, and negotiation.

NATIONAL WILDLIFE FEDERATION, Washington, D.C.
Counsel. May 1981 to July 1984.

PROFESSIONAL RECOGNITION

Best Lawyers in America
(www.bestlawyers.com)

Listed since 2007 in four categories: water law, land use & zoning law, natural resources, and environmental law.

Named "Lawyer of the Year" in Boise, Idaho seven times in the last decade:

- 2019 – top natural resources lawyer
- 2018 – top land use and zoning lawyer

- 2017 – top water lawyer
- 2015 – top land use and zoning lawyer
- 2014 – top natural resources lawyer
- 2013 – top environmental lawyer
- 2011 – top natural resources lawyer

Mountain States Super Lawyers
(www.superlawyers.com)

Listed since 2007 for energy and natural resources law. Named to "Top 100 Lawyers" in the Mountain West in 2019.

Chambers USA
(www.chambersandpartners.com/guide/usa/5)

Listed since 2008 in Band 1 (highest ranking) for natural resources and environmental law.

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Litigation Counsel of America
(www.litcounsel.org)

Inducted in 2010 as fellow in honorary society composed of less than one-half of one percent of American lawyers.

Marquis' Who's Who in the World, Who's Who in America, and Who's Who in American Law
(www.marquiswhoswho.com)

Martindale-Hubbell
(www.martindale.com)

Listed since 1996 with highest ranking (AV).

Idaho Yearbook Directory (2001)
(www.ridenbaugh.com/catalog.htm)

Described as a "key figure in Idaho water law" and "centrally located in the world of Idaho public affairs."

Listed among top 100 most influential Idahoans.

Dividing the Waters, the National Judicial College, a water law training program for judges.

Serves on the Board of Advisors.

EDUCATION

University of Michigan, School of Law
Juris Doctor, 1981

- cum laude

University of Michigan
Degree in economics, 1977

- High distinction (magna cum laude)
- Phi Beta Kappa
- James B. Angell Scholar
- Honors program in economics, class honors

- Osterweil Prize in Economics

LITIGATION

Nemeth v. Shoshone County, Idaho Supreme Court Docket No. 46118-2018 (exclusivity of federal quiet title act in Idaho road matters).

N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 164 Idaho 530, 432 P.3d 976 (2018) (Bevan, J.) (constitutionality of sewer capitalization fees).

Black Canyon Irrigation Dist. v. State, 163 Idaho 144, 408 P.3d 899 (2018) (Burdick, C.J.) (defending district court's rejection of late claims for refill water).

United States v. Black Canyon Irrigation Dist., 163 Idaho 54, 408 P.3d 52 (2017) (Burdick, C.J.) (defending district court's rejection of late claims for refill water).

Greater Boise Auditorium Dist. v. Frazier, 159 Idaho 266, 360 P.3d 275 (2015) (W. Jones, J.; Eismann, J., concurring) (defended district in constitutional challenge to government financing).

In the Matter of Accounting for Distribution of Water to the Federal On-Stream Reservoirs in Water District 63, Idaho Department of Water Resources (Oct. 15, 2015) (Spackman, Director) (water rights).

N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 158 Idaho 79, 343 P.3d 1086 (2015) (Eismann, J.; J. Jones, J., concurring) (constitutionality of sewer capitalization fees).

Washington County v. Bilbao, Case No. CV-2014-1854 (Idaho, Third Judicial Dist., Dec. 8, 2014) (successfully represented Washington County in public access litigation).

County of Shoshone v. United States, 589 Fed. Appx. 834 (9th Cir. 2014) (per curium) (road law).

A&B Irrigation Dist. v. State, 157 Idaho 385, 336 P.3d 792 (2014) (Burdick, C.J.) (water rights—single fill rule—Basin-Wide Issue No. 17).

In the Matter of Certified Question of Law – White Cloud v. Valley County, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.) (defended county in challenge to road development fees).

Hehr v. City of McCall, 155 Idaho 92, 305 P.3d 536 (2013) (Burdick, C.J.) (defended city in action involving impact fees – the Greystone Village case).

Alpine Village Co. v. City of McCall, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.) (defended city in action involving impact fees).

Buckskin Properties, Inc. v. Valley County, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.) (defended county in constitutional challenge to development impact fees).

Idaho Conservation League v. U.S. Forest Service, 2012 WL 3758161 (Aug. 29, 2012) (Lodge, J.) (NEPA and forest management litigation involving mining exploration).

Sopatyk v. Lemhi County, 151 Idaho 809, 264 P.3d 916 (2011) (W. Jones, J.) (defended county's validation of Anderson Creek Road as a public road).

White Cloud v. Valley County, 2011 WL 4583846 (D. Idaho Sept. 30, 2011) (Lodge, J.); *White Cloud v. Valley County*, 2012 WL 13018504 (D. Idaho Aug. 8, 2012) (Lodge, J.) (defended county in challenge to road development fees). Subsequent to this decision, the surviving state law question was certified to the Idaho Supreme Court, which ruled in Valley County's favor, *In the Matter of Certified Question of Law – White Cloud v. Valley County*, 156 Idaho 77, 320 P.3d 1236 (2014) (J. Jones, J.), and the federal case was dismissed with prejudice (Case 1:09-cv-00494-EJL-CWD Document 162).

Alpine Village Co. v. City of McCall, 2011 WL 3758118 (D. Idaho 2011) (Winmill, C.J.) (defended city in action involving housing fees). The city sought removal to federal court. On remand, the city prevailed in *Alpine Village Co. v. City of McCall*, 154 Idaho 930, 303 P.3d 617 (2013) (Burdick, C.J.).

Mann v. Peters, Case No. CV-2011-57 (Idaho, Fifth Judicial Dist., Aug. 11, 2011) (upholding right to develop an "accessory dwelling unit" on property).

American Independence Mines and Minerals Co. v. USDA, 733 F. Supp. 2d 1241 (D. Idaho 2010) (Lodge, J.) (NEPA, standing, and road law issues).

In Re SRBA, Case No. 39576, Subcase Nos. 63-02779 et al. (Idaho, Fifth Judicial Dist., June 3, 2009), Subcase Nos. 63-02449 et al. (Fifth Judicial Dist., May 20, 2009) (secured partial decrees for each of the City of Nampa's water rights).

In Re SRBA, Case No. 39576, Subcase Nos. 29-00271 *et al*. (Idaho, Fifth Judicial Dist., Nov. 9, 2009 and April 12, 2010) (Melanson, J.), *aff'd, City of Pocatello v. State*, 152 Idaho 830, 275 P.3d 845 (2012) (Eismann, J.) (upholding position of *amici curiae* regarding alternative points of diversion in City of Pocatello municipal water rights litigation).

Galli v. Idaho County, 146 Idaho 155, 191 P.3d 233 (2008) (W. Jones, J.; J. Jones, J., concurring) (amicus brief in public access case).

Cove Springs Development, Inc. v. Blaine County, Case No. CV2008-22 (Idaho, Fifth Judicial Dist., June 3, 2008) (Robert J. Elgee, D.J.) (declaring unlawful and unconstitutional various exaction and comprehensive plan ordinance provisions).

Schaefer v. City of Sun Valley, Case No. CV-06-882 (Idaho, Fifth Judicial Dist. July 3, 2007) (Robert J. Elgee, D.J.) (declaring unconstitutional Sun Valley's affordable housing fee).

American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources, 143 Idaho 862, 154 P.3d 433 (2007) (Trout, J.) (conjunctive management of ground and surface water).

Chisholm v. Idaho Department of Water Resources, 142 Idaho 159, 125 P.3d 515 (2005) (Burdick, J.) (water rights—local public interest).

Davisco Foods Int'l, Inc. v. Gooding County, 141 Idaho 784, 118 P.3d 116 (2005) (Schroeder, J.; J. Jones, dissenting) (land use).

Colorado Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005) (Martinez, J.) (article by Christopher Meyer cited by court).

Farrell v. Bd. of County Comm'rs of Lemhi County, 138 Idaho 378, 64 P.3d 304 (2002) (Schroeder, J.) (public road access—the Indian Creek Road case).

Potlatch Corp. v. United States, 134 Idaho 916, 12 P.3d 1260 (2000) (Schroeder, J.) (rejecting federal reserved water rights for wilderness).

State v. Hagerman Water Right Owners, Inc., 130 Idaho 727, 947 P.2d 400 (1997) (Schroeder, J.) (partial forfeiture water rights case).

Fremont-Madison Irrigation Dist. v. Idaho Ground Water Appropriators, Inc., 129 Idaho 454, 926 P.2d 1301 (1996) (Schroeder, J.) (interpretation of water right amnesty statute).

The Klamath Tribes, 135 I.B.L.A. 192, 1996 WL 518742 (Apr. 12, 1996) (prevailed in defending challenge by Indian tribe to cultural resource use permit).

State, ex rel. Higginson v. United States, 128 Idaho 246, 912 P.2d 614 (1995) (McDevitt, C.J.) (constitutionality of SRBA amendments—water law).

Nebraska v. Rural Electrification Administration, 23 F.3d 1336 (8th Cir. 1994) (Heaney, J.), aff'g, 1993 WL 662353 (D. Neb 1993) (scope of environmental trust's authority to litigate).

Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) (Tacha, J.) (federal reserved water rights – amicus brief).

State v. Morros, 766 P.2d 263 (Nev. 1988) (per curiam) (prevailed in establishing recognition of instream flows under state law).

Catherland Reclamation Dist. v. Lower Platte North Natural Resources Dist., 433 N.W.2d 161 (Neb. 1988) (Fahrnbruch, J.) (water rights and state endangered species act).

Hitchcock and Red Willow Irrigation Dist. v. Lower Platte North Natural Resources Dist., 410 N.W.2d 101 (Neb. 1987) (Hastings, J.) (right to build water project).

Tulalip Tribes of Washington v. FERC, 732 F.2d 1451 (9th Cir. 1985) (East, J.) (hydropower licensing).

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984) (mitigation for hydroelectric developments on public lands) (White, J.) (amicus curiae brief).

National Wildlife Fed'n v. Marsh, 568 F. Supp. 985 (D.D.C. 1983) (Parker, J.) (administrative law under NEPA).

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) (Stevens, J.) (ban on water export in violation of commerce clause) (amicus curiae brief available at 1982 WL 608572).

LEGISLATION

H.B. 1 (2019) (subordination of certain water storage rights).

Tax Deed Amendments of 2016 (easements), S.B. 1388.

Highway Funding and Detachment Amendments of 2014 (road law), H.B. 619a, 2014 Idaho Sess. Laws, ch. 214, codified at Idaho Code §§ 40-709, 40-709A.

Public Access Amendments of 2013 (road law), H.B. 321, 2013 Idaho Sess. Laws, ch. 239, codified at Idaho Code §§ 40-114, 40-202, 40-203, 40-208, 40-2312.

Exemption from water rights for land application of municipal effluent (water rights), H.B. 608, 2012 Idaho Sess. Laws, ch. 218, codified at Idaho Code §§ 42-201(8), 42-221(P).

Local Public Interest Amendments (water rights), 2003 Idaho Sess. Laws, ch. 298, codified at Idaho Code §§ 42-202B(3), 42-203A(5), 42-222(1), 42-240(5), 42-1763.

Municipal Water Rights Act of 1996 (water rights), 1996 Idaho Sess. Laws, ch. 297, codified at Idaho Code §§ 42-202(2), 42-202B, 42-217("4."), 42-219(1) & (2), 42-222(1), 42-223(2), 43-335, 43-338.

Idaho Administrative Procedure Act (logical outgrowth rule), 1992 Idaho Sess. Laws, ch. 263, codified at Idaho Code § 67-5227.

PUBLICATIONS

Spooner, *The Legal Climate of Climate Change - Water*, Michigan Law Quadrangle Notes (Spring/Summer 2018) (featuring Reed Benson, Chris Meyer, and Gary Ballestros).

Allen, Meyer, Nelson & Lee, *Idaho Land Use Planning Handbook*, Givens Pursley (2018).

Fereday, Meyer & Creamer, *Water Law Handbook: The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho*, Givens Pursley (2018).

Meyer, *Road Law Handbook: Road Creation and Abandonment Law in Idaho*, Givens Pursley (2018).

Meyer, *Ethics Handbook: Ethical Considerations for the Client and Lawyer in Idaho*, Givens Pursley (2018).

Meyer, *Urban Growth, Land Use Planning, and Water Rights in Idaho* (the Idaho Chapter of a publication by the National Judicial Council) (2017).

Fereday & Meyer, *What is the Federal Reserved Water Rights Doctrine, Really? Answering this Question in Idaho's Snake River Basin Adjudication*, 51 Idaho L. Rev. 341 (2016).

Meyer, *Cap Fee Basics and News from the Legal Front*, Association of Idaho Cities (2016).

Meyer, *The Non-Appropriation Lease After Greater Boise Auditorium District v. Frazier*, Idaho Association of Counties (2015).

Meyer, *Mitigation of Injury to Water Rights: Law & Strategy in Idaho*, The Water Report, at 14 (Dec. 2015).

Meyer, *Planning for Future Needs Under the Municipal Water Rights Act of 1996*, Association of Idaho Cities Conference on Municipal Issues (2011).

Meyer, *Municipal Water Rights and the Growing Communities Doctrine*, The Water Report at 1 (Mar. 15, 2010).

Meyer, "*Development, Codification, and Application of the Growing Communities Doctrine in Idaho*," presented at American Bar Association, Section of Environment, Energy, and Resources, 28th Annual Water Law Conference: Whose Spigot Is It? (Feb. 18-19, 2010).

Meyer, *An Introduction to the Law of Interstate Water Allocation: From Compacts to Common Sense*, Law Seminars International (2009).

Meyer, *Interstate Water Allocation*, The Water Report (Aug. 15, 2007).

Meyer, Idaho Chapter Author for *Brownfields Law and Practice*, Matthew Bender & Co., Inc. (2004) (named *Best Law Book of the Year* by the American Association of Publishers).

Meyer, *A Comprehensive Guide to Redeveloping Contaminated Property* (Idaho Chapter), American Bar Association (2002).

Meyer, *The Federal Reserved Water Rights Doctrine in a Skeptical Age*, 39 American Law Institute – American Bar Assn. 219 (2001) (Westlaw: SG039 ALI-ABA 219).

Meyer, *All I Really Need To Know About Legal Ethics I Learned in Law School*, 43 The Advocate (Idaho Bar Assn.) 15 (2000).

Allen, Himberger, Honhorst & Meyer, *Land Use Law in Idaho*, National Business Institute (1999).

Meyer, *Aquifer Storage and Recovery in Idaho*, University of Idaho (1999).

Meyer, *Complying with Environmental and Special Use Regulations*, in LAND USE LAW IN IDAHO, National Business Institute (1999).

Meyer, *Municipal Water Rights in Idaho: The Growing Communities Doctrine and Its Recent Codification*, Northwest Water Law & Policy Project (1996).

Meyer, *Small Handles on Big Projects: The Federalization of Private Undertakings*, 41 Rocky Mountain Mineral Law Institute 5-1 (1995).

Meyer, *Instream Flows: Integrating New Uses and New Players into the Prior Appropriation System*, in INSTREAM FLOW PROTECTION IN THE WEST, Natural Resource Law Center (1993).

Meyer, *Water Conservation: Looks Can Deceive*, in RIVER VOICES (1993).

Meyer, *Instream Flows: Coming of Age in America*, in PROCEEDINGS OF THE WESTERN REGIONAL INSTREAM FLOW CONFERENCE (1989).

Meyer, *Western Water Law: The New Frontier*, in AUDUBON WILDLIFE REPORT (1989).

Meyer, *New Developments in Water Rights on Public Lands: Federal Rights and State Interests*, paper presented at conference sponsored by the Natural Resource Law Center, University of Colorado School of Law, Water as a Public Resource: Emerging Rights and Obligations (1987).

Meyer, *Navigating the Wetlands Jurisdiction of the Army Corps of Engineers*, 9 Resource L. Notes 3, Natural Resources Law Center (1986).

Meyer, Two papers published in *Winning Strategies for Rivers: Proceedings of the Tenth Annual National Conference on Rivers*, American Rivers Conservation Council (1985).

Osann, Campbell, Meyer, & Allemang, *Shortchanging the Treasury: The Failure of the Department of the Interior to Comply with the Inspector General's Audit Recommendations to Recover the Costs of Federal Water Projects*, National Wildlife Federation (1984).

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Meyer, *Sporhase v. Nebraska: A Spur to Better Water Resource Management*, 1 Envtl. Forum 28, Environmental Law Institute (1983).

Burwell & Meyer, *A Citizen's Guide to Clean Air and Transportation: Implications for Urban Revitalization*, U.S. Environmental Protection Agency (1980).

Meyer, *The Effects of Labor Organization on the Functional Distribution of Income in Manufacturing Industries in the United States for the Years 1948 through 1972*, Senior Honors Thesis, University of Michigan (1978).

BAR MEMBERSHIPS

Member of the bars of Idaho, Colorado, and the District of Columbia.
Admitted to practice in federal courts in the District of Columbia, Eighth, Ninth, and Tenth Circuits.

PERSONAL

Born September 29, 1952, in Springfield, Missouri.
Married to Karen A. Meyer. One child, C. Andrew Meyer (graduate of Tulane Law School now practicing in Boulder, Colorado).
Chris has made his home in Boise, Idaho since 1991. He has lived in fifteen cities in thirteen states: Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Maryland, Michigan, Missouri, New York, Virginia, Washington, D.C., and Florence, Italy. He has lived in Boise for the last 27 years.

CONTACT INFORMATION

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Boise, Idaho 83702

208-388-1236
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Exhibit D: HANDBOOKS AVAILABLE FROM GIVENS PURSLEY

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